

A proposal for the design of

**WTO SMALL CLAIMS COURT
A CASE FOR DEVELOPING COUNTRIES**

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ALTERNATIVE DISPUTE RESOLUTION WITHIN THE WTO:

WTO SMALL CLAIMS COURT

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WTO SMALL CLAIMS COURT: A CASE FOR DEVELOPING COUNTRIES

I. Problem:

...decisions are generally taken on the basis of a consensus of members views i.e. those members who are present at particular meetings. Some members are systematically absent from meetings due to lack of resources, most small delegations do not have the necessary resources to service the negotiating process and participate meaningfully. Many Members do not even have a representative in Geneva, which makes even partial participation in the WTO process almost impossible - Sampson

The current WTO Dispute Resolution Understanding (DSU) is considered to be too technical, too costly, and too lengthy for developing country Members to participate; developing countries lack the resources to secure quality representation, and cannot afford the time required by the mechanism. During a Dispute Settlement Understanding (DSU) Review, Member countries including India, Guatemala, Egypt and Venezuela, claimed that developing countries did not have adequate access to the dispute mechanism (Parlin). The system may have been created with fairness in mind, but essentially, only wealthy nations can participate in the process. However, the WTO and many Members are satisfied with the new system, and will likely be resistant to change.

Experience has shown that formal changes to GATT and WTO rules are rare. Since the establishment of the GATT in 1948, there have been only two amendments: one in 1955 and another in 1964 (Sampson).

This evidence suggests that recommendations ought not to “re-invent” the process, but build on what is currently in place. Keeping this reality in mind will result in the most practical recommendations.

II. Small Claims Court:

The inclusion of a Small claims court in the WTO Dispute Resolution Understanding (DSU) may allow least developed countries an affordable alternative. Without the handicap of technical complexity and burden of high costs, a Small claims court ought to ensure that *all* WTO country Members have access to a suitable means of settling disputes.

III. Key Questions:

- What is the threshold for “small” (what is the maximum and minimum monetary value of a claim and who will provide this measure? Which countries are able to be plaintiffs?)
- Should Responding Members have to agree to participate?

- What is the most reasonable option for recourse?
- Practicality – what is the prospect of the WTO agreeing to “binding” outcomes?
- Feasibility – what will this process cost?

IV. Key Questions Explained:

A. Defining the parameters for a Small Claims Court: I) Which countries have access?

Presumably, only developing countries would have the opportunity to be a plaintiff in a Small claims court. An established maximum amount of a complaint would have to be established. Currently WTO contributions are determined according to a country's share of international trade.; this is based on intellectual property rights and trade in goods and services. A baseline of 15% has been established for Members whose share in the total trade is <15%. For example, Grenada, Haiti and Gambia each contribute 11,490 USD per annum. Further research would indicate if a similar figure establishing the parameter ought to take this calculation into consideration, recognizing the limited, yet varied, financial capabilities of developing country Members.

II) The size of the claim should also be addressed. What is too small? What is too large? Who will be responsible for determining the value of a claim?

B. Should Responding Members have to agree to participate?

Under the current DSU, a responding Member must reply to a request for consultation within 10 days, and agree to begin consulting within 30 days. If, within 60 days, the consultations fail to produce a mutually satisfactory resolution, the complaining Member may request the establishment of a dispute settlement panel. Recognizing that efficient use of time is fundamental, further study would indicate whether a similar time-line would be effective if applied to a Small claims procedure. For example, what limiting parameters would be placed on the length of the hearing?

C. Practicality

It is necessary to consider if the WTO will in fact agree to binding outcomes from a small claims court, while avoiding the use of sanctions. Since the creation of the DSU in 1994, the ability of the WTO to enforce decisions meaningfully has been questionable (Hecht) and a country is normally bound to a panel decision through moral suasion alone. A Small claims court (like the DSU) will not be binding in the sense of an enforceable injunction, so the question remains what the most practical form of recourse will be. Will recourse be moot, in that the moral suasion effect will dominate?

D. Feasibility: A cost-benefit analysis would determine the cost of a country to participate in the current dispute process vs. the cost of providing resources necessary in order to (for instance):

- a) enable developing country Members to become more involved in the negotiations that take place;
- b) access a small claims court

An estimate of the approximate number of countries that would utilize a small claims court, as well as an estimate of a cost per case, would be useful.

In addition, an analysis should take into consideration the cost/resources required for the following:

Article 27: Responsibilities of the Secretariat

1. The Secretariat has the responsibility of assisting panels, especially with the technical, legal and historical and procedural aspects of the matters dealt with and of providing secretarial and technical support.
2. While the Secretariat assists Members in respect of dispute settlement “at their request”, there may be a need to provide additional legal advice and assistance in respect of dispute settlement to a developing country Member – to this end, the Secretariat shall make available a qualified legal expert from the WTO technical cooperation services to any developing country Member which so requests – shall assist the Member in a manner ensuring the continued impartiality of the Secretariat.

The aforementioned article remains imperative; only developing countries would be awarded the concession of a Small claims court. Therefore, when a developing country is involved in a complaint with a developed country, legal advice/assistance, technical support and continued financial support are still essential as the Members work through the current dispute mechanism.

The WTO Director-General, Mike Moore, recently launched a campaign to encourage industrial country WTO Members to boost financial commitments for technical assistance to developing country Members. This campaign has been declared unsuccessful thus far (Sutherland et. al); further investigation could seek out new ways to encourage assistance from capable Members.

The cost- effectiveness of the proposed Small Claims court will depend on the caseload volume. Both the time frame and use of resources are contingent on:

- estimated number of countries utilizing the system
- cost per case utilizing the system
- reduction in case load in the current dispute process
- efficiency of good offices, conciliation, and mediation

These variables, and the “moral suasion factor” regarding court findings will be estimated.