

COMMONWEALTH TRADE POLICY DISCUSSION PAPERS

**Commonwealth Small States and Least Developed
Countries in the WTO Dispute Settlement System**

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Abstract

This paper provides the first specific evaluation of the participation of Commonwealth small states and LDCs in WTO dispute settlement. Despite these countries' small shares of global trade, the paper queries whether their current limited participation in WTO dispute settlement processes should be greater. The paper analyses the special constraints these countries face and makes some tentative proposals to improve that participation.

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Keywords: Commonwealth, small states, least developed countries, trade, WTO, dispute settlement

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Abbreviations and acronyms

ACP	African, Caribbean and Pacific
ACWL	Advisory Centre on WTO Law
ADR	alternative dispute resolution
EU	European Union
GATT	General Agreement on Tariffs and Trade
ICTSD	International Centre for Trade and Sustainable Development
LDC	least developed countries
OECD	Organisation for Economic Co-operation and Development
UNCTAD	United Nations Conference on Trade and Development
WTO	World Trade Organization

I. Introduction

The binding dispute settlement system of the World Trade Organization (WTO) has been heralded as the ‘jewel in the crown’ of the multilateral trading system. The establishment of the WTO in 1995 included a new Understanding on the Rules and Procedures Governing the Settlement of Disputes (DSU), which contains innovations that resulted in a paradigm shift from General Agreement on Tariffs and Trade (GATT) trading relations based on economic power and politics to a WTO system based on the rule of law. The resulting increased legality of the WTO was initially hailed to benefit considerably smaller countries, of which many are developing countries and least-developed countries (LDCs). As Steger and Hainsworth (1998: 225) commented shortly after the creation of the WTO, the shift ‘is particularly beneficial for smaller countries, as without the rules and procedures of the DSU... they would not have the necessary bargaining power *vis-à-vis* the larger powers’.

Despite these perceived benefits, data from the last 17 years demonstrate that the vast majority of developing countries have not participated actively in the WTO dispute settlement system (Nottage 2009a: 489–90). In particular, the Commonwealth small states and LDCs have initiated only two of the 450 WTO disputes to date. The fact that a group of 36 countries, which represents over 20 per cent of the WTO membership, has initiated less than 0.5 per cent of all WTO disputes raises a number of questions that this paper attempts to address.

In particular, Part II of the paper provides the first specific evaluation of the participation of Commonwealth small states and LDCs in WTO dispute settlement and poses the question whether that participation should be greater despite those countries’ small shares of global trade. Part II highlights that a spectrum of other WTO members, from large well-resourced developed countries to small developing countries, have participated in WTO dispute settlement to a greater extent than those countries’ shares of world trade might suggest. The paper therefore queries whether Commonwealth small states and LDCs might also draw greater benefit from the multilateral trading system if they were to participate more in the dispute settlement system, particularly as, paradoxically, small states and LDCs may be more reliant on WTO dispute settlement than larger countries when confronted with illegal trade barriers.

Part III of the paper then analyses whether the limited participation of the Commonwealth small states and LDCs in WTO dispute settlement may be due to the special constraints and limitations they face. Part III.A evaluates the significant human and financial costs that small states and LDCs face when initiating and litigating a WTO dispute. Part III.B then focuses on the problem that many small states lack resources within government and their private sectors to identify and communicate potentially illegal trade barriers to WTO legal experts. Parts III.C and III.D next identify two commonly perceived constraints for small states: the inability of small economies to effectively

enforce a favourable ruling and fears of political or economic retaliation from larger countries. The paper notes, however, that these perceived concerns may not arise frequently in practice.

In addition, Parts IV and V of the paper provide thoughts on Commonwealth small state and LDC third-party participation in WTO disputes as well as the untapped potential of using alternative dispute resolution (ADR) to resolve WTO disputes involving small countries.

The paper concludes with certain proposals. It highlights a number of tentative solutions to mitigate the high costs of WTO litigation for Commonwealth small states and LDCs and discusses

mechanisms to improve private sector and government capacity to identify and communicate trade barriers to WTO lawyers. It also proposes dialogue and experience-sharing in order to assuage fears with respect to well-publicised retaliation constraints that may not occur frequently in reality. Throughout, the paper draws from specific examples and case studies to highlight its major conclusions. In doing so, this paper attempts to set a platform for the second study in this project, by Lorand Bartels (2014), which addresses concrete ways to improve the access of Commonwealth small states and LDCs to the WTO's dispute settlement system.

II. Evaluation of the Participation of Commonwealth Small States and LDCs in WTO Dispute Settlement

A. Data on actual participation

For many of the Commonwealth's small states and LDCs, international trade accounts for over 50 per cent of gross domestic product (Commonwealth Secretariat 2010: 8). Nonetheless, Commonwealth small states and LDCs have only initiated two WTO disputes to date. In 2003, Antigua and Barbuda

initiated a dispute against the United States (US) regarding measures which affect the cross-border supply of gambling and betting services (*United States – Measures Affecting the Cross Border Supply of Gambling and Betting Services*).¹ In 2004, Bangladesh initiated a dispute against India regarding an anti-dumping measure imposed by India on imports of lead acid batteries from Bangladesh

¹ Panel Report, *United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, WT/DS285/R, adopted 20 April 2005, modified by Appellate Body Report, WT/DS285/AB/R ('*United States – Gambling*').

(*India – Anti-Dumping Measure on Batteries from Bangladesh*).² In 1999 and 2000, Trinidad and Tobago was the only Commonwealth small state to be subject to a WTO complaint, which was initiated by Costa Rica regarding provisional anti-dumping duties imposed on the import of macaroni and spaghetti (*Trinidad and Tobago – Provisional Anti-dumping Measure on Imports of Macaroni and Spaghetti from Costa Rica*).³ As a result, Commonwealth small states and LDCs have been complainants in less than 0.5 per cent of the 450 WTO disputes to date and a defendant in less than 0.25 per cent of those disputes.⁴

The participation of Commonwealth small states and LDCs as third parties has been greater than their participation as complainants or defendants. Pursuant to the DSU, any WTO member may participate in a WTO dispute as a third party where it has a substantial systemic or commercial interest. Engagement as a third party permits those WTO members to make their views known to the panel and appellate body hearing a dispute, and can also serve as a means to gain familiarity and experience with the dispute settlement system. To date, 16

Commonwealth small states and LDCs have participated as third parties in the WTO dispute settlement system. As such, Commonwealth small states and LDCs make up 26.6 per cent of the 79 WTO Members that have participated as third parties in WTO disputes – a figure which is broadly consistent with their 23 per cent share of the total WTO membership. Nonetheless, as discussed in part IV of this paper, this activity has been highly concentrated in 10 disputes and, consequently, Commonwealth small states and LDCs have only participated as third parties in 5.2 per cent of all established panels.⁵

B. Should participation be greater?

A common characteristic of all 36 Commonwealth small states and LDCs is that they individually account for minute shares of global trade.⁶ WTO statistics on shares of global trade in goods, services and intellectual property rights for these countries, over the last five years, demonstrate that collectively they account for an aggregate world trade share of between 0.528 per cent

2 Request for Consultations by Bangladesh, *India – Anti-Dumping Measure on Batteries from Bangladesh*, WT/DS306/1, 2 February 2004.

3 Requests for Consultations by Costa Rica, *Trinidad and Tobago – Provisional Anti-Dumping Measure on Imports of Macaroni and Spaghetti from Costa Rica*, WT/DS185/1, 19 November 1999 and WT/DS187/1, 20 January 2000.

4 For the purposes of this paper, each individual request for consultations pursuant to the DSU is counted as a separate WTO dispute. At the timing of writing, there have been 451 such requests.

5 Part IV of this paper evaluates this third-party participation in greater detail and makes certain proposals for the future.

6 Bangladesh accounts for the greatest share of world trade with a total contribution of a mere 0.103 per cent. Thirty-three of the 36 Commonwealth small states and LDCs account for less than 0.05 per cent of world trade, with 17 of those accounting for less than 0.015 per cent of world trade. These figures are based on the WTO statistics used to determine members' individual contributions to the WTO budget for 2011. Available at http://www.wto.org/english/thewto_e/secret_e/contrib_e.htm.

and 0.783 per cent.⁷ This low relative participation in world trade is not surprising when one considers that the Commonwealth defines 'small states' as countries that have populations of fewer than 1.5 million people and that the only other country in this group, Bangladesh, is one of the poorest countries in the world and classified as 'least-developed' by the United Nations.⁸

It might, therefore, be argued that the limited participation of these countries in WTO dispute settlement simply reflects their limited participation in world trade. As Francois et al. (2008: 4) explain, 'it is highly likely that a country that exports many products to many markets and in large volumes will encounter more illegalities than a country that exports a few products in limited amounts to a few markets.' A number of economic studies confirm a correlation between a country's share of world trade and its participation in WTO dispute settlement (e.g. Horn et al. 1999; Bown 2005; Bohanes and Garza 2012). If this criterion were used to evaluate the participation of Commonwealth small states and LDCs in WTO dispute settlement it might be concluded that their participation is 'adequate', as it is more or less in line with their share in global trade (i.e. 0.5 per cent participation as a complainant in all disputes is broadly consistent with a 0.6 per cent participation in global trade).

Concluding that a country's participation in WTO dispute settlement is 'adequate' if it correlates with that country's share of world trade does, however, have certain limitations. For one, statistics demonstrate that a number of other countries participate more actively in WTO dispute settlement than their shares of world trade. Notably, five of the six most active complainants in WTO dispute settlement fall into this category: US (12.4 per cent share of world trade compared to 22 per cent of initiated disputes); Canada (3 per cent share of world trade compared with 7.3 per cent of initiated disputes); Brazil (1 per cent share of world trade compared with 5.5 per cent of initiated disputes); Mexico (1.8 per cent share of world trade compared with 4.7 per cent of initiated disputes) and India (1.5 per cent share of world trade compared with 4.7 per cent of initiated disputes). These figures suggest that large and well-resourced governments, from both developed and developing countries, have found it worthwhile to litigate in WTO disputes to a greater extent than their world trade shares.

Furthermore, a similar phenomenon can be witnessed with respect to developing countries with small global trading stakes. This is particularly evident for the countries from Central America, many of whom have been active in a number of WTO disputes despite accounting for world trade shares far

7 The precise figure falls somewhere between these two as for 17 of the 36 Commonwealth Small States and LDCs the WTO applied a figure of 0.015 per cent of world trade for the purposes of the WTO budget contributions despite a smaller actual share of world trade.

8 The Commonwealth Secretariat has defined 'Commonwealth small states' as any Commonwealth country with a population of fewer than 1.5 million people and six countries with slightly higher populations but that share many similar characteristics to that group. All of the Commonwealth's LDCs are small states apart from Bangladesh. See Commonwealth Secretariat (2010).

smaller than the aggregate 0.6 per cent world trade share of the Commonwealth small states and LDCs. Honduras, for instance, has been a complainant in eight disputes, despite having a world trade share of only 0.05 per cent. As a result, it participates in disputes at a ratio of 34:1 of its world trade share. Other small traders that are active in WTO disputes are: Guatemala (eight disputes initiated despite a 0.07 per cent share of world trade), Costa Rica (eight disputes initiated despite a 0.08 per cent share of world trade), Panama (eight disputes initiated despite a 0.09 per cent share of world trade), as well as El Salvador and Nicaragua. As Raul Torres (2012: 7) of the WTO Secretariat observes, 'at least as far as Latin America is concerned, it is not true to say that developing countries do not participate sufficiently in the dispute settlement mechanism.' These figures suggest that that even countries with small global trading stakes have seen utility in enforcing their existing rights through the WTO dispute settlement system. Torres (2012: 9) concludes that this active participation 'enables Latin America to make full use of the tools offered by the multilateral trading system to defend their export markets, which are of crucial importance in their efforts to achieve development through economic growth.' One might query whether the Commonwealth small states and LDCs are doing the same?

This practice of other countries at least raises the possibility that Commonwealth

small states and LDCs might draw greater benefits from the multilateral trading system if they were to participate more in WTO dispute settlement despite their relatively small trading stakes. In fact, paradoxically, small states and LDCs may be more reliant on WTO dispute settlement than larger countries when confronted with illegal trade barriers. As Shaffer (2003a: 15) notes, small developing countries tend to export a narrower array and volume of exports to a relatively small number of markets. As a result, a single trade restriction can have higher relative and per capita stakes for that small and less-diversified economy. Commercial operators within the country may therefore struggle to divert exports to alternative markets. For these reasons, the rapid removal of trade restrictions through WTO dispute settlement can be imperative for companies within small states, precisely because of the limited range and destinations of their exports.

For all these reasons, this paper queries whether the limited dispute settlement participation of Commonwealth small states and LDCs is solely attributable to small trading stakes and suggests that it may also be due to the special constraints that these countries face when they attempt to access the WTO dispute settlement system. Part III of this paper provides a critical evaluation of those constraints.

III. Analysis of the special constraints faced by Commonwealth small states and LDCs when accessing the WTO dispute settlement system

A. The reality of small trade shares in terms of the relative costs of WTO litigation

1. Small trade shares make the relative costs of WTO litigation higher for Commonwealth small states and LDCs

The small trade shares and government budgets of Commonwealth small states and LDCs accentuate one of the major constraints that many developing countries face when accessing the WTO dispute settlement system – the human and financial costs of participating in WTO litigation.

As Bown and Hoekman (2005: 863) observe, developing countries' low trade volumes, often in competitive markets with low profit margins, 'make it difficult to charge mark-ups to cover any non-economic (i.e. litigation) costs associated with maintaining or enforcing market access rights'. The rationale behind this limitation is that claims involving smaller trade stakes are not offset by smaller litigation costs.

Consequently, as any WTO dispute involving a Commonwealth small state or LDC is likely to involve low levels of trade, the relative costs of litigation will be higher for those countries, especially in light of the high opportunity costs of investing in WTO litigation as opposed to other pressing social needs (Shaffer 2006: 185).

2. The costs of WTO litigation can be high

A number of WTO members and commentators argue that the WTO dispute settlement system is 'overly complicated and expensive', resulting in insurmountable 'human resource as well as financial implications' for developing countries (Bown and Hoekman 2005: 889).⁹ Ambassador Bhatia of India has observed that, even for a large developing country, the high costs of WTO litigation are a 'major deterrent' against using the system.¹⁰

The concerns of developing countries with the high costs of WTO litigation stem from many governments lacking sufficient internal WTO legal and

9 This view has been espoused by a number of developing countries in the context of negotiations on DSU review.

10 Presentation by Ambassador and Permanent Representative of India to the WTO, 'Settling Disputes Among Members', Presentation at the WTO Public Forum 2008, Session 6, 24 September 2008. Available at: http://www.wto.org/english/forums_e/public_forum08_e/programme_e.htm

technical expertise to conduct disputes themselves. Where internal expertise is lacking, governments are required to hire external legal counsel and contract economic and scientific evidence at considerable cost.

(a) Legal costs

The cost of hiring private legal counsel to litigate WTO disputes has increased exponentially in recent years. Commentators have estimated that ‘a “litigation-only” bill of US\$500,000 to an exporter for a market access case is likely to be fairly typical’ (Bown and Hoekman 2005: 870). Legal fees can, of course, be much higher, with reports of fees for parties in panel proceedings in excess of US\$10 million (see Nordström and Shaffer 2007: 9).

These increased legal costs can be attributed, in part, to the multiple stages of WTO dispute settlement under the DSU, whereby challenged measures may be subject to reviews by a panel, the appellate body, an arbitrator determining the reasonable period of time to comply, further reviews to determine compliance, as well as arbitration on the level of suspension of concessions.¹¹ As a result, it can take several years of litigation to resolve a single WTO dispute. Furthermore, the 500 hundred pages of WTO treaty text and ever-increasing volume of WTO jurisprudence contained in hundreds of panel and appellate body reports means that WTO lawyers competent to litigate in WTO disputes are highly specialised and able

to charge premium fees. The binding nature of WTO dispute settlement also means that governments (and the companies behind them) are taking each dispute far more seriously, which seems to lead to more detailed and costly submissions. Finally, it has been observed that the lack of retrospective remedies for businesses affected by illegal protectionist measures gives respondents an incentive to further complicate, hence delay, the dispute settlement process (Busch and Reinhardt 2000).

(b) Costs of economic and scientific inputs

The costs of participation in these multiple stages of WTO dispute settlement are compounded by a trend towards increasingly technical submissions. The WTO agreements that came into effect in 1995 include new legal standards that hinge on detailed scientific or economic determinations that were not as central under the GATT. In order to litigate successfully, parties in a dispute often need to provide considerable scientific or economic evidence to support their position.

For example, with the introduction of the *Agreement on the Application of Sanitary and Phytosanitary Measures* (SPS agreement), scientific evidence of human, animal and plant risks has been heavily litigated.¹² Similarly, provisions requiring detailed economic analysis have been the subject of a number of recent disputes under the *Agreement on Subsidies and Countervailing Measures*

¹¹ These stages are set out in, respectively, Articles 11, 17, 21.3(c), 21.5 and 22.6 of the DSU.

¹² To date, seven disputes concerning the SPS agreement have resulted in rulings by the WTO dispute settlement body.

(SCM agreement) and the *Agreement on Agriculture*.¹³ In these disputes, success requires the input of technical experts that may also need to be contracted externally at additional cost. A lack of technical expertise may explain why developing countries have hardly initiated WTO dispute settlement proceedings under the SPS agreement.¹⁴ In contrast, governments of developed countries have brought a number of disputes under the SPS agreement.¹⁵ This situation is perhaps surprising as a large proportion of the exports of developing countries exports are in agricultural products, and the SPS agreement ensures that trade measures on animals, plants and their products are not applied as disguised restrictions on international trade.

The resource constraints that stem from providing these scientific and economic inputs should not be underestimated. Over the last 3 years, WTO members have litigated three significant disputes under the *Agreement on Technical Barriers to Trade*. Those disputes tackled behind-the-border non-tariff measures such as a dolphin-safe labelling scheme on

tuna, country-of-origin requirements on meat products, and a ban on certain flavoured tobacco products.¹⁶ In each instance, the panels relied heavily on evidence of a technical nature when making their determinations. In the light of the former WTO director-general's recognition of the 'growing importance' of such non-tariff measures,¹⁷ and their prevalence in the agricultural sector,¹⁸ a developing country would be at an enormous disadvantage in a WTO dispute if it did not have access to technical expertise.

3. Commonwealth small states and LDCs have not availed themselves of current mechanisms designed to address cost constraints

(a) *The Advisory Centre on WTO Law has reduced the amount of trade that needs to be affected before WTO litigation makes economic sense*

In 2001, a group of WTO members established the Advisory Centre on WTO Law (ACWL) as an independent intergovernmental organisation with a mandate to

13 For example, the Panel Report, *United States – Subsidies on Upland Cotton*, WT/DS267/R, and Corr.1, adopted 21 March 2005, modified by Appellate Body Report, WT/DS267/AB/R ('*United States – Upland Cotton*'); the Panel Report, *European Communities – Export Subsidies on Sugar*, WT/DS265/R, WT/DS266/R WT/DS283/R, adopted 19 May 2005, modified by Appellate Body Report, WT/DS265/AB/R, WT/DS266/AB/R, WT/DS283/AB/R ('*EC – Export Subsidies on Sugar*'); Panel Report, *European Communities and Certain Member States – Measures Affecting Trade in Large Civil Aircraft (Second Complaint)*, WT/DS316/R modified by Appellate Body Report, WT/DS316/AB/R, adopted on 1 June 2011; and Panel Report, *United States – Measures Affecting Trade in Large Civil Aircraft (Second Complaint)*, WT/DS353/R modified by Appellate Body Report, WT/DS353/AB/R, adopted on 23 March 2012.

14 The only developing countries to have initiated dispute settlement proceedings under the SPS agreement are Argentina (in WT/DS293) and, if deemed 'developing', China (in WT/DS392).

15 US, Canada and New Zealand have initiated six disputes under the SPS agreement.

16 See WT/DS381, WT/DS384/386 and WT/DS406.

17 Introduction by WTO director-general Pascal Lamy to World Trade Organization (2012a: 3).

18 World Trade Organization (2012a: 8). While the importance of non-tariff measures 'has intensified' under the WTO, it should be noted that 82.5 per cent of all GATT disputes also involved challenges to non-tariff measures (Santana and Jackson 2012: 470–1).

provide developing countries with support in WTO dispute settlement proceedings, as well as legal advice and training on WTO law.¹⁹ In recognition of the cost constraints faced by developing countries, the ACWL provides its legal services to developing countries for free or at heavily subsidised rates. These services are financed largely from an endowment fund of developed- and developing-country contributions.²⁰

While legal advice and training are provided for free to developing-country members of the ACWL and all LDCs, support in dispute settlement proceedings is charged according to hourly rates that vary between CHF40²¹ and CHF324. The hourly rate applied depends upon the ACWL's categorisation of each developing country based on either its LDC status or share of world trade and income per capita. These dispute settlement fees are subject to ceilings such that the maximum ACWL fee for representation at the consultations, panel and appellate body stages of a WTO dispute would be:

- CHF34,160 for an LDC (at an hourly rate of CHF40);

- CHF138,146 for a 'category C' ACWL member (at an hourly rate of CHF162); and
- CHF207,522 for a 'category B' ACWL member (at an hourly rate of CHF243).²²

Consequently, the ACWL's capped dispute settlement fees are likely to be considerably less than those ordinarily charged by commercial law firms.²³

As a result of this fee structure, it has been commented that the ACWL 'has largely addressed many of the capacity constraints' faced by developing countries in WTO dispute settlement procedures (Abbot 2007. See also Bown and Hoekman 2005: 875). Pertinently, the economists Bown and McCulloch (2009: 20–2) have demonstrated that the reduced costs of ACWL legal representation in WTO litigation correlates with developing-country ACWL members bringing disputes over considerably lower values of lost trade than non-ACWL member developing countries. This finding is significant, as it confirms that when legal costs are reduced, developing countries have brought WTO

19 As of November 2012, the services of the ACWL were available to the 31 developing countries that had become members of the ACWL and the 43 LDCs that were WTO members or in the process of acceding to the WTO. See ACWL webpage at <http://www.acwl.ch>.

20 The 11 developed-country ACWL members that have made contributions to the ACWL are not entitled to its services. LDCs are exempt from the requirement to make a financial contribution to the endowment fund. www.acwl.ch.

21 CHF refers to the Swiss Franc.

22 Of the 36 Commonwealth small states and LDCs 11 are LDCs, 12 fall into 'category C' and nine fall into 'category B'. Cyprus would be the only 'category A' ACWL member and would face a maximum dispute settlement fee of CHF276,969.

23 One commentator suggests that 'developing countries can face fees ranging from US\$200 to US\$600 (or more) an hour when they hire private law firms to advise and represent them in WTO cases' (Shaffer 2003: 16). At the same time, it should be noted that some private law firms have represented developing countries at reduced fees as part of their pro bono programmes or to gain increased exposure to WTO litigation.

disputes involving relatively low trade values. This is an important observation for the Commonwealth small states and LDCs that account for small global trade shares.

The services of the ACWL have been well utilised since its inception. 31 developing countries have acceded to the ACWL and used its dispute settlement, legal advisory and training services. The ACWL has also assisted the 43 LDCs that are currently WTO members or in the process of WTO accession, predominantly with legal advice and training. With respect to WTO dispute settlement assistance, to date, the ACWL has provided support in 40 dispute settlement proceedings, which represents over 15 per cent of all proceedings initiated since 2001. This includes representing Bangladesh, the only LDC to initiate a WTO complaint, in its dispute against India over anti-dumping duties on batteries. Nonetheless, as explained below, the majority of Commonwealth small states have not joined the ACWL.

(b) Non-LDC Commonwealth small states have generally not joined the ACWL

Developing countries that are not LDCs need to pay an ACWL accession fee to be eligible to use the services of the ACWL. As with ACWL dispute settlement fees, the ACWL accession fee varies according to the ACWL's categorisation of each developing country based on its share of

world trade and income per capita. Thus, the 12 Commonwealth small states that fall into the ACWL's 'category C' would normally need to pay an accession fee of CHF81,000 and the nine Commonwealth small states that fall into the ACWL's 'category B' would probably need to pay an accession fee of CHF162,000 before they could avail of the ACWL's services.²⁴

However, only two of these 21 non-LDC Commonwealth small states have acceded to the ACWL: Mauritius in 2003 and Seychelles in 2012. As a result, 19 of the non-LDC Commonwealth small states are currently not eligible for the ACWL's free legal advice or subsidised legal support in dispute settlement proceedings. It is unclear why these countries have not acceded to the ACWL when 31 other developing countries have considered it worthwhile. One possible explanation is that their small populations, and minute disaggregated global trade shares, mean that it may be difficult for their governments to justify the upfront budgetary outlay for ACWL accession in the absence of an imminent WTO dispute. This possible explanation is accentuated by the fact that many Commonwealth small states have relatively high per capita incomes despite their small populations and, consequently, are likely to face the ACWL 'category B' accession fee. The most extreme example is St Kitts and Nevis with a population of only 52,000 but a likely ACWL accession fee of CHF162,000.

²⁴ These accession fees can be paid in instalments over 5 years. The precise terms and conditions for accession to the ACWL, including the accession fee, are negotiated between the ACWL general assembly and the country seeking to accede. The quoted accession fees were those paid by the original acceding members and have been applied, to date, to all subsequent acceding developing countries.

For these Commonwealth small states, failure to accede to the ACWL and consequently access free or low-cost WTO legal services on the basis of a perception of a small chance that their country would initiate a WTO dispute may result in a 'self-fulfilling prophecy'.²⁵ As noted above, statistics confirm that it was only once countries had access to the ACWL's subsidised legal services that they brought disputes over smaller trade shares. Thus, until the legal cost constraint has been addressed it is difficult to predict what disputes Commonwealth small states might bring.

4. Tentative solutions looking forwards

Despite the creation of the ACWL, there have been a number of other proposals in the context of the DSU review negotiations to address the cost constraints faced by developing countries when accessing the WTO dispute settlement system (Bartels 2014²⁶). One proposal put forward by a coalition of developing countries has been a separate dispute settlement fund established within the WTO (Bartels 2014).

Some have queried why a separate fund would be necessary in the light of the

existence of the ACWL.²⁷ As highlighted above, one explanation might be the ACWL accession fees that might be difficult for countries with small populations to justify. Although these accession fees were calibrated to take into account differences between developing countries, the relatively small number of accessions from low-population Commonwealth small states might indicate that further thinking and solutions are required. One solution, for instance, might be for aid agencies to pay the ACWL accession fees of these countries. Another solution, perhaps, would be for the ACWL general assembly to reconsider the accession conditions for countries that are considered 'small and vulnerable economies' within the WTO.²⁸ A counter-argument might be that it is simply a question of educating Commonwealth small states on the value of ACWL accession, not just for dispute settlement support, but also for its free legal advisory and training services.²⁹ Certainly, these ACWL services were deemed sufficient for Seychelles, with a population of only 84,000, to accede in 2013 as a 'category B' ACWL member and for Mauritius to do so in 2003.

A further important consideration is that any solution to mitigate the costs of

25 A self-fulfilling prophecy is a prediction that directly or indirectly causes itself to become true by the very terms of the prophecy itself. The twentieth-century sociologist Robert K. Merton is credited with coining the expression in his book *Social Theory and Social Structure* (e.g. when Roxanna falsely believes her marriage will fail, her fears of such failure actually cause the marriage to fail).

26 Topic 2 (Dispute settlement fund).

27 Comments from Pascal Lamy at the 10th anniversary conference of the ACWL (2011a: 4).

28 See WTO Ministerial Declaration, WT/MIN(01)/DEC/1, 14 November 2001, para. 35 ('We agree to a work programme, under the auspices of the General Council, to examine issues relating to the trade of small economies. The objective of this work is to frame responses to trade-related issues identified for the fuller integration of small, vulnerable economies into the multilateral trading system, and not to create a sub-category of WTO Members.').

29 The ACWL provides approximately 200 legal opinions to its members and LDCs per year. It also runs a training programme for Geneva-based diplomats and a small secondment programme for capital-based officials. See ACWL (2011b).

WTO dispute settlement needs to address not only legal fees but also the costs of scientific and economic expertise. In recognition that successful WTO litigation will often depend on the quality of the technical expertise presented by the parties, the ACWL has a technical expertise fund specifically dedicated to subsidising the costs of contracting such expertise. The fund is currently over CHF200,000 and has been used on four occasions to assist developing countries to acquire scientific, economic and domestic law expertise presented in disputes. It has been referred to by the United Nations Conference on Trade and Development (UNCTAD) as an ‘important development’, as developing countries now ‘have access to the Fund to help finance the scientific and technical expertise needed to participate in WTO dispute-settlement proceedings’ (UNCTAD 2003: 33, paras 107–8).³⁰ Any alternative mechanism considered within the context of DSU review negotiations ought to address this important cost constraint for many developing countries.

B. Constraints on identifying and initiating potential disputes

1. The importance of public–private partnerships to ‘name, blame and claim’

Even if the financial costs of hiring WTO lawyers and technical experts were

addressed, access to WTO legal experts is of little use if countries lack domestic mechanisms to identify and communicate trade barriers to those experts in the first place. In this regard, Abbott (2007: 12–13) notes that developing countries may still be at a disadvantage when initial steps are taken to ‘identify the trade barrier’ which ‘clearly has to precede any help with legal evaluation.’

The participation of a WTO member in dispute settlement activities will be a function of its ability to identify trade barriers faced by the private sector. As Shaffer (2006: 179) comments, prerequisites for a country’s effective use of the WTO dispute settlement system are mechanisms to ‘perceive injuries to its trading prospects, identify who is responsible, and mobilize resources to bring a legal claim or negotiate a favourable settlement.’

This ‘naming, blaming and claiming’³⁰ process is dependent upon effective domestic procedures for gathering and processing information on trade barriers. It is an area where many developing countries lack capacity. This can be contrasted with the procedures in most developed countries such as the European Union (EU), US and Japan, whose governments have trade barrier assessment mechanisms.³¹ It has been suggested by some that developing countries should request the assistance of development agencies and foundations to assist them in identifying trade barriers faced by their private sectors (Shaffer 2006: 184). Perhaps the

30 I have borrowed this phrase from Gregory Shaffer who pioneered most of the work in this area (Shaffer 2006).

31 Resulting in the (i) the European Commission Market Access Database, (ii) the Office of the United States Trade Representative (USTR) annual national trade estimate reports on foreign trade barriers and ‘Special 301’ reports on intellectual property, and (iii) Japan’s Ministry of Economy, Trade and Industry annual reports on the WTO Inconsistency of Trade Policies by Major Trading Partners.

most pragmatic market-oriented solution, however, would be to strengthen public–private networks to assist export sectors to communicate trade barriers to the government. The majority of developed-country governments have fostered such co-ordination with the private sector, and certain of the more active developing-country litigants, notably Brazil, have taken significant steps in this direction (Shaffer 2003b). Nonetheless, for the majority of Commonwealth small states and LDCs, the lack of effective domestic mechanisms to identify and communicate trade barriers faced by the private sector to WTO experts remains a real limitation curtailing their participation in the WTO dispute settlement system.

2. Tentative solutions looking forwards

There have been a number of initiatives in recent years that have attempted to address the domestic constraints that developing countries face to identify and communicate potential claims to WTO experts.

In some Commonwealth small states, such as Barbados, the government has actively supported business associations to develop the necessary skills to influence trade policy and regularly solicits the input of the private sector on trade matters through a dedicated ‘private sector trade team’ (Jones et al. 2010: 39–40). Furthermore, since 2003, the International Centre for Trade and Sustainable Development (ICTSD) has evaluated various developing countries’ experiences in the trade area in an attempt to discern

certain best-practices in enhancing public–private partnerships concerning trade barriers (see, for example Shaffer and Melendez-Ortiz 2010). These have been communicated through regional dialogues with both government officials and representatives of the private sector. Another institution that is focused on building private-sector awareness in this area is the International Trade Centre, in particular its Business and Trade Policy Unit. Educating the private sector about the WTO, the remedies it provides, and the appropriate contact points within national governments that can enforce market access commitments are essential.

Commonwealth small states and LDCs that wish to deepen the domestic capacity of their private sectors and government officials to identify and communicate potentially WTO-inconsistent trade barriers to WTO lawyers for evaluation may wish to avail themselves of the assistance of these organisations. This appears to be an area where the Commonwealth Secretariat is ideally placed to assist in the light of its specific work programmes on public–private partnerships and small states.³²

C. De-bunking the myth that countries need large trade shares in order to achieve compliance in WTO disputes

It has often been observed that a fundamental constraint limiting the utility of the WTO dispute settlement system for developing countries is the inability for many of them to enforce positive rulings against larger non-complying WTO members.

32 Including the Commonwealth Public–Private Partnership Network. See Commonwealth Secretariat 2010: 17.

The DSU permits retaliation against non-complying WTO members through the suspension of trade concessions or obligations as well as countermeasures.³³ The limitation of these retaliation rules, from a Commonwealth small state and LDC perspective, is that countries with small domestic markets are unlikely to be able to impose sufficient economic or political losses through trade sanctions within the larger WTO members to generate the requisite pressure to induce compliance. This limitation has led some commentators to characterise the WTO's retaliation rules as 'virtually meaningless' (Footer 2001: 94) for small countries and to a common perception that it is 'a waste of time and money for developing countries to invoke the WTO's dispute settlement procedures against industrialised countries' because 'the developing country has no effective way to enforce the ruling.'³⁴

The retaliation request of Antigua and Barbuda, one of the smallest WTO members with approximately 90,000 inhabitants, against US in the *United States – Gambling* dispute provides an illustration of retaliation difficulties where there is an asymmetry in market size. As Antigua and Barbuda stated in its request for retaliation, 'ceasing all trade whatsoever with the United States (approximately US\$180 million annually, or less than 0.02 per cent of all

exports from the United States) would have virtually no impact on the economy of the United States, which could easily shift such a relatively small volume of trade elsewhere.'³⁵ A similar statement was made by the arbitrator examining the ability of Ecuador to effectively retaliate against the EU by withdrawing tariff concessions in the *European Communities – Bananas* disputes. Ecuador imports less than 0.1 per cent of total EU exports, leading the arbitrator to observe that 'given the fact that Ecuador, as a small developing country, only accounts for a negligible proportion of the [EU]'s exports of these products, the suspension of concessions is unlikely to have any significant effect on demand for these [EU] exports.'³⁶ The arbitrator queried whether the objective of inducing compliance 'may ever be achieved where a great imbalance in terms of trade volume and economic power exists between the complaining party seeking suspension and the other party.'³⁷

Furthermore, it has been observed that '[p]erhaps the biggest disadvantage of WTO sanctions is that they bite the country imposing the sanction' (Charnovitz 2002: 621). If one subscribes to the benefits of trade liberalisation it makes sense that retaliation through trade barriers will be a suboptimal policy that amounts to 'shooting oneself in the foot' (Bronkers

33 Article 22 of the DSU and articles 4.10 and 7.9 of the SCM Agreement. This paper refers to these enforcement options, collectively, as 'retaliation rules'.

34 This common perception is referred to, and then critiqued, in Hudec (2002: 81).

35 Recourse by Antigua and Barbuda to Article 22.2 of the DSU, *United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, WT/DS285/22, 22 June 2007, para. 3.

36 Decision by the arbitrator, *European Communities – Regime for the Importation. Sale and Distribution of Bananas - Recourse to Arbitration by the European Communities under Article 22.6 of the DSU ('EC – Bananas III (Ecuador) (Article 22.6 – EC)')*, WT/DS27/ARB/ECU, 24 March 2000, para. 95.

37 *Ibid*, para. 73.

and Van den Brock 2006: 103). This concern with WTO retaliation was also raised by Antigua and Barbuda in its request for retaliation against US. Antigua and Barbuda are small islands with negligible natural resources, making them heavily reliant on imports. As 50 per cent of those imports are from US, Antigua and Barbuda expressed concern that retaliating through import restrictions would have a 'disproportionate adverse impact on Antigua and Barbuda by making these products and services materially more expensive to the citizens of the country.'³⁸ Retaliatory restrictions on goods or services from US were argued to have 'a much greater negative impact on Antigua and Barbuda than it would on the United States.'³⁹ Similarly, the arbitrator examining Ecuador's request for retaliation against the EU in *EC – Bananas* noted that 'in situations where the complaining party is highly dependent on imports from the other party, it may happen that the suspension of certain concessions or certain other obligations entails more harmful effects for the party seeking suspension of concessions than for the other party.'⁴⁰

The positions articulated by Antigua and Barbuda and Ecuador regarding the weaknesses of the WTO retaliation rules for developing countries are sound. They have led some to the conclusion that 'countermeasures are a more or less ineffective instrument in the hands of "smaller" players' (Bagwell et al. 2004: 14–15) and that 'as a practical matter' trade sanctions 'can probably only be adopted by developed country Members,

or large, advanced developing countries' (Renouf 2005: 118).

1. Arguments why Commonwealth small states and LDCs are likely to obtain compliance from even large countries if they succeed in WTO dispute settlement

While not disputing that the WTO's retaliation rules are likely to be ineffective if applied by Commonwealth small states and LDCs against a larger non-complying country, this reality ought to be tempered by the fact that in the vast majority of WTO disputes to date, compliance has occurred. This practice suggests that an inability to retaliate effectively will often remain a theoretical constraint and should not automatically deter Commonwealth small states and LDCs from using the WTO dispute settlement system.

Evaluations of the GATT and WTO dispute settlement data demonstrate high rates of compliance with dispute settlement rulings. One analysis of the first 10 years of the WTO dispute settlement system indicates a successful implementation rate of adopted panel and appellate body reports of 83 per cent (Davey 2005: 46–8). Only 10 of the 181 initiated disputes examined in that analysis resulted in no implementation or disagreement over implementation (Davey 2005: 47). A separate study, covering the period until March 2007, describes the 'generally positive record of Members in complying with adverse rulings' (Wilson 2007: 397). The study notes that of the 109 adopted panel and Appellate Body reports, 90 per cent

38 Recourse by Antigua and Barbuda to Article 22.2 of the DSU, *United States – Gambling*, paras. 2–3.

39 *Ibid.*

40 Decision by the arbitrator, *EC – Bananas III (Ecuador)* (Article 22.6 – EC), para. 73.

found violations of WTO law, and that in ‘virtually all of these cases the WTO Member found to be in violation indicated its intention to bring itself into compliance and the record indicates that in most cases it has already done so’ (Wilson 2007).

A key finding for the Commonwealth small states and LDCs is that these high compliance rates are not limited to those WTO disputes brought by large countries. Similar compliance rates have been observed when smaller and developing countries have obtained favourable rulings. As one study found:

WTO dispute settlement experience to date does not suggest that responding Members have a manifestly worse record of compliance with [Dispute Settlement Body] DSB rulings in cases where the complaining Member was a small or developing country than in cases where the complaining Member was another type of developing country or developed country. (Malacrida 2008:20)

This practice of high compliance with WTO dispute settlement rulings, even when the complainant was a small developing country, suggests that the capacity to retaliate effectively is often not a significant factor for government compliance with adverse rulings. In the words of Hudec (2002: 81), ‘enforcement is a more complex process than mere retaliation’, and governments often comply with dispute settlement rulings for reasons other than a fear of retaliation.

These other factors include that: (i) some parts of the defendant government and its constituents usually want the conduct found inconsistent with WTO law to be removed simply because it is good policy; (ii) the defendant government is likely

to see a long-term value in preserving the legitimacy of the legal system for when it may need to rely on it for its own purposes; and (iii) the shaming pressure caused by other governments wishing to preserve the legitimacy of the legal system should not be underestimated (Hudec 2002: 82–3).

Furthermore, WTO practice demonstrates that the high compliance rates observed in WTO dispute settlement have not required members to regularly request or impose retaliatory measures. Of the 60 WTO disputes where retaliation was possible, as the reasonable period of time to comply had expired without compliance being achieved, members requested the right to retaliate only in 17 disputes and imposed retaliatory measures only in five (Nottage 2009b: 85). Thus, while the WTO dispute settlement body has authorised retaliation on occasion, it seems fair to say that ‘retaliation has been the exception rather than the rule’ (Nottage 2009b). From these figures, one might extrapolate that, in the vast majority of disputes, the catalyst for compliance does not appear to have been the threat of retaliation.

Nonetheless, on those rare occasions where a defendant is a larger economy and does not voluntarily comply with adverse rulings, the weaknesses of WTO retaliation rules for small developing countries are real and will undermine the utility of WTO dispute settlement. For this reason, current DSU review negotiations proposals, as well as the potential for cross-retaliation, deserve continuing attention (Bartels 2014: topic 3).

2. Tentative solutions looking forwards

As noted above, in the majority of WTO disputes, compliance has occurred even

when small developing countries with little capacity to retaliate have been successful complainants. This practice suggests that an inability to retaliate effectively will often remain a theoretical constraint. This suggests that one solution to this perceived limitation of the WTO dispute settlement system is to communicate these facts to Commonwealth small states and LDCs in a manner that they should not be automatically deterred from initiating WTO dispute settlement proceedings on this basis alone.

D. The unquantifiable constraint – fears of political or economic retaliation

1. The special aid and trade relationships that Commonwealth small states and LDCs have with Organisation for Economic Co-operation and Development countries

Some commentators have noted that developing and least-developed countries may be unwilling to initiate WTO dispute settlement proceedings against developed countries due to their particular vulnerability to ‘retaliation’ in other areas such as development assistance or preferential market access (Bown and Hoekman 2005: 863). It has been observed that ‘there may be little that a small developing country can do to counter threats to withdraw preferential tariff benefits or foreign aid ... were the country to challenge a trade measure’ (Shaffer 2006: 193).

It is undeniable that the Commonwealth’s small states and LDCs

are particularly dependent upon aid and trade preferences granted by developed and, increasingly, large developing countries. It is also undeniable that many officials from these small states perceive that they will be subject to possible reprisals in these areas if they were to initiate a WTO dispute. A 2011 study that analysed the perceptions of Commonwealth small states’ trade negotiators, based on interviews with more than 80 trade negotiators from 30 small states, confirms that these officials commonly ‘perceive themselves to be operating under a high level of threat from large states’ including ‘fears of possible aid or trade reprisals’ which ‘severely constrains ... their determination to persist’ with offensive requests on trade matters (Jones et al. 2010: 45).

Nonetheless, as explained below, it is not clear that Organisation for Economic Co-operation and Development (OECD) countries would in fact apply political and economic pressures on a Commonwealth small state or LDC were it to initiate a WTO dispute.

2. The lack of evidence that OECD countries apply political or economic pressure on countries that initiate WTO disputes

It is impossible to determine objectively whether aid or preferential trade retaliation would be applied by OECD countries against Commonwealth small states or LDCs were they to initiate WTO disputes, as so few small states, and only one LDC, have brought WTO dispute settlement proceedings to date.⁴¹

There are, however, certain arguments why such retaliation is unlikely to be

41 Shaffer (2006: 193) states that threats of this nature have been ‘confirmed in a number of interviews, including with a former member of USTR’. In contrast, Abbott (2007: 14) notes that ‘there is not much empirical evidence that this has actually happened’.

applied in reality. First, increasingly, developed-country governments' aid and trade portfolios are managed by separate ministries in an intentional effort to de-link these two spheres. Second, there is very little evidence that such political or economic retaliation has been applied by WTO members in the 450 disputes initiated to date. Third, although this cannot be empirically proven, the number of WTO disputes between countries with close political, economic and security relationships over the last 17 years appears to suggest that, for the main users of the system, initiating a WTO dispute is seen first and foremost as a means to settle a discrete commercial matter as opposed to an aggressive political action that would warrant reprisals in other spheres of the countries' bilateral relations.

Nevertheless, it is apparent that officials in many small states and LDCs perceive that retaliation on a political, aid or preferential market access level might flow from the initiation of a WTO dispute. This in turn may have a chilling effect on their participation. Romano (2002: 551–2) has written that of all the factors affecting the decision to litigate 'perhaps the most fundamental one, is ... the willingness to utilise international judicial bodies.'

3. Case study: the experience of the cotton-producing LDCs in the *United States – Upland Cotton* dispute

On certain occasions, the lack of participation of certain developing countries

in dispute settlement activity may have been a rational decision not to dedicate resources to a dispute that is already being litigated by another WTO member. Where restrictive measures are applied to imports of all origins, or relate to subsidies that affect the trade a number of WTO members, there is a degree of logic behind smaller WTO members not actively participating in disputes initiated by other WTO members and consciously 'free-riding' on the implementation of positive rulings through the operation of the various most-favoured nation clauses of the WTO agreements. As this case study demonstrates, however, this approach has certain potential pitfalls.

In 2003, Brazil initiated WTO dispute settlement proceedings against US with respect to a range of agricultural subsidies provided to US' cotton producers. Four African LDCs (Benin, Burkina Faso, Chad and Mali (the 'Cotton-4')), also had a commercial interest in challenging these subsidies which were suppressing the global price for their cotton. Nonetheless, they decided either to not participate or to limit their participation to that of third parties.⁴²

The panel and appellate body in the original *United States – Upland Cotton* dispute ruled that the subsidies provided by US were inconsistent with the *Agreement on Agriculture* and the SCM agreement.⁴³ Following compliance proceedings pursuant to Article 21.5 of the DSU in 2006 and an arbitration to determine the level of retaliation pursuant to

42 Benin and Chad participated as third parties in the original panel and appellate body proceedings and Chad participated as a third party in the DSU Article 21.5 compliance panel and appellate body proceedings.

43 Panel report, *United States – Subsidies on Upland Cotton*, WT/DS267/R, and Corr.1, adopted 21 March 2005, modified by appellate body report, WT/DS267/AB/R (hereinafter '*United States – Upland Cotton*').

Article 22.6 of the DSU, Brazil was granted the right take countermeasures against US to the value of US\$147.3 million per year for certain marketing loan and countercyclical payments and to the value of US\$147.4 million, for the 2006 fiscal year, with regard to certain export credit guarantees.

Following these various rulings and awards, Brazil and US entered into negotiations regarding a possible settlement. A memorandum of understanding was signed on 20 April 2010 which contains, among other matters, US' agreement to establish a fund of approximately US\$147 million per year for technical assistance and capacity building relating to the cotton sector in Brazil.

As the Cotton-4 LDCs did not participate as complainants in this dispute, they did not obtain the same legal rights as Brazil under the DSU to apply countermeasures against US. As a consequence, their case to be included in the settlement negotiations, and for a share of US' annual payments to cotton producers in Brazil, is considerably weaker than that of Brazil. This is perhaps why the settlement between Brazil and US does not explicitly guarantee any funds to the Cotton-4 LDCs.⁴⁴

The moral of this story is that if a small state or LDC does not participate in a WTO dispute as a main party, perhaps due to retaliation fears associated with

such participation, it will not obtain the same rights as complaining parties to impose countermeasures pursuant to the DSU which may, in certain instances, have implications for any settlement agreement.

4. Tentative solutions looking forwards

Despite a common perception that small states and LDCs that initiate WTO disputes against larger countries are likely to be subject to retaliation on political, aid or preferential market access levels, there is little evidence that such pressures would be applied in reality.

It may be worthwhile for the Commonwealth countries of Antigua and Barbuda and Bangladesh to communicate their experiences on this specific issue to other Commonwealth small states and LDCs. As noted, Bangladesh initiated a WTO dispute against its largest regional neighbour, India, and Antigua and Barbuda launched a WTO dispute against US. They are in an ideal position to explain whether initiating these disputes resulted in political or economic retaliation by the larger country subject to the complaint. If not, such a dialogue may well assuage the fears that decision-makers in other Commonwealth small states and LDCs often refer to but that may be unlikely to eventuate in practice.

⁴⁴ We understand that there is a possibility, if Brazil agrees, that some of the US\$147 million per year in payments by US could be used for projects that benefit cotton sectors in other countries (including in the Cotton-4 LDCs).

IV. Thoughts on the effective participation of Commonwealth small states and LDCs as third parties in WTO disputes

Articles 10 and 17.4 of the DSU provide that any country with a substantial commercial or systemic interest in a WTO dispute may participate as a third party. Engagement as a third party permits a country to make its views known to the panel or appellate body hearing a dispute and can serve as a means to gain familiarity and experience with the WTO dispute settlement system.

As noted in part II.A of this paper, 21 Commonwealth small states and LDCs have participated as third parties in WTO disputes. This figure represents a 26.6 per cent share of the total 79 WTO members that have participated as third parties. However, this apparently active role ought to be tempered by the fact that this participation has been highly concentrated in 10 WTO disputes, in particular, the *EC – Bananas* and *EC – Export Subsidies on Sugar* disputes. Thus, Commonwealth small states and LDCs have only participated as third parties in 5.2 per cent of all established WTO panels.⁴⁵

1. The importance of third-party participation in those disputes that directly affect the interests of Commonwealth small states and LDCs

It is important that Commonwealth small states and LDCs participate as third parties

in those WTO disputes where they have a commercial or systemic interest, in order for their views to be heard by panels and the appellate body deciding the case. It is reassuring, therefore, that Commonwealth small states and LDCs have mobilised as third parties in certain disputes. Specifically, five Commonwealth small states participated as third parties in the early *EC – Bananas* dispute which challenged preferential market access granted by the EU to bananas from African, Caribbean and Pacific (ACP) states; and 10 Commonwealth small states and LDCs joined the *EC – Export Subsidies on Sugar* disputes that challenged, among other things, EU export subsidies provided to ACP sugar producers. Nonetheless, such participation could be greater – especially when one considers that 11 of the 21 Commonwealth small states and LDCs that have participated as third parties have done so in only a single dispute.

Participation as a third party is seen as useful for the main users of the WTO dispute settlement system. For instance, the EU, US and China are third parties in almost all WTO disputes, which suggests a belief that third parties are able influence the outcomes of disputes.

For the Commonwealth small states and LDCs, participation as a third party entails obvious resource constraints. Nonetheless, the human and financial costs are far less

⁴⁵ Not all requests for consultations have proceeded to the establishment of a panel. To date, the 451 consultations requests have resulted in 191 panels, which have given rise to 106 appeals.

than participating as a complainant or respondent, as third parties are under no obligation to make any written or oral submissions and can limit any submissions they do make to those issues of principal concern. In the *EC – Bananas* and *EC – Export Subsidies on Sugar* disputes, for instance, many Commonwealth small state third party submissions focused on the economic and social implications of removal of the preferences and subsidy schemes as opposed to their legality.

2. The value of third-party participation as a learning exercise

Another benefit of third-party participation is that it provides a unique means

to gain exposure to, and familiarity with, the WTO dispute settlement system. As such, third-party participation can serve as a valuable training tool for delegates from Commonwealth small states and LDCs who wish to learn how the WTO dispute settlement system operates in practice. Participation as a third party need not be daunting, as a country need not make submissions and need not take sides in the dispute. If a country desires to take a more active role, however, even if participating solely for training purposes, it may be worth noting that the ACWL recently changed its rules so that it is able to represent any LDC, as a third party, for free in a WTO dispute.

V. Thoughts on the untapped potential of alternative dispute resolution for Commonwealth small states and LDCs

The WTO's DSU permits WTO members to resolve their trade disputes through ADR mechanisms that differ from normal panel and appellate body procedures.⁴⁶ In particular, Article 5 of the DSU refers to the possibility of availing of 'good offices,

conciliation and mediation', while Article 25 of the DSU permits members to resolve disputes through 'arbitration'. These mechanisms provide the key advantage that they permit WTO members to resolve disputes expeditiously compared

⁴⁶ In dispute settlement theory, a distinction is typically made between *legal* means of dispute resolution and *diplomatic* means of dispute resolution. Diplomatic means of dispute resolution include so-called ADR mechanisms, such as good offices, conciliation and mediation and are characterised by non-binding decisions based on the parties' underlying interests. Legal means of dispute resolution include litigation, and are characterised by a binding decision based on the law. Technically, arbitration falls within the category of the *legal* means of dispute resolution as it results in a binding decision. However, it is considered part of ADR for the purposes of this paper, as it is an 'alternative' to the dominant WTO dispute resolution practice of panel and appellate body litigation.

with the longer timeframes required for panels and the appellate body to complete their determinations.

Expeditious WTO dispute settlement through ADR could be particularly attractive to Commonwealth small states and LDCs. The faster a WTO dispute is resolved the lower the legal fees. Indeed, on those few occasions where WTO members have opted to use ADR to resolve their WTO trade disputes, the rulings were issued extremely quickly.⁴⁷ The 2001 Copyright Arbitration pursuant to Article 25 of the DSU,⁴⁸ the 2005 *sui generis* Banana Tariff Arbitrations,⁴⁹ and the WTO Canned Tuna Mediation⁵⁰ illustrate this point.

It is a curiosity that at a time when the WTO dispute settlement system's panel and appellate body procedures have been subject to criticism for the time it takes to complete proceedings (Kennedy 2011), these ADR options have been rarely invoked. In contrast, domestic legal systems and private parties in international commercial disputes are increasingly turning to ADR in order to avoid lengthy and expensive litigation. This trend towards ADR outside the WTO is particularly clear in the context of private international commercial disputes where arbitration has superseded

litigation as the preferred means of dispute settlement (Nottage and Bohanes 2007: 213).

One explanation why ADR has rarely been invoked in the WTO is that, in contrast to panel and appellate body proceedings, it requires voluntary agreement by both parties. A respondent may not be comfortable agreeing to an expedited procedure for a range of reasons, including domestic industry pressures to maintain a protectionist measure for as long as possible or not wishing to be seen by domestic constituents as conceding too easily through a mediated settlement.

However, few commentators are aware that the normal limitation that ADR pursuant to Articles 5 and 25 of the DSU is only available 'if the parties to the dispute so agree' does not apply when a developing country or LDC invokes certain special ADR procedures. Article 3.12 of the DSU gives any developing country 'the right to invoke' special 1966 Procedures *in lieu* of standard panel procedures in any dispute against a developed country.⁵¹ Those 1966 Procedures in turn mandate that the WTO director-general 'shall consult' with the parties through his good offices. In effect, these special procedures require the WTO director-general to

47 See the detailed analysis in Nottage and Bohanes (2007) and Nottage (2009c).

48 Award of the arbitrators, *United States – Section 110(5) of the US Copyright Act*, Recourse to Arbitration under DSU Article 25, WT/DS160/ARB25/1, 9 November 2001 (the 'Copyright Arbitration').

49 On 1 August 2005 the arbitrator issued its award in *European Communities – The ACP-EC Partnership Agreement – Recourse to Arbitration Pursuant to the Decision of 14 November 2001*, WT/L/616, and on 27 October 2005 the arbitrator issued its award in *European Communities – The ACP-EC Partnership Agreement – Second Recourse to Arbitration Pursuant to the Decision of 14 November 2001*, WT/L/625 (the 'Banana Tariff Arbitrations').

50 Communication from the Director-General, *Request for Mediation by the Philippines, Thailand and the European Communities*, WT/GC/66 of 16 October 2002. This mediation was not requested pursuant to Article 5 of the DSU but followed the procedures in that provision.

51 Decision of 5 April 1966 on Procedures Under Article XXIII, BISD 14S/18.

provide good offices at the request of any developing country involved in a dispute with a developed country. Furthermore, Article 24.2 of the DSU provides that the WTO director-general 'shall ... offer' good offices, conciliation and mediation in any dispute involving an LDC.

These special DSU provisions provide a unique opportunity for Commonwealth small states and LDCs to invoke expeditious ADR procedures to resolve their WTO disputes. The track-record of these procedures is impressive. In 2007, Colombia invoked Article 3.12 of the DSU for the first time in an attempt to resolve over 20 years of GATT and WTO bananas litigation between the EU and a number of Latin-American banana-supplying countries. That request resulted in WTO director-general Pascal Lamy providing 2 years

of his 'good offices' and culminated in the 2009 *Geneva Agreement on Trade in Bananas*.⁵² That final agreement is considered to have ended, once and for all, 'one of the most technically complex, politically sensitive and commercially meaningful legal disputes ever brought to the WTO' (Nottage 2010; WTO 2012b).

To conclude, ADR as a means of WTO dispute settlement has enormous untapped potential. It has been highly effective on those rare occasions where it has been utilised and there seems little reason why Commonwealth small states and LDCs should not consider its use if they were to initiate WTO disputes in the future. For similar reasons, Commonwealth small states and LDCs should support efforts in other WTO bodies to facilitate rapid, interest-based, solutions to trade barriers.⁵³

VI. Conclusion and potential next steps

The WTO's dispute settlement mechanism has the potential to be of considerable benefit for small developing countries. It permits even the smallest and weakest economic powers to enforce the rules under which they trade and therefore provides unprecedented security and predictability in their trading relations.

Despite these potential benefits, this paper demonstrates that the 36 Commonwealth small states and LDCs have initiated a mere 0.5 per cent of all WTO disputes. While this share of WTO

disputes is in line with the Commonwealth small states' and LDCs' small share of global trade, the paper highlights that a number of other countries, from well-resourced developed countries to small developing countries, have found it worthwhile to participate in WTO disputes to a greater extent than their world trade shares.

For that reason, the paper queries whether the limited participation of Commonwealth small states and LDCs in WTO disputes is not solely attributable to their small trading stakes, but due to

52 *The Geneva Agreement on Trade in Bananas*, 15 December 2009, WT/L/784.

53 In particular, current proposals in relation to non-tariff barrier review mechanisms and the ongoing discussions on ad hoc mediation on SPS matters.

the special constraints these countries face when they attempt to access the WTO dispute settlement system.

The paper critically evaluates a number of those constraints and reaches the following tentative conclusions on how to improve Commonwealth small state and LDC participation in WTO dispute settlement in the future:

- 1) It is critical that Commonwealth small states and LDCs have cost-effective access to lawyers and technical experts able to represent them in WTO disputes. Data confirm that when developing countries have access to subsidised legal services they bring WTO disputes over considerably lower values of lost trade. Unfortunately, the majority of non-LDC Commonwealth small states has not joined the ACWL, which was created to address this legal cost constraint. Creative thinking is required on how these countries could access subsidised legal services, whether through facilitated ACWL accession or through other proposals in the ongoing DSU review negotiations.
- 2) Access to subsidised WTO lawyers will be of little use unless Commonwealth small states and LDCs improve their domestic capacity to identify and communicate potentially inconsistent trade barriers to relevant legal experts. Strengthening public-private partnerships on trade barriers has been effective in a number of other countries and could be replicated in Commonwealth small states and LDCs with the technical assistance of various organisations that are working in this area.
- 3) The inability of most small developing countries to enforce WTO dispute settlement rulings through trade sanctions will often remain a theoretical constraint and should not overly deter Commonwealth small states and LDCs from using the WTO dispute settlement system. Nonetheless, to address those rare occasions where countries do not voluntarily comply with dispute settlement rulings, cross-retaliation and the compliance proposals in the current DSU review negotiations deserve continuing attention.
- 4) There is no evidence that OECD or large developing countries would apply retaliation on a political, aid or preferential market access level were a Commonwealth small state or LDC to initiate a WTO dispute against one of them. In order to assuage this widely-perceived fear, Antigua and Barbuda and Bangladesh may wish to share their experiences on this specific concern, as complainants, with other Commonwealth small states and LDCs.
- 5) The participation of Commonwealth small states and LDCs in disputes as third parties should be encouraged, not only to convey views in disputes of special interest, but also as a means to gain familiarity with how the WTO dispute settlement system operates in practice.
- 6) Commonwealth small states and LDCs should seriously consider availing of the ADR options provided under the DSU to resolve their trade disputes. On the rare occasions that these alternative mechanisms have been utilised they have been effective, expeditious and cost-effective.

Despite the relatively small shares of global trade of Commonwealth small states and LDCs, providing these countries with the capacity to enforce their legal rights through the WTO dispute settlement system is important. Building that capacity to litigate is likely to also permit Commonwealth small states and LDCs to more effectively settle trade-frictions

‘outside court’ but ‘in the shadow of the law’ (Shaffer 2003a: 6). It is hoped that this paper has highlighted a number of areas for further work to improve the participation of Commonwealth small states and LDCs in the new, legalised, multilateral trading system where, indeed, ‘right perseveres over might’ (Gappah and Lacarte-Muro 2001: 401).

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