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Trappings of Legality: Judicialization of Dispute Settlement in the WTO, and its Impact on Developing Countries

Timothy Stostadt†

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Introduction

At the close of the Uruguay Round of Multilateral Trade Negotiations in 1994, when the member governments of the General Agreement on Tariffs and Trade (GATT)1 established the World Trade Organization (WTO),2 two of their avowed goals were to assist developing and Least Developed Countries (LDCs) in “securing a share in the growth in international

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trade,"³ and to establish a more robust and reliable procedure for the resolution of trade disputes among member countries.⁴ Indeed, as to the latter goal, Article III:3 of the Marrakesh Agreement makes clear that dispute resolution is one of the five key functions of the WTO.⁵ With respect to dispute settlement, it has been pointed out that a well-functioning system will generate "positive externalities" in that a challenged trade barrier or other WTO-inconsistent measure may often affect parties other than the member country bringing the challenge.⁶ Moreover, good dispute resolution reduces uncertainty in the marketplace by securing market access rights, thereby promoting efficiency in the global economy. As to the goal of stimulating growth in developing countries, the value of pursuing this end is accepted by scholars as virtually axiomatic, and its merits hardly require defense here. In any case, both of these laudable ambitions are stated overtly in the WTO's founding documents. How successful has the WTO been in achieving them?

The scholarly literature on world trade law has produced a lively debate concerning the effectiveness of WTO dispute resolution generally, and its impact on developing countries in particular.⁷ Embodied in the Dispute Settlement Understanding (DSU),⁸ the new procedures differ from those used under GATT principally in that they are more formal. The change from GATT to the WTO is often described as a shift from a largely diplomacy-based, or negotiated, apparatus for dispute resolution to a more rules-based, or adjudicatory, model.⁹ To name just two examples of this "judicialization," the new procedures added provisions for an automatic right of appellate review and, for the first time, made the decisions of dispute settlement panels automatically binding on the parties.¹⁰ This latter feature of the new system was itself considered a major reform because the old rules had made it extremely easy (at least in theory) for a respondent to block the adoption of an adverse ruling.¹¹ The change to a more judicial process was thought by many to be of particular importance to poorer member countries, whose lack of resources gave them relatively less bar-

3. Id. at Preamble.
4. Id. at art. III:3.
5. Id.
7. See infra § II.
9. See, e.g., Thomas Schoenbaum, WTO Dispute Settlement: Praise and Suggestions for Reform, 47 INT'L & COMP. L.Q. 647, 648 (1998) (observing that the system now "functions very much like a court of international trade"); see also Thomas A. Zimmer-
man, WTO Dispute Settlement at Ten: Evolution, Experiences, and Evaluation, 60:1 AUS-
10. See infra § I.
11. See infra note 32 and accompanying text.
gaining leverage in more diplomatic contexts. The WTO’s website underscores this very point, proposing that the new system helps to “mitigate the imbalances between stronger and weaker players by having their disputes settled on the basis of rules rather than having power determine the outcome.” Moreover, from the DSU’s beginning, optimistic observers have pointed to the increased dispute settlement activity by developing countries as evidence of the new system’s success.

Commentators, however, are far from unanimous in their praises. As emphasized in the literature, a cursory glance at the data reveals the United States and the European Community (EC) to be the largest users of the DSU, together appearing as complainants in more than 150 cases, or close to half of the total number of cases that have been filed. By contrast, developing countries seldom invoke the DSU and, significantly, only one case has been brought by a complainant classified as an LDC. Of greater concern than this mere disparity is the possibility that, as some scholars persuasively argue, developing countries are actually underutilizing the DSU, filing fewer cases than their wealthier counterparts relative to the number of actionable claims they may have. If this is true, it is cause for alarm not only because of its impact on the developing countries affected but also because of its tendency to undermine the perceived reliability and legitimacy of the system as a whole. Still more concerning is the possibility that such underutilization is attributable to systemic biases in the DSU itself, which may discourage developing countries from seeking to enforce their rights through formal dispute settlement. Ironically, these biases may find their origins in the judicializing features of the DSU that were originally intended as organic reforms. It is this proposition that I seek to examine in this Note.

This Note takes the position that the partial judicialization of the DSU, initially intended to safeguard the rights of poor countries, has actually

12. See, e.g., Kofi Oteng Kufuor, From GATT to the WTO: The Developing Countries and the Reform of the Procedures for the Settlement of International Trade Disputes, 31 J. WORLD TRADE 117 (1997) (arguing that the dispute resolution mechanisms established under the WTO represent a major improvement over those of GATT); see also Beatrice Chaytor, Dispute Settlement under the GATT/WTO: The Experience of Developing Nations, in DISPUTE RESOLUTION IN THE WTO 250, 251 (James Cameron & Karen Campbell eds., 1998) (observing that “the ‘rules-based’ organisation of the WTO seems to have decreased the risk that the system will be hampered by economic and political pressures”).


15. This figure is my own, based on data which are available at http://www.wto.org/english/tratop_e/dispu_e/dispu_e.htm (last visited Sept. 3, 2006).

16. India—Anti-dumping Measure on Batteries from Bangladesh, WT/DS306.

17. See infra § II.
made dispute settlement procedures less accessible to poorer member states. The reasons for this will be discussed at length below but, as a preliminary example, the vastly increased complexity of the substantive law, coupled with the more formal, quasi-judicial litigation process, has imposed enormous costs on would-be users of the system, both in the pre-litigation stage (when a country first identifies the existence of a disputable trade measure) and during the litigation itself (when substantial legal expertise is needed to "try" a case). Thus, perhaps to a degree greater than before, successful dispute settlement now depends on a country's ability to muster considerable economic and "human capital" resources of the kind developing countries typically lack.

In describing my thesis, however, I find it necessary also to circumscribe it. For example, I differ with those who feel that the move toward judicialization is a bad idea per se. On the contrary, I would argue that a more judicialized process—one that depends more on rules than on influence—may ultimately be just what is needed to rid the dispute settlement system of its inequities. This argument may at first appear somewhat counterintuitive: If "a lot" of judicial process is desirable, then it should follow, a fortiori, that "a little" judicial process is at least a good start. But in reality, it would appear that in implementing only some of the features commonly associated with judicial process, while omitting others, the WTO member countries have unwittingly unleashed a system that, at least in some respects, is performing less effectively than its predecessor. For example, one of the many judicial features lacking from the present system is a reliable enforcement mechanism. Thus, a country's ability to enforce a favorable ruling by the Dispute Settlement Body (DSB) still depends in large part upon its economic might. By partially judicializing the dispute settlement process, but not completely doing so, the member countries have created a system that imposes many of the costs of complex litigation, without guaranteeing the corresponding benefits that such a system is designed to secure.

The remainder of this note proceeds as follows: Part I supplies a brief overview of both the history and procedures of WTO dispute settlement. Here, I try to highlight the most judicialized aspects of the DSU, as compared to the procedures that existed under GATT. Part II surveys the scholarly literature on the DSU, addressing whether WTO dispute settlement has generally improved upon GATT, and how it has impacted poorer countries in particular. I conclude that power imbalances between rich and poor countries continue to determine who is able to use the system successfully, and that the partial judicialization discussed in the foregoing section has, if anything, only exacerbated the problem. Part III proposes a number of reforms that could ameliorate the problem of inequality of access, by moving towards more—not less—judicial process. The final part concludes.
I. Background: Dispute Settlement from GATT to the WTO

A. History: Origins of the WTO

GATT finds its roots in the failed attempt, shortly after World War II, to form a WTO-like organization called the International Trade Organization (ITO). Although preliminary negotiations on an ITO charter were concluded successfully, its formation ultimately failed under circumstances similar to those that plagued the League of Nations following World War I: The US Senate failed to ratify its charter. All was not lost however, as 23 of the participating nations succeeded in ratifying GATT. Though originally envisioned as an interim measure, awaiting the formation of the ITO, GATT was ultimately established as a permanent arrangement, whose membership grew steadily in succeeding years. It expanded to 128 countries by the end of the Uruguay Round, and to 149 countries today.

The modern WTO is essentially an institutional outgrowth of GATT but introduces a number of important changes. Unlike the pre-Uruguay GATT, which gave member states the flexibility to opt out of certain provisions, the WTO adopted the so-called “single undertaking” principle which, with a few exceptions, bound all countries to all aspects of the agreement. This all-or-nothing approach becomes all the more important when viewed in light of the other changes ushered in by the Uruguay Round. Initially, GATT focused exclusively on tariffs, gradually expanding to include various other aspects of trade in goods. From its inception, the scope of the WTO’s coverage was far more expansive, not only including new obligations regarding trade in goods but also covering such

19. Id.
20. Id.
22. Hoekman, supra note 18, at 41.
24. Hoekman, supra note 18, at 41.
25. Most of the Multilateral Trade Agreements of the Uruguay Round contain provisions for special treatment concerning developing countries. See generally Bhala & Kennedy, supra note 21, at ch. 4.
27. Id.
28. See, e.g., Agreement on Agriculture, Agreement on Sanitary and Phytosanitary Measures (SPS), and Agreement on Textiles and Clothing, in Marrakesh Agreement, Annex 1A.
entirely new areas as trade in services\textsuperscript{29} and intellectual property.\textsuperscript{30} Perhaps the most significant change from GATT to the WTO was the codification of formal rules for dispute resolution.

B. Judicialization: The Modern Dispute Settlement System

The dispute settlement process that persisted under GATT generated enormous criticism. It had no fixed timetable for resolution of disputes, making the system very susceptible to delaying tactics: no provision automatically established a panel upon filing of a complaint; there was no notification requirement for implementation of a panel recommendation;\textsuperscript{31} and the adoption of a panel recommendation, as with any action by the member countries collectively, required consensus (i.e., total unanimity) which meant that, in theory, the losing party in a panel dispute could essentially veto a panel’s ruling to prevent it from gaining force.\textsuperscript{32} With its lack of procedural formality, it may seem something of a wonder that the GATT dispute settlement system worked at all. That it did work has been credited to the fact that, in its early days, GATT “was essentially a small ‘club’ of like-minded trade officials who had been working together since the . . . ITO negotiations,” and therefore “did not need an elaborate decision-making procedure to generate an effective consensus . . . .”\textsuperscript{33} As membership in GATT grew, however, so too did the need for procedural formality in the realm of dispute settlement. By the time of the Uruguay Round, it had become clear that a major overhaul was needed. The result was the DSU we see today.

In common with its predecessor system, the DSU makes certain allowances for diplomatic resolution of disputes. By its terms, the DSU makes a mutually agreed solution between parties the preferred resolution of any dispute and, accordingly, such a solution is an alternative available to the parties at any stage during a dispute.\textsuperscript{34} Additionally, the DSU pro-

\textsuperscript{29} See General Agreement on Trade in Services (GATS), Marrakesh Agreement, Annex 1B.
\textsuperscript{30} See Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS), Marrakesh Agreement, Annex 1C.
\textsuperscript{31} In dispute settlement parlance, a panel ruling is referred to as a “recommendation,” because the impaneled tribunal merely recommends an action to the aggregated Dispute Settlement Body—basically the entire Ministerial Conference—which must then vote on whether or not to “adopt” the ruling, i.e., give it force. “Implementation” refers to actions taken by the respondent to comply with an adverse recommendation, e.g., removal of an offending trade barrier.
\textsuperscript{32} BHALA \& KENNEDY, supra note 21, at 26. It should be noted that, in practice, losing respondents under GATT had seldom used their veto, because members seemed to understand that their long-term interest in having a stable forum for dispute resolution generally outweighed their interest in maintaining a particular trade barrier. Still, the replacement of the consensus rule with the “negative consensus” rule is justifiably regarded as one of the major reforms under the WTO. Under the new system, the final panel report becomes effective automatically, unless there is unanimous consensus among members—including the victorious complainant—to block it. For obvious reasons, this has yet to happen.
\textsuperscript{33} Hudec, supra note 26, at 5-6.
\textsuperscript{34} DSU art. 3.7.
vides a number of institutional alternatives to a formal panel proceeding. Moreover, certain diplomatic steps are required of the parties before any litigation may commence. When one WTO member country believes that another has taken WTO-inconsistent measures, its first option is limited to a request for mandatory bilateral consultations. The aggrieved party ("complainant") notifies in writing both the member country in question ("respondent") and the DSB of the particular measures it finds objectionable, and the legal basis for its objection. In submitting the request the complainant thereby formally invokes the DSU and notifies the public at large of the existence of a dispute. Clearly, the DSU's authors hoped this first stage would also be the last. Often, it is: A majority of disputes are resolved during bilateral consultation and never reach the next stage. However, if the parties cannot reach a mutually agreed solution within 60 days, the complainant automatically gains the option to request adjudication by a panel.

For disputes that reach this next stage, the complainant submits its request for a panel to the DSB, setting forth once more the complained-of measures and the legal grounds for the complaint. The request, though brief, requires careful drafting by the complainant, as it establishes the terms of reference which will determine the scope of review during adjudication of the dispute. Put another way, the panel's jurisdiction is confined to a factual examination of the measures specifically identified by the complainant and the treaty provisions specifically cited as bases for the complaint, and appellate review exclusively treats the latter. Following submission of the complainant's request, an attempt is made to convene a panel at the next meeting of the DSB. Here is one of the few remaining situations in which the old GATT consensus rules still apply. If desired, the respondent may block the establishment of the panel by single-handedly upsetting the consensus. However, such a move by the respon-

35. Id. art. 4.7.
36. Id. art. 4.
37. Note that the Dispute Settlement Body is simply the Ministerial Conference of the WTO (which consists of a delegate from every member nation) when acting in its dispute settlement capacity; the DSB can be seen as one of the various "hats" that the Conference may wear.
38. DSU art. 4.4.
40. See DSU art. 4.7. Note, too, that a party may request a panel before the expiration of 60 days if the responding party has failed to respect deadlines for negotiation, or if both parties agree that negotiations have failed to produce a mutually agreed solution.
41. DSU art. 6.2.
42. Id. art. 7.1.
43. Id.
44. See supra note 32 and accompanying text.
dent is a mere delaying tactic; if the same request again arises at a second meeting of the DSB—usually only a month later but sometimes even sooner—the so-called "negative consensus" rules operate and permit the complainant to force the establishment of a panel.\(^4^5\)

Panels, usually consisting of three members, are composed ad hoc for each dispute that arises.\(^4^6\) The Secretariat keeps a running list of potential panelists,\(^4^7\) each of whom meets certain standards of independence and expertise.\(^4^8\) The list ordinarily consists of the trade delegates of WTO member countries, but may also include other qualified persons, such as former secretariat officials, or retired academics sitting on a part-time basis.\(^4^9\) When the time comes to convene a panel, the Secretariat nominates candidates, usually from this list.\(^5^0\) For "compelling reasons," either party may oppose a nominee, forcing the Secretariat to nominate another.\(^5^1\) By the terms of the DSU, there does not appear to be any theoretical limit on the maximum number of times a party may reject a panelist, but there is a practical limit; if after 20 days a panel has not been agreed upon, either party may request intervention by the Director-General, who may appoint panelists over the adverse party's objections.\(^5^2\) If a dispute involves a developing country against a developed country, the developing country may require that at least one panelist also be from a developing country.\(^5^3\)

The panel examination resembles a courtroom procedure but is less formal. Following written submissions by the parties, the panel examination typically involves two meetings with the parties, neither of which is open to the public.\(^5^4\) Following initial deliberations, and the delivery of an interim report upon which parties may request review,\(^5^5\) the final panel report is delivered to the parties, usually no more than six months from the panel's composition.\(^5^6\) Within three months, it is issued to the DSB, which may "adopt" it, i.e., vote to make it binding on the parties.\(^5^7\) At this point, the losing party has an automatic right of appeal.\(^5^8\) As discussed above,\(^5^9\) this is one of the major changes from the GATT procedures. A permanent Appeals Body, consisting of seven members, conducts a review limited to

\(^{45}\) DSU art. 6.1.
\(^{46}\) Id. art. 8. By agreement of the parties, five panelists may sit.
\(^{47}\) Id. art. 8.4.
\(^{48}\) Id. arts. 8.1, 8.2.
\(^{50}\) Id.
\(^{51}\) DSU art. 8.6.
\(^{52}\) Id.
\(^{53}\) Id. art. 8.10.
\(^{54}\) Id. art. 12.
\(^{55}\) Id. art. 15.2.
\(^{56}\) Id. art. 12.8; app. 3, para. 12(j).
\(^{57}\) DSU art. 12.9; app. 3, para. 12(k).
\(^{58}\) Id. arts. 16.4, 17.
\(^{59}\) See supra, Introduction.
questions of law, and then proceeds to affirm, modify, or reverse the panel's original report.\textsuperscript{60} Finally, after the appeal, the report is once again issued to the DSB for adoption.\textsuperscript{61}

Once adopted, it then falls to the losing party to undertake "implementation" of the panel's recommendation.\textsuperscript{62} This usually means that the respondent is recommended to discontinue the WTO-inconsistent measure that gave rise to the complaint.\textsuperscript{63} Since it is not always feasible to remove the measure immediately (e.g., because of market conditions or domestic political hurdles), the respondent is given a "reasonable period of time" to comply, which varies from case to case.\textsuperscript{64} The parties have the option of negotiating voluntary compensation for the complainant pending full implementation by the respondent.\textsuperscript{65}

Sometimes the losing party simply fails to implement the panel's recommendation. When this happens, the complainant has the option, 30 days after the lapse of the reasonable period of time, to request the right to suspend concessions with the losing party pending implementation.\textsuperscript{66} In the literature, the suspension of concessions is referred to, variously, as "sanctions," "countermeasures," "retorsion," "reprisal," and "punishment."\textsuperscript{67} Whatever one calls it, the effect is to excuse the injured party from its treaty obligations to the respondent to an extent commensurate with its injury. It is considered preferable, should a mutual agreement fail, for the "losing" respondent in litigation to remove the WTO-inconsistent policy, rather than for the "winning" complainant to impose sanctions.\textsuperscript{68} Countermeasures are seen as an absolute last resort.\textsuperscript{69}

II. The Debate: How Well is the DSU Performing?

A. Confidence in the System: How Extensively is the DSU Used?

How much faith do member countries place in the DSU? It is widely believed that the extent to which the system is used is a good indication of the amount of confidence members place in the system. After all, "[a] tribunal that is used is more successful than a tribunal that is not used."\textsuperscript{70}

\textsuperscript{60} DSU art. 17.6.
\textsuperscript{61} Id. art. 17.14.
\textsuperscript{62} Id. art. 21.3.
\textsuperscript{63} Id.
\textsuperscript{64} Id.
\textsuperscript{65} Id. art. 22.2.
\textsuperscript{66} DSU art. 22.
\textsuperscript{67} See generally ELISABETH ZOLLER, PEACETIME UNILATERAL REMEDIES: AN ANALYSIS OF COUNTERMEASURES (1984).
\textsuperscript{68} DSU art. 22.1; see also WTO SECRETARIAT, GUIDE TO THE URUGUAY ROUND AGREEMENTS 1, 20 (2002).
\textsuperscript{69} This makes sense. Suspension of concessions, after all, effectively answers a WTO-inconsistent trade barrier with another WTO-inconsistent trade barrier. It has been argued that there is something perverse about the WTO authorizing sanctions that subvert the very goals of the organization. See, e.g., Steve Charnovitz, Rethinking WTO Trade Sanctions, 95:4 AM. J. INT'L L. 792, 810 (2001).
Accordingly, numerous critics who have praised the DSU have pointed to a dramatic increase in dispute settlement activity immediately following the establishment of the WTO. Conversely, the lack of dispute settlement activity under GATT is often cited as evidence of its comparative ineffectiveness in this area.71 As then Director-General Ruggiero stated in 1998, "[s]ome 106 cases have been brought to the WTO in the first three years of its existence, compared to approximately 300 cases throughout the life of the GATT—and many more of these cases are being brought by developing countries, underlining their growing faith in the system."72 Reasonable though this assumption may seem, it has since been subject to close scrutiny in the scholarly literature. What follows in this subsection is a sample of the prevailing rebuttals.

In a 1999 article, Robert E. Hudec sought to evaluate the optimistic proposition that the observed flurry of new dispute settlement activity evinced an enthusiastic reception by member nations embracing the newer, better, rules-based DSU.73 Prior to the establishment of the WTO, the number of disputes had been trending gently upward.74 The question, then, was what might account for the dramatic spike immediately following the Uruguay Rounds. By Hudec's rough calculation, the surplus of cases following Uruguay (i.e., the amount by which the actual number of cases exceeded the number predicted for the period by extrapolating from the upward trend under GATT) was 46 (98 minus 52).75 Of these 46 cases, 20 were brought under TRIPS (General Agreement on Trade in Services), GATS (Trade-Related Aspects of Intellectual Property Rights), or under the new agreements on agriculture and textiles—agreements in areas formerly not covered by GATT.76 Another 10 cases, though not brought under newly created substantive obligations, were brought under the newly revised SPS and TRIMS (Trade-Related Investment Measures), which made
them functionally friendlier to complainants. As Hudec points out, we need only assume that three of these ten cases would not have been brought under GATT in order to conclude that fully half of the increase in dispute settlement activity for the period was attributable to disputes over new substantive obligations, rather than to an influx of member countries hoping to avail themselves of the new-and-improved procedures.\(^7\)

Additionally, one must consider the impact of the single undertaking principle, under which all nations—developing and developed alike—were expected to sign onto all multilateral trade agreements covered by the WTO, and be subject to the same austerity.\(^7\) As mentioned above, there were exceptions to the rule but, by and large, poorer countries were held to the same standards as richer ones and, more importantly, to higher standards than had been imposed under GATT. This heightened austerity led to 25 cases being brought against developing countries that could not have been brought under GATT.\(^7\) Hudec points out that, since there is little overlap between these 25 cases, and the (at least) 20 cases attributable to new obligations, "there is a strong case for saying that substantially all the increase in WTO litigation can be traced to the new or intensified obligations of the Uruguay Round."\(^8\)

In another study, also published in 1999, Eric Reinhardt uncovered additional reasons to be skeptical of the apparent increase.\(^8\) Reinhardt hypothesized a variety of factors, unrelated to institutional reform, that might account for much of the variation in the frequency of DSU usage following the establishment of the WTO. In a vast, first-of-its-kind empirical examination of the then-current data, Reinhardt used multiple regression analysis in an attempt to determine whether variables concerning the relationships among member countries and their markets might accurately predict the likelihood that any state would be involved in a dispute settlement action against another state. A number of factors did indeed yield statistically significant increases in this probability. For example, controlling for other factors, a member country is more likely to file a complaint against a country which has previously filed a complaint against it.\(^8\)

\(^7\) Id. at 19. Note that this proposition has been questioned. As Reinhardt has pointed out, GATT art. XXIII had always allowed complaints regarding sectors and trade measures not specifically enumerated in the agreement, through its "very permissive 'nullification or impairment' clause," which effectively enabled complainants to allege that a respondent's trade measure, though not facially violative of the treaty, had nonetheless produced a GATT-inconsistent effect. Reinhardt, supra note 70, at n.51. Thus, Reinhardt concludes, "such conflicts are not new to the WTO, and hence the legal expansion of GATT in this regard is probably not responsible for the growth in disputes over time." Id. Reinhardt appears to be conjecturing here, as he confines his observations to a footnote and supplies no data. For this reason, I too devote a footnote to his objections, rather than evaluating them at length.

\(^8\) See supra notes 24-27 and accompanying text.
hardt calls this the "countersuit effect." Additionally, a country is more likely to bring a complaint against a trade measure that has already become the subject of an outstanding complaint filed by a third country. This Reinhardt refers to as "bandwagoning." What these two factors have in common is that they involve situations in which prior dispute activity begets more dispute activity. In other words, far from being grounds for praise, any increase in disputes related to these two factors ought to count against the effectiveness of the DSU, at least as measured by its ability to put disputes to rest. As Reinhardt puts it, "[c]omplaints arise today disproportionately because of the failure of the dispute settlement regime to facilitate successful resolution of previous complaints."

Still more important is Reinhardt's evaluation of trade dependence as a predictor of DSU-usage. In evaluating the probability of a bilateral dispute between any two countries, Reinhardt defines "trade dependence," for each country, as "the sum of imports from and exports to the partner country, divided by gross domestic product (GDP)." The hypothesis is that the probability of disputes occurring over measures affecting a particular market rises as a function of that market's importance to the economies of the prospective disputants. Here, value-of-trade as a percentage of GDP supplies an intuitively satisfying proxy for the degree of importance. Reinhardt's findings are telling. As predicted, he finds that "a state is more likely to initiate disputes and to be targeted as well when a high proportion of its GDP derives from imports and exports with its partner." In other words, as countries become more dependent on foreign trade for their fiscal health generally, disputes are proportionately likelier to arise. Thus, increased trade dependence, rather than institutional reform, seems to account for the increase in dispute settlement activity. Indeed, after controlling for this factor over time, Reinhardt concludes that "the probability of dispute initiation between any two countries has not risen... under the WTO regime, ceteris paribus."

More recently, other scholars who have interrogated the data have reached comparable conclusions. One study, by Eric Posner and John Yoo, found that much of the observed increase in DSB usage can be explained simply by controlling for the number of member states in the WTO. Writing in early 2004, they begin by comparing the number of complaints that had then been filed under the WTO (227) to the number that had arisen under the entire history of GATT from 1948 to 1994 (432). At

83. Id. at 14.
84. Id. at 12.
85. Id.
86. Id. at 25 (emphasis added).
87. Reinhardt, supra note 70, at 15.
88. Id. at 19.
89. Id. at 2-3.
90. Posner & Yoo, supra note 70, at 40.
91. Id. Again, note that this figure varies—here by a wide margin—from Ruggiero's number. See Ruggiero, supra note 14, at 70. As discussed supra note 75, different scholars employ different methods in counting a single "dispute."
first blush, this reveals a significant increase from 9.2 disputes per year under GATT to 37.9 under the WTO. On closer inspection, however, the increase appears somewhat illusory. First, it is necessary to control for outlier years during the GATT period, which artificially deflate the usage statistics. For instance, during the first ten years following the establishment of the EC, Europe's use of the GATT dispute settlement procedures was on practical hiatus, such that including this period in any study would yield an unrepresentatively low per-annum mean. For this reason, Posner and Yoo confine their comparison period to 1989-1994 which, by itself, boosts GATT's usage rate to 20.3 complaints per year. Next, by indexing for the number of member states during the subject periods—105 and 132, respectively—they close the gap even further finding 0.19 complaints per state per year for GATT, as compared with 0.29 for the WTO. Finally, the authors take their analysis one step further, and argue that a valid comparison should control not only for the number of states but also for the number of state pairs. The argument is based on factorial analysis: Since the number of potential conflicts rises nonlinearly as a function of the number of states participating, state pairing arguably presents a more accurate predictor of increased dispute activity. Viewed this way, the data reveal .0037 complaints per state pair per year under GATT, as compared to .0044 under the WTO—a negligible difference.

Hudec and Reinhardt both published in 1999, and covered a period during which there was an undisputed explosion of new dispute settlement activity under the WTO. Posner and Yoo, though writing far more recently, still confronted a body of data that, at least on its face, suggested a high per-annum rate of usage relative to that of GATT. What is interesting today, and what immediately confronts any researcher who seeks to "update" the work of Hudec and others—say, by looking at more recent data in search of patterns corresponding to those observed early on—is that the apparent "surplus" of cases now seems to have dissipated. DSU usage grew robustly from 1995 until 1997, peaking at 49 cases in that year. 1998 saw only 40 cases and, through 2003, the number of new cases per year remained between 20 and 40. In 2004, the number declined to a then-record low of 18, only to be cut nearly in half again in 2005, during which there were a mere 10 new cases.

93. Posner & Yoo, supra note 70, at 40.
94. Id.
95. Id.
96. These are my own counts, from data available at the WTO's website, http://www.wto.org/english/tratop_e/dispu_e/dispu_status_e.htm#yr2005 (last visited Jan. 1, 2006). As discussed supra notes 75, 91, counting methods differ among researchers and it should be noted that my method is, in some respects, less sophisticated than that favored by others. For example, some researchers will find more (or fewer) disputes than the number of named disputes recorded by the WTO. This is so because many
This erosion, however, does not completely foreclose further inquiries of the sort that interested Hudec. One might still evaluate the basis-for-dispute statistics of the current—albeit depleted—volume of cases. In so doing, one may be able to strengthen the conclusions of Hudec, Reinhardt, and others, possibly demonstrating that, in the waning years of GATT, member countries had been “saving up” potential disputes in anticipation of the new system, or that the temporary surplus after Uruguay reflected an explosion of long overdue objections to trade measures in sectors now covered by the WTO. Such a project is beyond the scope of the present Note, however, and will have to await future research. For now, I conclude this subsection by proposing that the scholarly investigation of the increase in dispute settlement activity has gone a long way toward dispelling the optimistic notion that such an increase is the product of a stronger, healthier, or more confidence-inspiring dispute settlement mechanism. Rather, the increase probably stems from such factors as (i) new and more severe substantive obligations, (ii) increasing WTO-membership, (iii) increased trade dependence, and (iv) the system’s own failure to resolve prior disputes.

B. Equal Access: Developing Countries and the DSU

Just how well do poor countries fare under the new system? As with the discussion of the effectiveness of the DSU in general, this question has prompted a great deal of scholarly debate, as scholars have struggled to determine whether—and if so, why—developing countries are under-utilizing the DSU. Before engaging this debate, a brief review of the major disadvantages thought to be facing poor countries will be useful, as it will map out the landscape in which the various research questions arise.

1. The Hypotheses: Possible Obstacles to Developing Country Dispute Participation

Broadly speaking, economists expect that an exporting country faced with a disputable trade measure will seek to resolve it through formal dispute resolution if, and only if, the expected benefits of litigation exceed the expected costs, where the expected benefit is the gain that would accrue to the exporter following successful resolution of the dispute multiplied by the probability that the dispute will be resolved successfully.97 This decep-
tively simple formula masks more variables than at first appear. For example, this formula assumes that an exporting country is aware of the disputable trade measure in the first place. In fact, developing countries may be much less equipped to identify WTO-inconsistent measures than their wealthier counterparts. This is due in large part to the fact that developing countries, both in the public and private sectors, tend to lack the domestic expertise necessary to identify these disputes. These deficits form part of what may be referred to as a human capital problem in developing countries. In developed countries, the private sector is highly vigilant in monitoring and patrolling its own market access rights, and the governments tend, at the very least, to have effective mechanisms in place for public-private interaction. In these countries, by the time a disputable case lands on the trade minister’s desk, much of the legal leg work, in terms of compiling facts, conducting economic analysis, and researching the legal basis for the complaint, has already been done by members of the industry associations whose sectors are most affected. Such mechanisms are largely absent in developing countries.

The human capital factor manifests itself in other ways as well, not the least in that developing countries are simply unrepresented or under-represented at the WTO in Geneva. Constantine Michalopoulos was, to my knowledge, the first scholar to examine the locations and sizes of WTO “missions” as possible indicators of the quality of countries’ WTO representation. Now somewhat out of date, his findings are nevertheless instructive. As of his writing, there were 65 developing country missions in Geneva, and another 26 elsewhere in Europe, while seven developing countries’ trade representatives operated out of their home capitals. By contrast, all but one of the developed countries had full-time trade representation at the WTO. Michalopoulos also found that “of the 29
least developed country members, only 12 had representations in Geneva, and that most all of the small island economies were represented from missions in Europe or from their capitals.”

As to size, Michalopoulos considered not only the comparative sizes of developed and developing country missions but also attempted to estimate the minimum mission size sufficient to manage the typical workload that it could expect to encounter, in order to see whether developing countries were represented adequately. He cited a study estimating an average 40 to 45 scheduled WTO meetings per work week, suggesting that a staff of at least four to five people would constitute the minimum “effective representation.” According to these estimates, there were, in addition to the 33 developing countries that had no mission in Geneva, another 17 whose missions were inadequately staffed. Add to these another six, for whom an arrears in dues rendered their missions formally inactive, and the total percentage of inadequately represented developing countries came to nearly 60%. I would argue that, if the all too common lack of human capital in developing countries can be shown to impact their ability to identify and pursue cases, there will be a strong basis for saying that these countries have become casualties of the judicialization of dispute settlement under the WTO. This is so because the increasingly complex WTO laws raise barriers to dispute settlement that disparately filter out poorer countries, which are under-resourced in terms of legal and economic expertise.

A closely related issue, also on the cost side of the equation, concerns the cost of litigation itself. The cost here may seem to fit under the rubric of human capital, but I feel it deserves its own category: once litigation is in prospect, legal expertise is readily (if not always affordably) available for hire in a way that full-time, in-house economic expertise is not. Hence, the costs associated with litigating a claim are distinct from the costs of identifying a claim in the first place. In any case, this problem is directly related to my thesis. As judicialization demands increasingly sophisticated legal talent, it drives up the cost of formal dispute settlement, which is disproportionately burdensome to developing countries. This has to do with economies of scale. Whereas the value of removing a trading partner’s WTO-inconsistent trade measure varies with the volume of a potential complainant’s exports to that partner, the cost of legal services does not. Hence, smaller, poorer countries, with smaller volumes of trade, are more likely to tolerate WTO-inconsistent measures because, at best, litigation costs for such countries represent a greater percentage of the expected gain and, at worst, they make that gain cost-prohibitive.

Still another cost—one perhaps poorly captured by the above formula—is what might be called political economic cost. It has been pointed out that poor countries are more likely than rich ones to be

106. Id. at 125.
107. Id. at 126.
108. Id.
beholden to potential respondent countries for development assistance.\textsuperscript{110} It is easy to see how this could have a chilling effect on a developing country's willingness to initiate a dispute. A developing country’s vulnerability to various extra-WTO modes of retaliation may cause it to eschew formal dispute settlement in favor of preserving delicate diplomatic balances with more powerful nations. This cost, if it proves significant, relates to the second part of my thesis. That is, this cost is not directly attributable to the new judicial features of the WTO but is instead a throwback to the old GATT power-based model which the DSU has yet to rectify. As I hope to show below, this problem may be amenable to solutions that would involve increasing the judicial character of the organization.

Moving to the benefit side of the equation, again we find more variables than initially meet the eye, particularly with respect to the problem of calculating the probability of successful resolution. Not only must the prospective complainant attempt to calculate the likelihood that it will prevail on the merits—that it will secure a favorable \textit{judicial} outcome—but it must also weigh its chances for securing a favorable \textit{economic} outcome, a much broader question. Recall that the WTO is, in essence, nothing more than a collection of “self-enforcing agreements”\textsuperscript{111} with no overarching sovereign capable of compelling compliance with its directives. In the event of non-implementation by a losing respondent, the complainant's last recourse is to seek permission from the DSB to suspend concessions with the respondent.\textsuperscript{112} As should be obvious, this remedy may be wholly inadequate and even counterproductive. To illustrate why, imagine a developing country \(A\) exporting a product \(x\) to a developed country \(B\), which has imposed a WTO-inconsistent trade barrier on \(A\)'s access to \(B\)'s market for \(x\). Further suppose that developing country \(A\) is one of dozens of small countries importing a product \(y\) from developed country \(B\). As such a small importer, \(A\) may not be able to inflict sufficient economic harm on \(B\) to induce compliance. And if, in suspending concessions, \(A\) would thereby harm its own citizens by driving up the domestic price of product \(y\), the available “remedy” is not only ineffective but actually harmful.

A prospective complainant that finds itself in this unhappy position may be said to lack \textit{reparatory capacity} against the prospective respondent.\textsuperscript{113} If it appears probable that the respondent will not comply, and that countermeasures would be an inadequate substitute for compliance, a rationally acting developing country will choose to live with the offending WTO-inconsistent measure, rather than pursue costly and unprofitable litigation—a choice a richer country may not have to make. And of course, a logical corollary is that a rationally acting richer country, with the same knowledge, will choose to impose unfair trade measures, because threatened repercussions lack the “teeth” to change economic incentives.

\textsuperscript{110} Bown & Hoekman, \textit{supra} note 6, at 863.
\textsuperscript{111} Id. at 865.
\textsuperscript{112} See \textit{supra} note 66 and accompanying text.
\textsuperscript{113} Bown & Hoekman, \textit{supra} note 6, at 866.
These are some of the major issues thought to burden developing countries today. This list is by no means exhaustive; it is only meant as a sample of the controversies in this area. As will be shown in the next subsection, there is indeed a great deal of controversy.

2. The Arguments: Are Developing Countries Really Underutilizing the DSU?

A preliminary question is whether developing countries are in fact under-using the DSU. This question is surprisingly thorny. Some have optimistically pointed out that developing countries use the new DSU more often than they used the GATT dispute settlement procedures. While true, this trend must be placed in context. Perhaps the most obvious context is to consider not only the raw number of developing country complaints pre- and post-WTO but also the rate of developing country participation as compared to that of developed country participation. As Hudec pointed out in his early examination of the data, the share of complaints brought by the US or EC increased from 45% under GATT to 54% during the first three years of the WTO, when overall dispute activity was still apparently on the rise. During this same period, the percentage brought by developing countries held constant at 31%. While the US and EC were respondents in 64% of cases brought under GATT, they were respondents in only 41% of cases brought under the WTO. And while the representation of smaller developed country respondents (e.g., Japan, Switzerland, etc.) decreased slightly from 22% to 20%, there was a remarkable three-fold increase in the percentage of cases in which developing countries were respondents, from 13% under GATT to 39% under the WTO.

Some have argued, however, that usage rate alone supplies an inadequate context. A "country," after all, is an artificial political unit, and the developed/developing distinction may be a rather blunt classificatory instrument. With this in mind, a number of scholars, in the tradition of Reinhardt, have sought to uncover the underlying predictors of DSU-usage by any particular country. On the basis of such factors, many have argued that the apparent disparity in usage rates between rich and poor countries does not in fact reflect systemic bias. One example is a study by Peter Holmes et al. who, writing in 2003, argued that trade share is "a pretty robust indicator" of a country's likelihood to be involved in a dispute, and "thus, the frequently remarked-on absence of [developing countries] from the dispute-settlement system can be explained by their low volume of trade." This argument can appear quite persuasive; even without sup-

114. See supra note 14 and accompanying text.
115. Hudec, supra note 26, at 22.
116. Id.
117. Id. at 24.
118. Id.
119. Peter Holmes et al., Emerging Trends in WTO Dispute Settlement: Back to the GATT?, 2 (World Bank, Policy Research Working Paper Series No. 3133, 2003). Note that, in their paper, "trade share" refers to a country's share of global trade, as opposed
porting data, it is intuitively satisfying. If it can be shown that countries are using the DSU in proportion to their share of global trade, and that the share of global trade tends to correspond to development status, then it would appear that trade share is the unseen “common cause” that underlies both the large amount of DSU participation by rich countries, and the small amount by poor. Rather than some systemic bias at fault, rich and poor alike are simply using the system to a degree consistent with their needs. It turns out that, when the data are added, the model performs fairly well. The authors find that trade share correlates to the frequency of a country’s appearance before the DSB as complainant with an $r^2$ of 0.8012 and, as respondent, with an $r^2$ of 0.8858—both statistically significant figures. Moreover, multiple regressions considering other indicia of national poverty (e.g., income per capita) show that they do little to explain the variation in dispute settlement involvement. In the authors’ succinct words, “a large poor country doing lots of trade is as likely to be a [disputant] as a small rich one with the same trade value.”

Similar arguments appear elsewhere in the literature. In an earlier and better known study by Henrik Horn et al., probability modeling is used to test the hypothesis that the likelihood of encountering a disputable trade measure (and thus, the likelihood of appearing before the DSB) “is proportional to the diversity of a country’s exports over products and partners. . . .” This would mean that “larger and more diversified exporters would be expected to bring more complaints than smaller and less diversified exporters.” Once again, the hypothesis satisfies intuition. It seems reasonable to suspect that, other things being equal, a country doing a certain amount of trade in one market or with one partner would find itself facing fewer opportunities for conflict than a country doing the same volume of trade in multiple markets or with multiple trading partners. And, once again, the model performs fairly well. “It is shown,” the authors write, “that the theoretical distribution of disputes generated by this simple incidence model goes quite far toward predicting the actual pattern of complaints across countries.” Since poorer countries tend to be less diversified in terms of both products and trading partners, this study, like Holmes’, tends to suggest that countries across the development spectrum are using the dispute settlement system approximately as much as they “should” be, as predicted by an objective measure of need, and that there is no under-use by developing countries.

Arguably, even Reinhardt himself can be read as supplying some support for this type of idea (though probably above his own objections). In

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120. Id. at 30. R-squared is simply a measure of the explanatory or predictive power of a model. It ranges from 0 to 1; the closer to 1, the better the model.
121. Id. at 13.
122. Id.
123. Horn et. al., supra note 101, at 2.
124. Id.
125. Id.
his discussion of trade dependence as a predictor of DSU usage, he notes that the patterns he observes hold true "even when one factors in the role of relative GDP size and [developing country] status." So, just as Holmes and Horn have done in their studies, Reinhardt appears to show that a factor unrelated to development status is a better predictor of DSU usage than development status itself. It would seem, therefore, that these three studies can be cited together for the proposition that WTO member countries are utilizing the dispute settlement system commensurately with their needs, as measured by such factors as trade share, trade dependence, and export diversity, and that any apparent under-use by developing countries is simply an artifact of their lower trade share, lower trade dependence, and lower export diversity. In other words, the under-representation is purely coincidental. So why worry?

As it turns out, there remain grounds for concern. Two features of the above studies deserve closer attention. First, the authors themselves vary widely in their optimism. Holmes et al. are the most optimistic, concluding that poor countries are not, in fact, underrepresented in the system. Horn et al. are more cautious and qualify their findings by admitting that their model fails to explain certain facets of the data, such as the extreme overuse of the DSU mechanism by the US and EC. Reinhardt is least apologetic for the WTO's perceived failures. Some of the changes inaugurated by the new regime have, in his words, "backfired." Although, as discussed above, Reinhardt finds that "the probability of dispute initiation by any two countries has not risen" under the WTO, he also notes that this is true "except against developing countries." As Reinhardt explains, "the WTO has raised the probability that disputes will be filed against [developing countries] by up to 4.7 times . . . while lowering the prospects for initiation by [developing countries] by as much as a third." Notwithstanding the predictive power of trade dependence in explaining the overall increase in dispute activity, it does not "explain away" the disparities in DSU participation between rich and poor member countries. As Reinhardt and Busch have written elsewhere, "[developing countries] are one-third less likely to file complaints against developed states under the WTO than they were under [GATT]," even after controlling for trade dependence.

A second concern centers on a feature common to all of the above-discussed studies. Each study depends upon probabilistic proxies for the "predicted" volume of dispute settlement activity and compares the predicted and observed volumes of activity. The need for such statistical proxies should be obvious: We have no realistic way of knowing how many

126. Reinhardt, supra note 70, at 19.
127. Horn et al., supra note 101, at 12.
128. Reinhardt, supra note 70, at 4.
129. Id. at 2 (emphasis in original).
130. Id.
131. Id. at 19 (emphasis in original).
disputes may exist in the world that do not generate a formal complaint. Horn et al. state the problem elegantly:

If we knew the extent to which countries are affected by disputable trade measures . . . we could immediately determine whether there are any biases in the propensity to bring complaints to the [DSU] by simply comparing the distribution of complaints with that of [disputable measures]. The problem is of course that the distribution of [disputable measures] is unobservable since only a subset of all potential disputes arrive at the WTO.\textsuperscript{133}

There is, in short, no denominator, no way to rationalize the number of disputes that become visible by being litigated before the DSB.

Additionally, intuitions vary as to what this missing denominator may look like from one economic sector to another. In other words, researchers disagree as to how disputable trade measures are likely to be distributed across various markets. As Horn et al. note, "[s]ome would argue that the correlation between legal trade barriers . . . and [disputable trade measures] is likely to be positive," given the supposition that the powerful sectors, most successful in lobbying their governments for lawful protections, will be the same sectors whose lobbying efforts result in legally doubtful protections.\textsuperscript{134} The problem, of course, is that "it could equally be the other way round."\textsuperscript{135} That is, sectors "already protected by regular trade barriers have presumably less need for additional trade measures of a doubtful nature."\textsuperscript{136} Without any way to break this tie, the authors were forced to assume, for their study, that disputable trade measures are randomly and uniformly distributed across markets, products, and trading partners. This assumption is rather controversial.

Several recent studies have taken a variety of innovative approaches to this data problem. Chad P. Bown, in 2005, devised a particularly creative method of generating a complaints-filed-to-complaints-possible ratio, albeit within a manageably small sample space.\textsuperscript{137} He began by taking a sample of all unique disputes during a five year period.\textsuperscript{138} Next, he coded them according to the type of product involved and used trade data from the United Nations in order to identify nations that, as exporters in the affected product market, had interests (as potential complainants) in the outcomes of these disputes.\textsuperscript{139} Because the DSU permits multiple countries to bring a dispute action as co-complainants or, alternatively, to join ongoing disputes as interested third parties, Bown's method produces a quick snapshot of the countries that could have joined disputes but chose not to. From here, Bown is able to analyze the joiners and the non-joiners to see if any characteristics (e.g., development status) appear to make par-

\begin{itemize}
\item \textsuperscript{133} Horn et. al., supra note 101, at 4.
\item \textsuperscript{134} Id.
\item \textsuperscript{135} Id. at 5.
\item \textsuperscript{136} Id.
\item \textsuperscript{137} Bown, supra note 97, at 287.
\item \textsuperscript{138} "Unique" in this context denotes any case with a single WTO-inconsistent policy, respondent, and product or set of products. Id. at 295.
\item \textsuperscript{139} Specifically, Bown took data from the United Nations Center for Trade and Development's (UNCTAD's) Trade Analysis Information System (TRAiNS). Id.
\end{itemize}
participation more likely. The beauty of Bown's approach is that it uses data that are commonly available (viz., complaints that have been filed) to generate a reasonable estimate with respect to data that are usually obscured from view. He is, in short, able to quantify non-participation. While we may never know, in absolute terms, how many disputable measures go entirely unchallenged, we can know how many existing challenges go unjoined by other interested parties. While we still do not have (and probably never will have) a denominator that represents the universe of possible disputes, we do have a denominator in the disputes filed.

After matching the information on disputes to the information on participating exporters, Bown finds that, in 54 disputes, there were 89 complainants, 65 affected exporters who joined as third parties, and fully 711 adversely affected exporters who did not participate.\textsuperscript{140} Next, he looks for evidence that various disadvantages facing developing countries were correlative to decisions not to participate.\textsuperscript{141} Because Bown has managed to avoid the denominator problem, he is able to avail himself of very sensible proxies (not the vague, highly debatable proxies referred to above) to quantify and test for these disadvantages. As to the human capital problem, Bown refers, as did Michalopoulos, to the size of each country's WTO delegation in Geneva.\textsuperscript{142} As to the problem of pure litigation cost, he simply looks at each would-be complainant's GDP as a proxy for its capacity to absorb such costs.\textsuperscript{143} He accounts for the political economic cost problem by looking at the amount of foreign aid a prospective complainant receives from the respondent and, as a measure of retaliatory capacity, he uses the share of the respondent's total exports to the developing country.\textsuperscript{144} Across the board, Bown finds statistically significant positive correlations between each of these factors and the decision by potentially interested parties not to participate.\textsuperscript{145}

What makes these findings so useful is that they paint a richer, more detailed picture than earlier studies that asked only whether developing countries used the DSU "a lot" or "a little." Instead, we see developing countries abstaining from the process in precisely those situations where, based solely on their legal interest in the dispute, they should be participating. What these findings also suggest is that there may be yet another problem facing developing countries. Closely related to their individual cost problems, developing country participation rates may also reflect a collective action problem. Since a successful dispute resolution can remove a trade barrier that affects parties other than the complainant, many potential complainants will have an incentive to free-ride on the successful litigation of others.

\textsuperscript{140} Id. at 295-96.
\textsuperscript{141} Id.
\textsuperscript{142} Id. at 301.
\textsuperscript{143} Bown, supra note 97, at 301.
\textsuperscript{144} Id.
\textsuperscript{145} Id.
Another creative approach to this research is to avoid the data problem altogether. A recent study by Kyle Bagwell et al. examines the relationship between developing and developed complainants in those situations where a complainant has already received a favorable ruling and the respondent has not complied, such that the complainant has the option to request countermeasures under DSU art. 22.4.146 The study first identified four scenarios, jointly exhaustive of the possible permutations: (1) countermeasures may have been imposed and remained in place; (2) countermeasures may have been imposed and resulted in implementation of the adverse ruling by the losing respondent; (3) countermeasures may have been authorized but not imposed by the prevailing complainant; and (4) countermeasures may never have been requested, despite non-implementation by the respondent.147 The study then examined the cases in each of these scenarios, seeking a relationship between a country’s development status and its position within this framework. The results for each scenario are as follows: There were only two cases in which countermeasures had been imposed and had remained in place through the date of the study.148 In each of those cases, both complainant and respondent were developed countries.149 There was only one case in which the countermeasures had led to implementation and, again, both parties were developed countries.150 In the third scenario, there were four cases in which countermeasures had been requested and authorized, but in which the requesting party had taken no further action.151 One of these cases pitted a developed complainant against a developed respondent; in another case, the contest was between a developed complainant and developing respondent; and the remaining two cases involved developing complainants litigating against developed respondents.152 Finally, there were three cases in which, despite lack of implementation, the complainant did not even bother to request countermeasures.153 One of these was a case between two developed countries; the other two involved developing complainants against developed respondents.154 Note from these data that there has never been a single case in which a developing country complainant, prevailing on the merits and faced with non-implementation of a DSB ruling, has imposed sanctions.

Although Bagwell et al. are somewhat less precise than Bown (they use OECD membership as a coarse proxy for development status and do not peel away as many layers as Bown does in search of causal factors), their findings are highly instructive. Just as Bown shows that there are situa-

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147. *Id.* at 12.
148. *Id.*
149. *Id.*
150. *Id.*
151. *Id.*
152. See generally Kyle Bagwell et al., *supra* note 146, at 12.
153. *Id.*
154. *Id.*
tions in which developing countries are known to have an interest that they choose not to litigate, Bagwell et al. show, perhaps even more strikingly, that there are situations in which developing countries are known to have a right that they choose not to enforce. These findings argue strongly for the conclusion that retaliatory capacity and political economic costs are motivating the decisions.

Space constraints prevent me from presenting a detailed summary of the scholarship in this area. Suffice it to say in summary that, as researchers have brought increasingly sophisticated tools of empirical analysis to bear on the question of developed country participation in the DSU, there has been a steadily growing body of evidence to indicate systemic biases.

III. Judicialization: Problem and Solution

What emerges from the above evidence is the unfortunate irony that the DSU, intended to reform the malfunctioning GATT dispute settlement system, seems to have harmed those parties most in need of help. Developing countries, historically at a disadvantage in the diplomatic arena, were supposed to find in the new DSU a system where the rule of law, rather than wealth and power, would determine outcomes. Instead, the developing countries of the world have found a system that is costlier, more complex, and more mechanical, but which has yet to redress some of the most basic problems with a power-based system. As Busch and Reinhardt have stated the problem:

By adding 26,000 pages of new treaty text . . . ; by imposing several new stages of legal activity per dispute, such as appeals, compliance reviews, and compensation arbitration; [and] by judicializing proceedings and thus putting a premium on sophisticated legal argumentation as opposed to informal negotiation . . . the WTO reforms have raised the hurdles facing [developing countries] contemplating litigation.\(^{155}\)

What, then, is to be done? I would argue that the correct course is to strive for more, not less, judicialization of the process. Despite the fact that increasing complexity has placed greater and greater costs on developing country participants, I believe that these costs could be offset by completing the process that the DSU has started.

In this section, I outline a brief list of reforms and demonstrate how each could help soften or solve some of the problems identified above. What these reforms have in common is that they are inspired by systems already in place in other legal and judicial contexts, particularly in domestic civil litigation systems.

A. Compensation

As discussed at some length above,\(^ {156}\) the optimal result available to a prevailing complainant in a dispute settlement action under the DSU is the

\(^{155}\) Busch & Reinhardt, supra note 39, at 467.

\(^{156}\) See supra notes 62-69 and accompanying text.
prospective removal of the offending trade barrier. What this means is that, even disregarding the risk of non-implementation by the respondent, the best a complainant can hope for is that the respondent's WTO-inconsistent policies will not affect the complainant's future exports to that country. Thus, in the cost/benefit calculus discussed above, a potential complainant with relatively low export volumes faces the discouraging prospect that, even under the best scenario, it may take years to recoup expenses incurred in litigating to remove the trade barriers—a risk exacerbated by the fact that the time lapse between the initiation of a complaint and the implementation of a panel ruling can easily run from two to three years.

One solution to this problem would be to take a page from contract theory and introduce a mechanism for compulsory compensation, requiring the respondent to pay something akin to benefit-of-the-bargain expectancy damages, including litigation costs. If potential developing country complainants could be assured of receiving damages retroactive at least to the commencement of the action, they might be emboldened to pursue meritorious claims, even when those claims imposed fairly high short-term transaction costs. This is because such a provision would permit a potential complainant to confine its cost/benefit analysis to the actual merits of its complaint, regardless of extrinsic economic factors. As a corollary, respondents should be less likely to make a scorched-earth, dilatory defense of a losing case, because there would be less (if anything) to gain from doing so. Such a reform would also pose little risk of inviting a spate of unmeritorious "strike suits," because complainants could only be assured of recovering their status quo ante when they actually prevailed at the DSB. Thus, there would be no incentive to expend resources on a case unlikely to succeed. Finally, this reform may also help ameliorate the col-

157. See supra notes 111-113 and accompanying text.
158. This estimate is generated by simply summing the stated timeframes for various dispute phases in the DSU itself. I have not undertaken an empirical examination of the average length of time that elapses in practice, but such estimates do appear in the literature and in official documents. See, e.g., Special Session of the Dispute Settlement Body, Negotiations on Improvements and Clarifications of the Dispute Settlement Understanding, Proposal by Mexico, TN/DS/W/23 (Nov. 4, 2002) [hereinafter "Proposal by Mexico"] (putting the average length of time at three years).
159. Throughout this subsection, distinguish my use of the word "compensation" from the concept that appears in the DSU. There are provisions for negotiating interim "compensation" pending implementation, see DSU art. 22.1, but this form of compensation differs from what I envision in several important respects. First, it begins after the lapse of the reasonable period of time and is strictly voluntary. In other words, what is contemplated by the terms of the DSU is an alternative to suspension of concessions failing implementation and, therefore, like suspension of concessions, it is strictly prospective in nature. There is no provision in the current DSU for compulsory retroactive compensation in addition to implementation. Another important difference is that, as I use the term, I imagine monetary compensation—an actual payment by the respondent to the complainant—whereas "compensation" in the DSU may take other forms, such as compensatory concessions in other markets.
lective action problem\textsuperscript{161} because, rather than having an incentive to free ride on another nation’s successful action, affected non-participants would stand to gain less than the nations who actually brought the case: Non-participants would continue to enjoy the removal of the offending trade-barrier, but only named complainants would be entitled to receive compensatory payments from the respondent.

One criticism I anticipate here is that I only address the \textit{best case} scenario for complainants, and that this reform would have no impact on those situations where a recalcitrant respondent simply failed to implement a ruling. As has been pointed out elsewhere,\textsuperscript{162} one advantage suspension of concessions has over compulsory remedies is that the former are self-implementing; the complainant can suspend concessions unilaterally, which requires no cooperation by the respondent. It is true that when parties to a system flout the rules, there is scant comfort in creating bigger, more demanding rules for them to flout. There are two answers to this critique, however. First, it should be noted that, absent any other changes to the system, this proposal at least does no harm (the current remedy of suspension of concessions would still be available in the case of a non-implementing respondent). Second, there are other amendments that could add “teeth” to the proposed measure. Since the “teething” proposal cross-cuts several of the proposals for compulsory remedies, I reserve comment on that subject for its own subsection below.\textsuperscript{163}

B. Compulsory Implementation vs. Efficient Breach

Here, I would like to propose two alternative possibilities, both of which relate closely to the compensation issue discussed in the previous subsection. It is often proposed that the DSU could be amended to provide for compulsory removal of WTO-inconsistent trade measures.\textsuperscript{164} Currently, the removal of such measures is, of course, \textit{not} mandatory, nor is the ongoing payment of compensation to the complainant during non-implementation; the \textit{only} remedy of which the complainant can be assured is its own ability to suspend concessions. Hence, a proposed amendment providing for compulsory implementation of panel recommendations would not be incompatible with the above proposal for retroactive (as opposed to ongoing) compensatory payments.\textsuperscript{165} I therefore second those who have recommended that compliance with panel rulings be made compulsory.

However, in acknowledgement of the political resistance such a proposal is likely to encounter, I would also like to propose a softer alternative, this one borrowing from the (admittedly controversial) concept of efficient breach in contract theory. Under this alternative proposal, the DSU could

\textsuperscript{161} See supra Part II.B.2.
\textsuperscript{163} See infra notes 182-186 and accompanying text.
\textsuperscript{164} See, e.g., \textit{SOUTH CENTRE, supra} note 71, at 31.
\textsuperscript{165} See supra notes 156-163 and accompanying text.
be amended to make ongoing (or "interim") monetary compensation compulsory but would leave it to the discretion of the respondent to remove or leave in place the offending trade barrier that gave rise to the dispute. The result would be that a losing respondent that found it more affordable to make continued payments to the complainant than to remove the barrier for all imports, would have the option of doing just that. Thus, the prevailing complainant would be made whole (even inclusive of retroactive "expectancy" damages), and the losing respondent would be better off than it would have been had it been forced into total compliance.

In common with the above proposal concerning retroactive compensation, this proposal has the potential to empower weaker would-be complainants. It would supply a corrective to the now flawed litigation incentives because a developing country complainant with a meritorious claim would be assured of realizing the real value of that claim, whether through reduced trade barriers, or through compensation commensurate with the value of its (nominally continuing) injury. Moreover, this proposal might have some impact on the collective action problem, since there would be no incentive to wait for other complainants to go to Geneva where, likely as not, they would simply be "bought off," generating no positive externalities for those exporters who remained on the sidelines. However, it must be acknowledged that this proposal is not without potentially serious flaws. For example, it would appear to violate the spirit of one of the fundamental principles of the WTO, viz., the "most favored nation" status each member is to accord every other member. By letting a losing respondent make a separate peace with a prevailing complainant, the practical consequence would be nearly indistinguishable from permitting the respondent to set a special tariff schedule for the complainant. I say "nearly" indistinguishable because, as I envision monetary compensation, the complainant would presumably receive rebates from the respondent, rather than having its products receive actual differential tax treatment in the marketplace. But this remedy would still create the unseemly appearance of the rich country bribing the poor one to keep its mouth shut, all under color of law. For this reason, the proposal should be treated with great caution. Still, the imagined outcome in this situation does not differ greatly from an outcome already possible in the current system, in which voluntary compensation is negotiated while the underlying disputed measure remains in place perhaps indefinitely.

C. Independent Prosecutor

One proposal that has begun surfacing in the literature, inspired by domestic civil and criminal justice systems, is for the WTO Secretariat to create an office whose mandate would resemble that of an independent

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166. See supra Part II.B.2.

167. True, under the current system, any compensatory concession (as opposed to monetary payments) has to be offered on a most-favored-nation basis, meaning it cannot benefit the complainant alone. But it easy to imagine a respondent working around this difficulty by offering compensation in a market dominated by the complainant.
prosecutor. As of this writing, I am unaware of any scholar who has proposed a detailed enumeration of what responsibilities such an office might include. In brief, it would simply be an office authorized to bring dispute actions against countries that had taken WTO-inconsistent measures—actions that, today, can only be brought by member country complainants. Clearly, it would be difficult to imagine this office being of much use outside the context of a system that also provided for compulsory implementation of panel rulings. This follows from the fact that, with no complainant to suspend concessions, the only obvious remedy would be for the respondent to remove its trade barrier. Thus, as with most of the proposals I discuss, this is primarily intended as a component of a larger bundle of judicializing measures that make more sense together than they do in isolation. Nevertheless, this proposal may still have some value as a freestanding measure. For example, an action by an independent prosecutor would obviously have to name markets affected such that, following a successful “prosecution,” the DSB could authorize suspension of concessions by all affected exporters in the relevant market in one fell swoop. Alternatively, the DSU could be amended to authorize monetary fines in these cases.

The major benefits of the independent prosecutor proposal would lie in its effects on the problems of human capital, litigation costs, and political economic costs. It would improve upon the current system in the pre-litigation stage because a centralized, multilateral body, backed by all the resources of the Secretariat, would have the funding and legal expertise to identify and pursue potential claims, particularly on behalf of developing countries that often have difficulty identifying such claims for themselves. It would improve the litigation stage for substantially the same reason: A full-time staff of lawyers within the Secretariat’s office would “try” cases before DSB panels, easing the burden on developing countries, which would otherwise have to contract for costly legal services. Finally, because cases would be brought on behalf of, rather than by, the developing countries most affected, WTO-inconsistent trade barriers could be targeted without weaker complainants first having to summon the temerity to challenge stronger countries with whom they have diplomatic relationships, or on whom they depend for foreign aid. In short, this would bypass many of the hurdles associated with political economic costs.

Chief objections to this proposal are likely to include the following. First, there is the problem of generating the political will necessary to create such an office. It is difficult to imagine member countries funding an office whose work would potentially run contrary to their own economic interests. As to this objection I have no good answer, other than to say that the proposal is consistent with the larger goal of securing market access.

168. See, e.g., Hoekman et al., supra note 101, at 538; see also Bown, supra note 97, at 293.
169. See supra notes 98-109 and accompanying text.
170. See supra pp. 116-17.
171. See supra note 110 and accompanying text.
rights and promoting efficiency in the global economy through the principle of comparative advantage. The long term benefits of pursuing this objective should, in theory, benefit all member countries. I can only say that members should consider this proposal, although it may be unrealistic to say that they are likely to do so.

Second, some critics will be understandably concerned that the proposed office would compromise the impartiality of the WTO Secretariat. It is, of course, important that the Secretariat not be seen as taking sides in an adversarial process. In response, I would point out that there is ample precedent for the formation of similar semi-autonomous offices whose independent functions have not been deleterious to the neutrality of the larger organizations they serve. Administrative agencies in the United States, for example, conduct quasi-judicial hearings in which both the prosecutor and the administrative law judge (or "ALJ") are technically within the agency's chain of command but in which neither is permitted to influence the course of the other's work. Although this system has attracted some criticism, most agree that it is unproblematic.

In the interests of maintaining prosecutorial independence, the WTO could remove the hiring, promotion, and retention of prosecutors from the discretion of the Secretariat. For example, the appointment of prosecutors could be made subject to approval by consensus of the Ministerial Conference, and their service could run for a fixed term of years during which they could not be removed except for cause. Such measures would not only insulate prosecutors from the influence of the Secretariat during their decision-making process but would also insulate the Secretariat from even the appearance of impropriety.

D. "Public Defenders"

A related proposal involves providing free or deeply discounted legal services for developing country respondents in dispute settlement actions. Provisions in the DSU already provide for legal assistance to developing countries. However, this assistance falls well short of what is needed, for reasons both formal and practical. Formally, the DSU limits the assistance available to the provision of technical advice. Legal experts in the Secretariat's office may assist developing countries "in a manner ensuring the continued impartiality of the Secretariat," but they may not act as advocates. In other words, these experts are officially proscribed from rendering the advice that developing countries most need; they cannot discuss legal strategies calculated to secure the favorable disposition of a case. As a practical matter, there are simply too few of these experts to go around. In fact, there are only two, and "[t]heir services are available

173. See, e.g., SOUTH CENTRE, supra note 71, at 29.
174. DSU art. 27.2.
175. Id.
176. SOUTH CENTRE, supra note 71, at 23.
for a total of four person days a month, roughly 400 hours a year—which is usually not enough to deal with one case.”177

There have been various efforts to address the problem of litigation costs facing developing countries. For example, 2001 saw the establishment of the Advisory Centre on WTO Law (ACWL), an inter-governmental organization, independent of the WTO, whose mission is “to provide legal training, support and advice on WTO law and dispute settlement procedures to developing countries...”178 Still, more is needed. The ACWL and organizations like it depend for their funding on voluntary contributions and, to date, some of the world’s richest economies (notably, the US, Japan, and the EU) have not contributed to the ACWL’s endowment.179 In order to put developing country respondents on a level field vis-à-vis wealthier complainants, legal assistance, up to and including outright advocacy, should be provided through the WTO itself.

Here, I anticipate objections similar to those raised in the above discussion of independent prosecutors. The establishment of a permanent defense counsel to assist poor countries would undoubtedly meet with stiff political resistance, perhaps from the very countries that have opted not to contribute to the ACWL. And again, I have no good answer to this objection, other than to say that the idea, properly viewed, is intended for the benefit of all nations, and not just those developing countries it helps directly. The issue of impartiality will also resurface here and, again, I would argue that there are numerous options for ensuring the independence of developing country advocates.

As to the issue of impartiality, there remains one objection that is unique to the permanent defense counsel’s office. There is a difference between the sort of “independence” required of an independent prosecutor, and the sort that would be relevant to an office assisting respondent countries. With prosecutors, the Secretariat could conserve its impartiality by removing itself from the process by which prosecutors choose which cases they pursue. A permanent defense counsel’s office, however, though independent of the Secretariat, can never be impartial as between interested parties because, by definition, it is taking sides. Whereas prosecutors would be seen as pursuing cases for the greater public good, the defense counsel would be assisting individual member countries in their disputes against other member countries. In this sense, the contemplated office is imperfectly analogous to the type of office that gives this subsection its title: Whereas “public defenders” are appointed to defend actions brought by the state, a permanent defense counsel of the WTO would be defending parties against other parties. A correct analogy might be to a system that would supply court-appointed counsel to indigent defendants in, say, divorce cases—hardly an uncontroversial proposition.

177. Michalopoulos, supra note 103, at 138.
178. Advisory Centre on WTO Law, About Us, http://www.acwl.ch/e/about/about_e.aspx (last visited July 8, 2006).
179. Bown & Hoekman, supra note 6, at 875 n.25.
Valid though the above objection may be, I submit that the proposed office is still desirable. To a degree rarely seen in domestic civil litigation, WTO dispute resolution has sweeping effects beyond the mere allocation of rights and duties between litigants. As noted above, correct dispute resolution will often generate positive externalities since the parties involved are seldom the only participants in the market in which the dispute arises. But even if we imagine a dispute limited to two trading partners, we still have their individual citizens to consider. As Bown and Hoekman have observed, securing market access rights through sound dispute resolution "reduces uncertainty, increasing the likelihood that firms and individuals in countries on both the export and import sides of international transactions make mutually beneficial, relationship-specific investments." Thus, in evaluating the importance of defense counsel, analogizing to domestic civil litigation may fail because there is far more at stake in WTO litigation. Because it may result in the exploitative removal of valid, legal trade measures, the prospect of a developing country respondent losing not because its claim was unmeritorious, but because of inadequate counsel, should be at least as troubling as the conviction of an innocent individual criminal defendant.

E. Small Claims

One interesting proposal that deserves brief mention here, recognizing that the size of claims varies greatly, is that the DSU might benefit from some degree of scalability. As Hoekman et al. have observed: "[J]ust as a low wage worker's wrongful termination suit ought not to be litigated before the US Supreme Court, the DSU should be reserved for the more 'important' issues and not be used to address disputes that pertain to small trade volumes." I agree. It is perhaps surprising that, while virtually every domestic legal system in the world has some stratification of its courts, with higher courts often setting amount-in-controversy minimums, there is as yet no analog on the global stage. The creation of smaller panels for smaller disputes may be a significant improvement over the current, one-size-fits-all system. Just as domestic small claims courts facilitate inexpensive access to judicial process, a leaner panel system (perhaps permitting adjudication of small cases by a single panelist) could provide developing countries with a third choice, between the current extremes of a costly, full-dress panel proceeding on the one hand, and simply tolerating a disputable trade measure on the other. Hence, a "small claims court for the world" deserves serious consideration.

F. Enforcing Panel Rulings: Giving the WTO Teeth

As to many of the proposals sketched out above, it has been noted that little can be done to enforce them. Despite my heavy reliance in this Note

180. See supra note 140 and accompanying text.
181. Bown & Hoekman, supra note 6, at 862.
182. Hoekman et al., supra note 101, at 536.
on analogies to domestic judicial processes, the element of the analogy most conspicuous by its absence is a sovereign entity. The WTO is, after all, not a government. As has been pointed out elsewhere, "[t]he WTO has no jail-house, no bailbondsmen, no blue helmets, no truncheons or tear gas." 183 However, from the fact that the organization lacks Leviathan status, it does not follow that it must be entirely impotent with respect to the behavior of its members. The DSU could be amended to create greater incentives for the prompt implementation of panel rulings.

One option that has been suggested would provide for "joint retaliatory action by all WTO members against the offending member which has refused to either remove the offending measure or to pay compensation..." 184 Rather than leaving it to the respondent to suspend concessions or other obligations, this device would simply have all member nations withdraw the respondent’s market access rights. A harsh measure to be sure, it has much to recommend it. A respondent who has failed to implement a panel recommendation is in breach of at least two WTO provisions: (1) the panel ruling itself, and (2) the substantive provision that gave rise to the panel ruling in the first place. Such a respondent is continuing to enjoy many of the benefits of WTO membership while failing to honor those obligations on which membership is supposedly conditioned. Intuitively, it only makes sense that, while such behavior persists, the offending country should forfeit the benefits of membership. When such forfeiture includes all market access rights, rather than just those granted by the complainant, only then will the WTO truly be a multilateral organization, rather than just a multilateral forum to administer a collection of bilateral relationships.

For those who find the above proposal extreme, there are gentler alternatives available. One option might be to suspend voting rights, financial assistance, and other incidentals of membership, effectively treating non-compliant respondents as though they were in arrears in their dues. 185 A weakness in this proposal is simply that the WTO does not vote often and does not provide much in the way of financial assistance in the first place. 186 A slightly stronger alternative might be to suspend the respondent’s right to initiate dispute actions as a complainant.

Another rather elegant idea, a variant of which has already been officially proposed by Mexico, 187 is that remedies, in terms of suspension of concessions, should be tradable. At first, this proposal does not seem a perfect fit with the bundle of reforms I envision, in part because it is not immediately apparent that it is inspired by domestic judicial process, and

184. SOUTH CENTRE, supra note 71, at 31.
186. Charnovitz, supra note 69, at 827.
187. See Proposal by Mexico, supra note 158; see also Bagwell et al., supra note 146. Note that my discussion in this subsection is not an analysis of the Mexican proposal itself, but merely a discussion of tradable remedies generally.
in part because the imposition of compulsory compensatory payments proposed above would appear to render this proposal superfluous. As to the first point, I would say that, in fact, the assignability of remedies does have close analogs in domestic law: A judgment against a party is, after all, a debt, and debts are ordinarily market-alienable. As to the second point, I admit that in the world I imagine there would ideally be little place for the assignment of remedies, because a respondent would be compelled either to remove trade barriers or, alternatively, to make compensatory payments, thus obviating the need for unilateral suspension of concessions by the complainant. Still, the assignability proposal may be just the sort of measure that would put "teeth" behind the other proposals I envision. That is, after providing for assignable remedies, countries may never actually have occasion to assign them because the threat alone would induce compliance.

How, exactly, would the proposal work? As I envision it, the proposal would simply enable a prevailing complainant to sell (perhaps at auction) its right to suspend concessions with the losing respondent to a third country (or countries). To illustrate the value of such a proposal, let us reconsider the case of hypothetical countries A and B discussed above, only now let us put some (admittedly exaggerated) numbers to it. Suppose that B's WTO-inconsistent restrictions inflict a $1 billion "injury" on A in loss of market access. Now suppose that A has received a favorable panel ruling against B (and, of course, that B has not complied after a reasonable period of time) such that A is authorized to suspend concessions. Further suppose that A's volume of import from B is such that, after its retaliatory suspension of concessions, A can expect to harm B to the tune of $1 million per year. As a Texas alumnus, I am reminded of the old joke about the Oklahoma Sooner (I invite the reader to substitute your own favorite sports rival), ecstatic after winning his state's lottery, payable in $1 installments per year for a million years. Practically, A's "remedy" under the current system is worthless.

Under some version of the Mexican proposal, by the simple expedient of permitting A to sell its right to suspend concessions to a larger importer (or even to several smaller importers), we would expect to see the market value of that right begin to approximate its face value. That is, a nominal $1 billion in remedies would suddenly be worth an actual $1 billion, both to the complainant and the respondent, thus correcting the incentives for compliance and, by extension, for initiating (and defending) litigation in the first place. This proposal would therefore help alleviate the retaliatory capacity problem, since the relevant capacity would be that of the import market as a whole, rather than merely the complainant's share of that market. Finally, this proposal has the additional benefit of being more or less unilaterally enforceable, unlike compulsory compensation. True, the remedy is not strictly unilateral since, obviously, other countries would be

188. See supra notes 163-166.
involved. But it is unilateral in the more relevant sense that it requires no cooperation by the respondent.

Conclusion

The WTO is failing in its stated goals of supplying stable dispute settlement and stimulating growth in the developing world. True, the judicialized dispute settlement system of today appears to get more use than did its diplomacy-based GATT predecessor, but this increased usage appears to be the result of increasing WTO membership, increasing trade dependence, and the new substantive obligations covered by the DSU. And while developing countries are using the DSU at a greater rate than they used the GATT dispute mechanism, there is evidence that, as complainants, they are underutilizing the system relative to the number of disputable claims they may have, while they are appearing disproportionately as respondents. The under-use seems to be the result of problems relating to human capital, litigation costs, political economic costs, and retaliatory capacity. The human capital and litigation costs have probably gotten worse under the WTO as a direct result of the judicializing "reforms" of the DSU, while the problems relating to wealth and power—political economic costs and retaliatory capacity—are no better now than they were under GATT. The dispute settlement system as of today straddles the border between two worlds: It has one foot in the costly world of highly formalized litigation that, though adorned with all the trappings of legality, nevertheless leaves the other foot planted firmly in a world where treaties are only as good as their signers' willingness to comply with them. Dealing, as it does, in two worlds, the system has in some ways harvested the worst of both. The promises of reform have so far disappointed.

Happily, the system is amenable to repairs. By finishing what has been started, and further borrowing from the model of domestic litigation and adjudication, the system can be made to deliver on the promise of the rule of law. The DSU should be amended to provide for a degree of expectancy-type compensation, rather than just the prospective removal of trade barriers or negotiated interim compensation. It should discourage nonimplementation by losing respondents by making removal of trade barriers (or, at least, interim compensation) compulsory rather than voluntary. For such compulsory measures, enforcement power could be provided either by suspending a respondent's market access rights with respect to all WTO member countries pending implementation, or by letting the injured complainant sell its right to suspend concessions to other countries with the economic leverage to realize the value of that right. These reforms would do much to address the problem of retaliatory capacity that currently plagues developing countries.

Additionally, the DSU should be amended to provide for independent prosecutors, which would address the problems of litigation and political economic costs, as well as the human capital problem. A permanent defense counsel should be established to assist developing countries who
are targets of dispute actions by developed countries, thus easing the burden of litigation cost in these actions. Finally, a provision should be made for the inexpensive adjudication of smaller claims, thereby reducing litigation costs in such actions and facilitating developing country access to effective dispute settlement.