

NOTE

THINKING REGIONALLY TO ACT GLOBALLY: INCREASING REGIONAL COOPERATION TO SOLVE DEVELOPING COUNTRY NONPARTICIPATION IN THE WORLD TRADE ORGANIZATION'S DISPUTE SETTLEMENT PROCESS

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“The law, in its majestic equality, forbids rich and poor alike to sleep under bridges, beg in the streets or steal bread.”¹ Similarly, the World Trade Organization’s Dispute Settlement Body (DSB) ostensibly permits the same access for all World Trade Organization (WTO) member states, regardless of gross domestic product. Actual practice, however, has been quite different. As international trade between developing states, known as South-South trade, grows in volume and sophistication, few developing countries utilize the WTO to adjudicate trade-related disputes with other developing nations.

On paper, the WTO member states have affirmed their commitment to the notion that international trade promotes development and reduced poverty.² While the majority of global trade currently flows between developed nations, or between developed and developing nations,³ experts foresee explosive trade growth between emerging economies.⁴ South-South trade now accounts for twenty-three percent of world trade, and since 2008, developing nations export more to each other

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1. Gary Horlick, *Introduction to WTO DISPUTE SETTLEMENT: AN AFRICAN PERSPECTIVE* 7, 9 (Trudi Hartzenberg ed., 2008) (quoting ANATOLE FRANCE, *THE RED LILY* ch. 7 (1894)).

2. See World Trade Organization, Ministerial Declaration of 14 November 2001, WT/MIN(01)/DEC/1, 41 I.L.M. 746 (2002).

3. See WORLD TRADE ORG. [WTO], INTERNATIONAL TRADE STATISTICS 2011, available at http://www.wto.org/english/res_e/statis_e/its2011_e/its2011_e.pdf.

4. See, e.g., STEPHEN KING, HSBC GLOBAL RESEARCH, *THE SOUTHERN SILK ROAD: TURBOCHARGING ‘SOUTH-SOUTH’ ECONOMIC GROWTH 1* (2011), available at <http://www.hsbc.com/~media/HSBC-com/about-hsbc/in-the-future/pdfs/111013-the-southern-silk-road.pdf>.

than to their First World counterparts.⁵ As South-South trade increases, the number of trade-related violations between developing states has also increased.⁶

It is perhaps inevitable that disputes will arise over protectionist policies⁷ implemented by individual WTO members, many of which are prohibited by the WTO agreements.⁸ To resolve trade disputes, the WTO member states created the DSB to adjudicate trade disputes between members.⁹ Despite recent advances within the DSB, developing countries are still largely invisible in the WTO's dispute settlement processes.¹⁰ Although developing countries comprise the vast majority of the WTO membership, South-South trade disputes are practically non-existent in the DSB.¹¹ As a result, there is a growing mismatch in the WTO dispute resolution framework: economic intercourse between developing nations is more important, but few developing nations attempt to solve disputes with other developing states through the WTO framework.

This Note argues that the WTO should work with regional trade blocs to create regional resource-sharing arrangements to assist developing countries in South-South WTO litigation because of the rising need for effective resolution of trade disputes between developing countries. Importantly, reform to promote greater cohesion between the WTO and regional trade bodies would minimize many of the latent factors hindering South-South dispute settlement such as the lack of dedicated resources and overlap between the WTO and regional trade standards. Such a reform is also designed to stimulate greater support for internal

5. U.N. CONFERENCE ON TRADE & DEV., SOUTH-SOUTH TRADE MONITOR NO. 1, at 1 (2012), available at http://unctad.org/en/PublicationsLibrary/webditctab2012d2_en.pdf.

6. See Diana Tussie & Valentina Delich, *Dispute Settlement Between Developing Countries: Argentina and Chilean Price Brands*, in MANAGING THE CHALLENGES OF WTO PARTICIPATION: 45 CASE STUDIES (Peter Gallagher et al. eds., 2005), available at http://www.wto.org/english/res_e/booksp_e/casestudies_e/case1_e.htm.

7. For a brief description of the types of protectionist policies prohibited by the WTO agreement, see *Anti-Dumping, Subsidies, Safeguards: Contingencies, etc.*, WTO, http://www.wto.org/english/thewto_e/whatis_e/tif_e/agrm8_e.htm (last visited Mar. 2, 2014).

8. For access to the full text of the WTO agreements, see *Legal Texts: The WTO Agreements*, WTO, http://www.wto.org/english/docs_e/legal_e/final_e.htm (last visited Feb. 11, 2013).

9. Understanding on Rules and Procedures Governing the Settlement of Disputes art. 2(1), Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, 1869 U.N.T.S. 401 [hereinafter Dispute Settlement Understanding].

10. For a full list of cases submitted to the dispute settlement processes, see *Chronological List of Disputes Cases*, WTO, http://www.wto.org/english/tratop_e/dispu_e/dispu_status_e.htm (last visited Mar. 2, 2014).

11. Compare *id.* (listing countries involved in each case), with *Members and Observers*, WTO, http://www.wto.org/english/thewto_e/whatis_e/tif_e/org6_e.htm (last updated Mar. 2, 2013) (listing all WTO member and observer countries).

structures in developing countries so they can augment their respective trade control and litigation mechanisms.

Considering the apparent inadequacies of the WTO dispute settlement system to accommodate or encourage dispute resolution between developing country members, this Note will analyze the causes of developing country nonparticipation and examine regional development as a potential solution. This Note consists of two parts. Part I provides background on the DSB and the rise of international trade between developing states and discusses how developing states are integrated into regional trade agreements and the WTO. Part II analyzes the potential factors hampering dispute resolution between developing countries and two specific disputes involving South-South dispute resolution; this Part also proposes increased regional integration as a means of promoting South-South dispute resolution in the DSB.

I. BACKGROUND

A. *Development and Purpose of the WTO*

The WTO is the most extensive multilateral trading system in the world.¹² The basis for what would become the WTO was established in 1947 with the signing of the General Agreement on Tariffs and Trade (GATT) by twenty-three nations in Geneva, Switzerland.¹³ The creation of this alignment was intended to bring order and cooperation to the often chaotic system of international trade.¹⁴ GATT sought to restrict conflicting tariffs, industry protections, sanctions, and other trade barriers hindering international trade and commerce.¹⁵ In contrast, the goal of GATT was to provide a forum for signatory states to “negotiate tariff concessions among themselves” and to help facilitate tariff reductions.¹⁶ The system was subsequently developed in a series of trade negotiations, known as “rounds,” held under GATT.¹⁷

The creation of the WTO arose out of the 1986–1994 Uruguay Round

12. See *What Is the WTO?*, WTO, http://www.wto.org/english/thewto_e/whatis_e/whatis_e.htm (last visited Mar. 2, 2014).

13. See Press Brief, WTO, Fiftieth Anniversary of the Multilateral Trading System (July 2, 2012), available at http://www.wto.org/english/thewto_e/minist_e/min96_e/chrono.htm.

14. Cf. *The GATT Years: From Havana to Marrakesh*, WTO, http://www.wto.org/english/thewto_e/whatis_e/tif_e/fact4_e.htm (last visited Mar. 2, 2014) (describing the intentions behind the creation of GATT).

15. See ROOTS OF THE WTO, <http://www2.econ.iastate.edu/classes/econ355/choi/wtoroots.htm> (last visited Mar. 2, 2014).

16. Press Brief, WTO, *supra* note 13.

17. *The Multilateral Trading System—Past, Present, and Future*, WTO, http://www.wto.org/english/thewto_e/whatis_e/inbrief_e/inbr01_e.htm (last visited Mar. 2, 2014).

of negotiations.¹⁸ In addition to a permanent membership of 158 members, the WTO maintains a secretariat of six hundred lawyers, economists, and statisticians headquartered in Geneva, Switzerland.¹⁹ The main ongoing functions of the WTO include trade negotiations, implementation and monitoring, and building trade capacity for developing states.²⁰ Giving force to these functions is the WTO's dispute settlement function, which is necessary to enforce the organization's rules and ensure the free flow of trade.²¹

B. *Overview of the WTO's Dispute Settlement Process*

To understand how developing states function within the WTO dispute settlement system, it is important to understand the structure of the DSB. In its current form, the DSB was created at the Uruguay Round of negotiations under GATT.²² Prior to the Uruguay Round, trade disputes under GATT applied principles of negotiation and mutual dispute resolution rather than adverse party adjudication.²³ This historical GATT dispute resolution process, however, was generally toothless and ineffective because GATT dispute settlement acted by consensus and "either party could block the creation of a panel."²⁴

The modern WTO dispute procedure is laid out in the WTO's Dispute Settlement Understanding (DSU).²⁵ The DSU explains how, on a basic level, the WTO's dispute settlement process is conducted under the aegis of the DSB.²⁶ The DSB is a body within the WTO nominally comprised of all member governments.²⁷ The DSB is accordingly empowered to "establish panels, adopt panel and Appellate Body reports, maintain surveillance of implementation of rulings and recommendations, and authorize suspension of concessions and other obligations."²⁸

A dispute between the WTO members typically arises when one state

18. *Id.*

19. *What We Do*, WTO, http://www.wto.org/english/thewto_e/whatis_e/what_we_do_e.htm (last visited Mar. 2, 2014).

20. *Id.*

21. *See id.*

22. *See* Ron Kessler, *Delayed Fight: The World Trade Organization Dispute Settlement Mechanism, Negotiation, and the Transatlantic Conflict over Commercial Aircraft*, 35 B.C. INT'L & COMP. L. REV. 253, 257–58 (2012).

23. *See id.* at 258 (noting that GATT did not use rules or quasi-judicial institutions).

24. Eric A. Posner & John C. Yoo, *Judicial Independence in International Tribunals*, 93 CALIF. L. REV. 1, 44 (2005).

25. Dispute Settlement Understanding, *supra* note 9.

26. *Id.*

27. *See Dispute Settlement*, WTO, http://www.wto.org/english/tratop_e/dispu_e/dispu_e.htm (last visited Mar. 2, 2014).

28. Dispute Settlement Understanding, *supra* note 9, art. 2(1).

adopts a policy that one or more fellow members consider to breach applicable WTO agreements or obligations.²⁹ Following this action, the affected state may then file a grievance with the WTO.³⁰ At this point, the parties will enter into a mandatory period of “consultation” for sixty days.³¹ During the consultation period, disputing states are required to seek a negotiated settlement before resorting to further litigation.³²

If the disputing states are unable to settle their differences during the consultation stage, the complainant will then ask the DSB to establish a dispute settlement panel, which will formally adjudicate the dispute between the adverse states.³³ During this stage, a panel of adjudicators is appointed and the disputants are given time to prepare their cases and gather evidence.³⁴ Following this, each side submits written briefs and appears before the panel to make its case.³⁵ After the first hearing, the disputants then submit rebuttal arguments and, when necessary, expert testimony.³⁶ Upon the conclusion of the arguments, the panel issues an interim report to the parties that includes tentative findings and conclusions, giving the parties one week to petition for review.³⁷ After considering any further points raised by the disputants, the panel will issue a final report.³⁸ In turn, this final report becomes the DSB’s ruling “within [sixty] days unless a consensus rejects it.”³⁹ The panel stage is the most complex portion of the dispute settlement process and may take many months to conclude.⁴⁰

Following the panel stage, either side can appeal the final ruling.⁴¹ Often, both sides choose to appeal some facet of a holding.⁴² Three members from a permanent seven-member panel, made up of “individuals with recognized standing in the field of law and international

29. *A Unique Contribution*, WTO, http://www.wto.org/english/thewto_e/whatis_e/tif_e/disp1_e.htm (last visited Mar. 2, 2014).

30. *See The Process—Stages in a Typical WTO Dispute Settlement Case*, WTO, http://www.wto.org/english/tratop_e/dispu_e/disp_settlement_cbt_e/c6s1p1_e.htm (last visited Feb. 18, 2014).

31. *See A Unique Contribution*, *supra* note 29.

32. *See id.*

33. *See id.*

34. *See id.*

35. *Id.*

36. *See id.*

37. *Id.*

38. *See id.*

39. *Id.*

40. *See id.*

41. *Id.*

42. *See id.*

trade,⁴³ hear appeals. The Appellate Body can uphold, modify, or reverse the panel's legal findings and conclusions.⁴⁴ Normally, the appeals process should not last more than sixty to ninety days.⁴⁵

Once the Appellate Body makes its ruling, the DSB then oversees the complex and often contentious enforcement process.⁴⁶ Initial DSB reports generally recommend bringing nonconforming policies into compliance with WTO agreements.⁴⁷ Following a final decision, a noncompliant state will provide the DSB with notice of its intention to comply with the DSB ruling as well as a detailed compliance plan.⁴⁸ Throughout the compliance process, the DSB is empowered to "keep under surveillance the implementation of adopted recommendations or rulings."⁴⁹ If the noncompliant party is unable or unwilling to comply with the DSB's judgment, the DSB may compel a new round of negotiations between the parties to develop a mutually acceptable compensation plan.⁵⁰ Ultimately, as a last option, the DSB is empowered to permit the complaining party to implement retaliatory trade restrictions that correspond with those implemented by the defendant.⁵¹

C. *Developing States and International Trade*

Although developing nations represent the minority of participants in the WTO's dispute settlement regime,⁵² the same cannot be said of their participation in international trade as a whole. This Section elaborates on the growing prominence of trade between developing nations. Indeed, the explosive growth of South-South trade lends further support to the need to increase participation of developing countries in the WTO dispute settlement processes—if South-South trade is to continue to grow, trading states must have an effective tool to solve disputes and break down trade barriers as they arise.

In real terms, the portion of trade between developing states is now almost a quarter of all international trade.⁵³ The increase in South-

43. *Id.*

44. *Id.*

45. *See id.*

46. *See id.*

47. *See generally* Dispute Settlement Understanding, *supra* note 9, art. 21 (outlining how the Dispute Settlement Body (DSB) is to surveil the implementation of its recommendations and rulings).

48. *See id.* art. 21(3).

49. *Id.* art. 21(6).

50. *See id.* art. 22(2).

51. *See id.* art. 22(2)–(3).

52. *See Chronological List of Disputes Cases, supra* note 10.

53. *See U.N. CONFERENCE ON TRADE & DEV., supra* note 5.

South trade was especially important to developing countries during the recent global economic crisis, where developing country exports declined less and recovered faster than developed country exports.⁵⁴ While a disproportionate share of the growth in South-South trade can be attributed to a handful of larger developing countries, such as the “BRIC” economies (Brazil, Russia, India, and China),⁵⁵ the World Bank recognizes that South-South trade holds great promise for least-developed countries (LDCs) as well.⁵⁶ Overall, South-South trade promotes economic diversification, which is essential to ending the over-reliance of many emerging economies on natural resource exports.⁵⁷

For all of its potential growth, however, a complex web of national trade protections and barriers hampers South-South trade.⁵⁸ Although the WTO-supported trade liberalization has led to decreased protectionism, the Organisation for Economic Co-operation and Development notes that traditional barriers are generally higher in the South.⁵⁹ Trade liberalization in developing states, furthermore, leads to greater economic benefits than it would elsewhere: a 10 percent tariff cut is estimated to increase exports by 1.6 percent.⁶⁰ This could translate into an additional \$5.7 billion in export earnings per year, whereas an equal reduction in North-North or North-South barriers would have a lesser impact on trade flows.⁶¹

Although their participation in dispute settlement procedures lags behind their developed counterparts, developing states comprise a large majority of the WTO membership.⁶² There are currently 158 total members of the WTO.⁶³ Of these, over three-quarters are developing countries.⁶⁴ The vast majority of developing states are located in Latin

54. See *Millennium Development Goals: Trade and Development*, WTO, http://www.wto.org/english/thewto_e/coher_e/mdg_e/development_e.htm (last visited Mar. 2, 2014).

55. See Dan Keeler, *Special Report: BRICs*, GLOBAL FIN. (Feb. 6, 2012), <http://www.gfmag.com/archives/147-february-2012/11604-special-report-brics.html>.

56. See Octaviano Canuto, *South-South Trade Is the Answer*, WORLD BANK INST. GROWTH & CRISIS BLOG (May 11, 2011), <http://blogs.worldbank.org/growth/node/8774>.

57. *Id.*

58. See ORG. FOR ECON. CO-OPERATION & DEV. (OECD), SOUTH-SOUTH TRADE: VITAL FOR DEVELOPMENT 1, 5–6 (2006) [hereinafter OECD, SOUTH-SOUTH TRADE].

59. See *id.* at 1, 5–6 (summarizing trade barrier trends in the South); *The 10 Benefits: 4. Freer Trade Cuts the Cost of Living*, WTO, http://www.wto.org/english/thewto_e/whatis_e/10ben_e/10b04_e.htm (last visited Mar. 2, 2014) (“The WTO’s global system lowers trade barriers . . . and applies the principle of non-discrimination.”).

60. OECD, SOUTH-SOUTH TRADE, *supra* note 58, at 3.

61. *Id.*

62. See *Members and Observers*, *supra* note 11.

63. See *id.*

64. *The WTO in Brief, Part 4: Developing Countries*, WTO, http://www.wto.org/english/thewto_e/whatis_e/inbrief_e/inbr04_e.htm (last visited Mar. 3, 2014).

America, Africa, Asia, and the Pacific, giving rise to the term “global South” as a reference to the developing world.⁶⁵ Furthermore, of the WTO’s developing members, thirty-four are classified as LDCs.⁶⁶ Pursuant to the U.N. definition, which has been adopted by the WTO, an LDC categorization includes a number of specific criteria that relate to low national income, low levels of “human assets” development, and a high degree of “economic vulnerability to external shocks.”⁶⁷

In keeping with its members’ commitment to economic development through trade, the WTO provides a number of accommodations for developing country members.⁶⁸ Preferential treatment for developing WTO members comes in two forms: (1) special and different treatment (S&D) provisions in the WTO documents and agreements, and (2) technical assistance programs.⁶⁹ S&D treatment provisions are specific clauses inserted in the WTO agreements to mitigate difficulties on compliance and implementation, often allowing relaxed requirements for developing states.⁷⁰ Such provisions may be considered during a WTO dispute as long as a state affirmatively asserts its S&D rights as a developing state.⁷¹ Technical assistance programs, meanwhile, come in the form of monetary aid funding specific technical support programs intended to help developing members grow trade capacity and meet the

65. It should be noted that the WTO does not release criteria for developing states, but rather the developing members opt into this classification for purposes of special and differential consideration described below. See *Development: Definition: Who Are the Developing Countries in the WTO?*, WTO, http://www.wto.org/english/tratop_e/devel_e/d1who_e.htm (last visited Mar. 8, 2014). For further explanation on the term “global South” and its context, consult the website for American University’s Center for the Global South. See *American University: Center for the Global South*, AM. U., <http://www1.american.edu/academic.depts/acainst/cgs/about.html> (last visited Mar. 8, 2014).

66. See *Understanding the WTO: The Organization: Least-Developed Countries*, WTO, http://www.wto.org/english/thewto_e/whatis_e/tif_e/org7_e.htm (last visited Mar. 8, 2014).

67. *Criteria for Identification and Graduation of LDCs*, UN-OHRLLS, <http://unohrlls.org/about-ldcs/criteria-for-ldcs> (last visited Mar. 8, 2014); see *Understanding the WTO: The Organization: Least-Developed Countries*, *supra* note 66.

68. Although little has been agreed upon to date, the ongoing Doha Round of the WTO negotiations is the first round “to focus on helping developing countries join the global marketplace.” Paige McClanahan, *Doha Round Trade Talks—Explainer*, THE GUARDIAN (Sept. 3, 2012, 5:17 AM), <http://www.guardian.co.uk/global-development/2012/sep/03/doha-round-trade-talks-explainer>.

69. See *Understanding the WTO: Developing Countries: Overview*, WTO, http://www.wto.org/english/thewto_e/whatis_e/tif_e/dev1_e.htm (last visited Mar. 8, 2014).

70. See Chang-fa Lo, *From S&D Treatment to S&D Agreement Under the WTO: Developing Friendlier Global Governance of Trade for Developing Countries*, 1 ASIAN J. WTO & INT’L HEALTH L. & POL’Y 33, 35 (2006).

71. See Panel Report, *Dominican Republic—Safeguard Measures on Imports of Polypropylene Bags and Tubular Fabric*, paras. 7.442–44, WT/DS415/R, WT/DS416/R, WT/DS417/R, WT/DS418/R (Jan. 31, 2012) [hereinafter Panel Report, *Dominican Republic—Plastic Bags*].

WTO obligations.⁷² Thus far, the returns for technical assistance programs have been mixed, with many examples of success and failure.⁷³

With regard to the dispute settlement process, there has been a concerted effort to assist developing country complainants. Founded by special agreement in 2001, the Advisory Centre on WTO Law (ACWL) was created by the WTO member states to provide a resource for legal training, expertise, and advice on the WTO law for developing countries and the LDCs.⁷⁴ Although created with the purpose of aiding in the WTO complaint process, the ACWL is independent of the WTO and relies on voluntary contributions from developed and developing nations alike.⁷⁵

Unfortunately, the ACWL has fallen short of its goal of increasing the dispute settlement capacity of developing states. Although the ACWL does maintain a technical expertise fund for the purposes of providing legal counsel and support for developing country litigants, very few WTO states have contributed to the fund.⁷⁶ Between 2007 and 2011, the amount of legal opinions given by the ACWL grew from 110 to 218.⁷⁷ Yet, this is not as expansive as it appears: for the purposes of this calculation, the ACWL includes any individual opinion given, “regardless of the extent of work involved.”⁷⁸ Additionally, not all of the ACWL’s advisory opinions pertain to the dispute settlement process; many involve issues such as accession for prospective members, trade remedies, and regional trade agreements.⁷⁹ Indeed, in 2011, the ACWL helped provide legal counsel and support in just three WTO dispute settlement proceedings.⁸⁰ More troubling still, the ACWL reports that, between its inception in 2001 and 2011, only four percent of assistance given to developing states in dispute settlement went to the LDC coun-

72. See *Understanding the WTO: Developing Countries: WTO Technical Cooperation*, WTO, http://www.wto.org/english/thewto_e/whatis_e/tif_e/dev3_e.htm (last visited Mar. 9, 2014).

73. See Marjorie Florestal, *Technical Assistance Post-Doha: Is There Any Hope of Integrating Developing Countries into the Global Trading System?*, 24 ARIZ. J. INT’L & COMP. L. 121, 121–23 (2007).

74. See Agreement Establishing the Advisory Centre on WTO Law art. 1, *opened for signature* Nov. 30, 1999, 2299 U.N.T.S. 249 (entered into force July 15, 2001).

75. See *Organisational Structure*, ADVISORY CENTER ON WTO L. (ACWL), http://www.acwl.ch/e/about/org_structure.html (last visited Mar. 9, 2014).

76. See Kristin Bohl, *Problems of Developing Country Access to WTO Dispute Settlement*, 9 CHI.-KENT J. INT’L & COMP. L. 130, 149 (2009).

77. ACWL, REPORT ON OPERATIONS 4 (2011), available at http://www.acwl.ch/e/documents/reports/Oper_2011.pdf.

78. *Id.*

79. See *id.* at 7–9.

80. See *id.* at 2, 11.

tries.⁸¹

Ultimately, the ongoing Doha Round of the WTO negotiations provides a unique opportunity for the WTO to institute developmental friendly reforms.⁸² Although talks have largely stalled, this round began with the stated goal of increasing the integration of developing states into the global trading system.⁸³ The ongoing failure to achieve agreement at Doha is exacerbated by disagreements between developed and developing nations over agricultural subsidies and other issues.⁸⁴ Nevertheless, it is likely that any meaningful reforms involving the integration of developing states in the WTO will have to occur through the framework of the Doha negotiations.⁸⁵

D. *Regional Trade Agreements and the WTO's Dispute Settlement Process*

In addition to the WTO trade framework, there are many regional and bilateral trade agreements that have been created outside the confines of the WTO jurisdiction.⁸⁶ As of July 2005, only one WTO member, Mongolia, was not a party to some regional trade agreement.⁸⁷ Almost every free trade or partial scope agreement contains some sort of dispute settlement mechanism.⁸⁸ Most of the extant regional trade agreements, furthermore, permit a complaining state to choose whether to bring a claim before a regional dispute body or under the DSU.⁸⁹ Although not incorporated into the WTO's dispute settlement process itself, the WTO's Committee on Regional Trade Agreements was established with the two-fold purpose of examining regional trade agreements and con-

81. *See id.* at 12, 28.

82. *Cf. Goodbye Doha, Hello Bali*, *ECONOMIST* (Sept. 8, 2012), <http://www.economist.com/node/21562196> (describing one way the WTO negotiations can be saved to produce concrete results).

83. *See id.*

84. *Cf. McClanahan, supra* note 68 (“Officials came close to striking a deal—and concluding the Doha round . . . in July 2008. But after 10 days of talks, the negotiations broke down over a dispute between the US and India about rules governing trade in agricultural goods.”).

85. *Cf. Goodbye Doha, Hello Bali, supra* note 82 (“With Doha paralysed, regional alternatives to a multilateral deal are springing up. They are not all bad, but regional deals tend to benefit insiders at the expense of outsiders, so that global gains will be achieved only if they can be fitted together.”).

86. *See, e.g., Regionalism: Friends or Rivals?*, WTO, http://www.wto.org/english/thewto_e/whatis_e/tif_e/beyl_e.htm (last visited Mar. 9, 2014); *Lamy Warns Bilateral Agreements Are Not the “Easy Way Out” from the Suspended Talks*, WTO (Oct. 31, 2006), http://www.wto.org/english/news_e/sppl_e/sppl46_e.htm.

87. *Regionalism: Friends or Rivals?*, *supra* note 86.

88. Jennifer Hillman, *Conflicts Between Dispute Settlement Mechanisms in Regional Trade Agreements and the WTO—What Should the WTO Do?*, 42 *CORNELL INT'L L.J.* 193, 195 (2009).

89. *Id.* at 196.

sidering the implications of such agreements on the multilateral trading system.⁹⁰ Article XXIV of GATT 1994 also provides a structure for the WTO member states to show preferences in favor of their partners in regional customs or free trade regimes subject to certain limitations.⁹¹

There are a number of prominent organizations that adjudicate trade disputes in developing regions, including MERCOSUR in Latin America and the Southern African Development Community (SADC).⁹² Despite their potential for success, however, most regional trade organizations do not have the same ability to set worldwide standards as the WTO.⁹³ Accordingly, most regional bodies that deal with trade policy do not have the same specialization or expertise as the WTO.⁹⁴ Many regional trade regimes possess concrete customs and trade protection standards but lack a functioning dispute settlement body to enforce these agreements.⁹⁵ Where regional tribunals do exist in developing regions, they often face the same issue of underutilization as the WTO's dispute settlement bodies.⁹⁶ For example, the SADC's tribunal, which adjudicates trade and nontrade disputes alike, adjudicated just ten cases total between 2007 and 2008.⁹⁷

90. See World Trade Organization, General Council, Committee on Regional Trade Agreements: Decision of 6 February 1996, WT/L/127 (1996); *Work of the Committee on Regional Trade Agreements (CRTA)*, WTO, http://www.wto.org/english/tratop_e/region_e/regcom_e.htm (last visited Mar. 9, 2014).

91. Panel Report, *Brazil—Measures Affecting Imports of Retreaded Tyres*, paras. 7.273–74, WT/DS332/R (June 12, 2007) [hereinafter Panel Report, *Brazil—Retreaded Tyres*]; see also *WTO Analytical Index: GATT 1994: Part III: XXVI. Article XXIV*, WTO, http://www.wto.org/english/res_e/booksp_e/analytic_index_e/gatt1994_09_e.htm#article24 (last visited Mar. 9, 2014) (providing full text and analysis of Article XXIV).

92. See Hillman, *supra* note 88, at 194 (mentioning MERCOSUR); Joost Pauwelyn, *Going Global, Regional, or Both? Dispute Settlement in the Southern African Development Community (SADC) and Overlaps with the WTO in Other Jurisdictions*, 13 MINN. J. GLOBAL TRADE 231, 232–33 (2004).

93. Indeed, it is common for states to adjust their trade policies or trade restrictions to conform to the WTO agreements. See Carlos M. Vázquez & John H. Jackson, *Some Reflections on Compliance with WTO Dispute Settlement Decisions*, 33 LAW & POL'Y INT'L BUS. 555, 561–62 (2002).

94. For example, the Southern African Development Community (SADC) website explains that the organization has a broad purpose of helping member states “achieve economic development, peace and security, and growth.” *SADC Objectives*, S. AFR. DEV. COMMUNITY (SADC), <http://www.sadc.int/about-sadc/overview/sadc-objectiv> (last visited Mar. 9, 2014). Any trade adjudication that the SADC engages is incidental to its stated purpose. *Cf. id.* (outlining the SADC's objectives).

95. See, e.g., Christian Leathley, *The Mercosur Dispute Settlement System* 11, 13, 15 (Sept. 27, 2002), available at <http://www.iadb.org/intal/intalcdi/PE/2007/00548.pdf> (explaining that although member states agreed to create a dispute settlement body the agreement has not yet been implemented).

96. See, e.g., *Court Decisions*, SADC TRIB., http://www.sadc-tribunal.org/?page_id=1872 (last visited Mar. 9, 2014) (listing all SADC decisions to date).

97. See *id.*

Despite the above-mentioned shortcomings, regional trade bodies also offer developing countries advantages that the WTO cannot. One important difference is that small-scale agreements and organizations are better suited to understand local and regional regulatory policy.⁹⁸ Regional organizations also stimulate cooperation by promoting a sense of regional cohesion and solidarity that is not present in wide-scale trade agreements.⁹⁹ Often, regional trade pacts pave the way for future WTO standards by providing a forum for groups of states to negotiate standards that exceed what may initially be possible on a wider scale.¹⁰⁰ Despite their shortcomings, regional trade blocs also have a positive impact on South-South trade and economic development.¹⁰¹ For example, between 1991 and 2003, MERCOSUR contributed to a 207 percent rise in intraregional trade in South America, compared with a 122 percent rise in trade with the rest of the world.¹⁰² In contrast, the North American Free Trade Agreement (NAFTA), comprised mainly of developed states, experienced smaller increases in regional and world trade.¹⁰³

E. *South-South Trade Disputes: Intersection Between Form and Function*

Although there are few South-South trade disputes to analyze, fewer still have completed the arc from the settlement stage to appeal and enforcement stage.¹⁰⁴ For analysis below, this Section compares two disputes that demonstrate the potential for regional integration to promote South-South dispute settlement. First, *Dominican Republic—Plastic Bags* shows how coordinated regional action and ACWL assistance promotes effective dispute resolution between developing states. Next, *Brazil—Retreaded Tires* is a study in contrast: it is a two-level dispute that demonstrates the need for greater coordination between regional trade bodies and the WTO.

The first dispute, *Dominican Republic—Safeguard Measures on Im-*

98. See David Livshiz, *Public Participation in Disputes Under Regional Trade Agreements: How Much Is Too Much—The Case for a Limited Right of Intervention*, 61 N.Y.U. ANN. SURV. AM. L. 529, 536–37 (2005).

99. See, e.g., *Quienes Somos [Who We Are]*, MERCOSUR, http://www.mercosur.int/t_generic.jsp?contentid=3862&site=1&channel=secretaria&seccion=3 (last visited Mar. 9, 2014) (explaining purpose as a South American customs union to facilitate economic cooperation, development, and trade).

100. See *Regionalism: Friends or Rivals?*, *supra* note 86.

101. See, e.g., *MERCOSUR—Demystified*, GLOBAL ENVISION (Sept. 28, 2005), <http://www.globalenvision.org/library/15/807>.

102. See *id.*

103. See *id.*

104. See *infra* Part II.

ports of Polypropylene Bags and Tubular Fabrics,¹⁰⁵ is one of the few existing South-South DSB cases not involving two large developing states.¹⁰⁶ This dispute involves a complaint by Costa Rica—later joined by El Salvador, Guatemala, Honduras, and Panama—against the Dominican Republic for restrictions imposed by the Dominican government on the import of polypropylene plastic bags.¹⁰⁷ In this dispute, the DSB panel held that Dominican tariffs on plastic bags were inconsistent with its obligations under the WTO and regional free trade agreements with the complainants.¹⁰⁸ The panel thus recommended “the Dominican Republic bring its measures into conformity with its obligations under those Agreements.”¹⁰⁹

Next, the *Brazil—Measures Affecting Imports of Retreaded Tires*¹¹⁰ dispute arose when Brazil, citing public health concerns, banned the import of retreaded tires.¹¹¹ Retreaded tires, which are created when preused tires are refitted with new rubber, are attractive to consumers in developing countries due to their bargain pricing.¹¹² However, retreaded tires also wear out quickly and are a significant source of waste in developing states.¹¹³ In Brazil, waste tires created breeding grounds for mosquitoes—contributing to the spread of malaria and other tropical diseases.¹¹⁴ To manage the spread of disease, Brazil banned the import of retreaded tires in 2000.¹¹⁵

The first challenge to Brazil’s retreaded tire ban came at the regional level when Uruguay filed complaints against Brazil and Argentina, which had a similar policy, in the MERCOSUR Review Court.¹¹⁶ In this dispute, Brazil did not raise public health concerns as it would in its

105. See Panel Report, *Dominican Republic—Plastic Bags*, *supra* note 71.

106. See *id.* paras. 1.1–3 (listing the parties).

107. See *id.*

108. See *id.* para. 8.3.

109. *Id.*

110. See Appellate Body Report, *Brazil—Measures Affecting Imports of Retreaded Tyres*, WT/DS332/AB/R (Dec. 3, 2007) [hereinafter Appellate Report, *Brazil—Retreaded Tires*].

111. See Colm Patrick McNerney, *From Shrimps and Dolphins to Retreaded Tyres: An Overview of the World Trade Organization Disputes, Discussing Exceptions to Trading Rules*, 22 N.Y. INT’L L. REV. 153, 189 (2009).

112. See Appellate Report, *Brazil—Retreaded Tires*, *supra* note 110, para. 118 (explaining what retreaded tires are and how they are manufactured); *Retread Benefits*, BANDAG BRIDGESTONE, <http://www.retreadinstead.com/benefits.php> (last visited Mar. 10, 2014) (describing cost savings).

113. See MARCOS A. ORELLANA & NATHALIE BERNASCONI-OSTERWALDER, CTR. FOR INT’L ENVTL. L., *THE BRAZIL—RETREADED TIRES CASE: BACKGROUND PAPER 1* (2006) [hereinafter CEIL PAPER], available at http://www.ciel.org/Publications/Brazil_Tires_3Apr06.pdf.

114. See McNerney, *supra* note 111, at 189.

115. See *id.*

116. See CEIL PAPER, *supra* note 113, at 5.

later WTO dispute.¹¹⁷ Instead, Brazil argued that MERCOSUR agreements permitted it to restrict trade in used goods.¹¹⁸ The MERCOSUR tribunal declared Brazil's ban on imported retreaded tires from other South American states to be an impermissible obstacle to free trade.¹¹⁹ The tribunal emphasized the importance of economic integration in the efforts of MERCOSUR to develop and create a common regional market.¹²⁰ As a result, Brazil created an exception on its import ban for retreaded tires from MERCOSUR states.¹²¹

In 2005, the European Union, a large exporter of retreaded tires, requested consultations with Brazil over its remaining ban on imported retreaded tires from non-MERCOSUR states.¹²² After the panel stage, the WTO panel issued a report ruling against the actual import ban Brazil had in place but suggesting that a better-crafted ban could be generally justified on the health and environmental grounds Brazil raised.¹²³ The DSB Appellate Body, however, reversed much of the panel's reasoning and upheld the overturning of Brazil's retreaded tire ban as a violation of free trade principles.¹²⁴

F. *Factors Behind Developing State Underutilization of the DSB*

As of 2009, only one LDC had initiated a complaint through the DSB.¹²⁵ Over all, forty-four "lower middle income" and twenty-four "low income" economies have initiated complaints.¹²⁶ These numbers are distorted by the handful of large-developing countries, which file the vast majority of the WTO complaints brought by developing states.¹²⁷ Notwithstanding the active participation of countries such as Brazil, India, and Mexico, the majority of developing states merely profess a

117. *See id.* at 4–5.

118. *Id.* at 5.

119. *See id.*

120. *Id.*

121. *See* McInerney, *supra* note 111, at 189.

122. *See* *Brazil—Measures Affecting Imports of Retreaded Tyres*, WTO, http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds332_e.htm (last visited Mar. 15, 2014) [hereinafter *Current Status*].

123. *See* Panel Report, *Brazil—Retreaded Tires*, *supra* note 91, paras. 7.30, 7.212–16; *see also* *Brazil Loses Retreaded Tyres Dispute, but Happy with Panel's Mixed Ruling*, BRIDGES WKLY. TRADE NEWS DIG., June 20, 2007, at 5 [hereinafter *Panel's Mixed Ruling*], available at <http://ictsd.org/i/news/bridgesweekly/7859> (summarizing the report's findings).

124. *See* *Current Status*, *supra* note 122; *BioRes: WTO Appellate Body Reinforces Ruling Against Brazil Tyre Import Ban*, INT'L CENTRE TRADE & SUSTAINABLE DEV. (Dec. 18, 2007), <http://ictsd.org/i/news/biores/59904>.

125. *See* Bohl, *supra* note 76, at 132.

126. *Id.*

127. *See id.* at 132–33.

“systematic interest” in dispute settlement.¹²⁸ For example, of the twenty-four complaints by lower-income members cited above, sixteen were brought by India.¹²⁹

When the amount of suits filed by developing countries is further narrowed solely to South-South disputes, the numbers get even sparser.¹³⁰ Upon a recent count, it appears there have been sixteen South-South DSB proceedings since 2003 out of roughly one hundred seventy total DSB proceedings during this time.¹³¹ When compared with the figures above that demonstrate the growing volume of South-South trade,¹³² it is clear that there must be some systemic reason why there are disproportionately few South-South disputes filed. This Note suggests four main factors that are likely the cause of these disproportionate numbers.

1. Cost of Litigation

First, the clearest cause for the lack of South-South disputes appears to be the high cost of litigation.¹³³ Although some disputes are resolved efficiently and cheaply during the negotiation stage, many drag on for years as the parties engage in lengthy fact-finding, appeals, and protracted disputes on the implementation of the DSB rulings.¹³⁴ Furthermore, developing and developed states alike often must hire sophisticated international law firms from the United States or Europe to draft legal submissions, conduct fact finding, and provide guidance throughout the dispute settlement process.¹³⁵

128. *Id.* at 133 (quoting Mohan Kumar, *Dispute Settlement System in the WTO: Developing Country Participation and Possible Reform*, in REFORM AND DEVELOPMENT OF THE WTO DISPUTE SETTLEMENT SYSTEM 180 (Dencho Georgiev & Kim Van der Borgh eds., 2006)).

129. *Id.* at 132.

130. *Compare Chronological List of Disputes Cases*, *supra* note 10, with INT’L MONETARY FUND, WORLD ECONOMIC OUTLOOK APRIL 2012: GROWTH RESUMING, DANGERS REMAIN 182–83 (2012), available at <http://www.imf.org/external/pubs/ft/weo/2012/01/pdf/text.pdf>. It is again important to note that the WTO currently does not certify countries as “developing” states but instead allows states to self-apply this definition. *Who Are the Developing Countries in the WTO?*, *supra* note 65. There is no list of states that have self-applied this definition. *Cf. id.* (noting that the WTO members announce themselves whether they are “developing”). As a result, I rely on the International Monetary Fund list of developing countries. *See* INT’L MONETARY FUND, *supra*, at 182–83.

131. *Compare Chronological List of Disputes Cases*, *supra* note 10, with INT’L MONETARY FUND, *supra* note 130, at 182–83. Note that this does not include disputes in which developing countries later joined as interested parties. *Cf. Chronological List of Disputes Cases*, *supra* note 10 (listing only initial parties).

132. *See* U.N. CONFERENCE ON TRADE & DEV., *supra* note 5, at 1.

133. *See* Bohl, *supra* note 76, at 144.

134. *See supra* Part I.B for an explanation of the DSB process.

135. *Cf., e.g.,* Håkan Nordström & Gregory Shaffer, *Access to Justice in the WTO: A Case for Small-Claims Procedure?*, in DEVELOPING COUNTRIES IN THE WTO LEGAL SYSTEM 191, 192–93 (Chantal Thomas & Joel P. Trachtman eds., 2009) (remarking that high legal fees apply

Scholars have identified a number of cost-related factors that hamper developing country access to dispute settlement proceedings at the WTO.¹³⁶ Although many of these factors also apply to the general absence of developing states from the dispute settlement process, they undoubtedly have a deterrent effect on the filing of disputes between developing countries as well. Some of the cost-deterrent factors include the expense of fact-finding, the high cost of hiring private firms, and the expense of retaining expert advice.¹³⁷ Litigation costs are largely independent of the underlying value of a dispute.¹³⁸ High fixed costs lead to situations where a developing country that seeks to resolve a trade dispute with its developing neighbor over \$1 million of agricultural goods incurs roughly the same legal costs and overhead as a developed country in a dispute involving billions of dollars.¹³⁹ As a result, there is less incentive for developing states to expend their scant resources filing potentially expensive trade complaints over low-value disputes against developing trading partners.

2. Industry and Corporate Support

Effective support from industry and business may be another factor hindering the ability of developing states to bring the WTO complaints. In some countries, the high cost of the WTO dispute settlement is defrayed by contributions by private companies and entities that have a business interest in the resolution of a dispute.¹⁴⁰ Brazil, for example, developed an effective partnership with its business community, which it relies on to fund foreign legal assistance in trade disputes.¹⁴¹ Unfortunately, this is not a model for wide application in the developing world. Such a method of relying on private industry to help defray the costs of trade litigation likely poses a problem in the LDCs, where local companies are generally small or nonexistent.¹⁴²

equally to developed and developing states); Andrea M. Ewart, *Small Developing States in the WTO: A Procedural Approach to Special and Differential Treatment Through Reforms to Dispute Settlement*, 35 SYRACUSE J. INT'L L. & COM. 27, 75 (2007) (citing Brazilian example).

136. See, e.g., Bohl, *supra* note 76, at 144–51.

137. See *id.*

138. See Nordström & Shaffer, *supra* note 135, at 192–93.

139. See *id.*

140. See Ewart, *supra* note 135, at 75.

141. See *id.*

142. Cf. U.N. CONF. ON TRADE & DEV., FOREIGN DIRECT INVESTMENT IN LDCs: LESSONS LEARNED FROM THE DECADE 2001–2010 AND THE WAY FORWARD, at 3–4, 18, 20–21, U.N. Doc. UNCTAD/DIAE/IA/2011/1 (2011) (explaining that inflows of foreign corporate funds are very important to the least-developed country economies whereas local formal-sector companies are less present).

3. Government Expertise and Human Capital

Lack of internal expertise and human capital is another barrier to South-South dispute settlement. Having the governmental expertise is essential:

For a WTO member to use the WTO system successfully, it must develop cost-effective mechanisms to perceive injuries to its trading prospects, identify who [or what] is responsible, and mobilize resources to bring a legal claim or negotiate a favorable settlement . . . referred to as naming, blaming, and claiming.¹⁴³

Once again, the example of Brazil is particularly relevant. Brazil is one of the few consistent developing litigants in the DSB against both developing and developed states.¹⁴⁴ After defending a series of disputes from Canada and the United States in the 1990s and 2000s, Brazil recognized the importance of engaging in the DSB litigation and created a specialized WTO dispute settlement office, which is empowered to engage the private sector, attorneys, and civil society for support.¹⁴⁵ As a result of this proactive approach, Brazil has successfully petitioned against a number of foreign barriers to its exports.¹⁴⁶ Unfortunately, however, Brazil is again an exception to the rule: most developing states lack experienced trade policy and dispute resolution professionals.¹⁴⁷

4. Inadequate Enforcement Mechanisms

The uncertainty of enforcement against developing states adds a unique impediment to developing South-South dispute resolution. Even before a state can seek to enforce a favorable ruling, the DSB process lasts years and is likely to cost a state a half-million dollars or more in legal fees.¹⁴⁸ These costs are compounded if the defendant-state is unwilling or unable to comply with the eventual DSB determination. The issue of enforcement is especially prominent in Africa, where the WTO member states have never participated in the DSB proceedings as com-

143. Gregory Shaffer et al., *The Trials of Winning at the WTO: What Lies Behind Brazil's Success*, 41 CORNELL INT'L L.J. 383, 408 (2008).

144. *See id.* at 413, 490–500. However, the vast majority of Brazil's disputes are still filed against developed states. *See id.* at 419. Approximately thirty-nine percent of Brazil's complaints were against the United States and twenty-six percent have been against the European Union. *Id.*

145. *Id.* at 414–17.

146. *See id.* at 421–22. Many of these successes have come in disputes with other developing states. *See, e.g.*, Panel Report, *Argentina—Definitive Anti-Dumping Duties on Poultry from Brazil*, WT/DS241/R (Apr. 22, 2003); Request for Consultations by Brazil, *Peru—Countervailing Duty Investigation Against Imports of Buses from Brazil*, WT/DS112/1 (Jan. 9, 1998).

147. *See Shaffer, supra* note 143, at 428.

148. *See Nordström & Shaffer, supra* note 135, at 192–93.

plainants.¹⁴⁹ Here, there is almost no hope of collecting on favorable judgments against other developing states because the ability to comply with the DSB decisions relies on the existence of a governmental infrastructure that is often lacking.¹⁵⁰ As a result, it is noted, “[t]here is almost a sense of fatigue and surrender in view of the complications involved in using the system.”¹⁵¹

Ultimately, when one contrasts the special and differential treatment provisions and other developing country safeguards that are built into the governing documents of the WTO¹⁵² with the systemic inequities explained above, it is clear that any effective solution must address these root causes. The underlying problem that needs to be addressed to increase South-South dispute settlement, therefore, is not what happens to developing states in the proverbial courthouse but how they get through the door.

II. ANALYSIS: LEVERAGING REGIONAL TRADE AGREEMENTS TO INCREASE SOUTH-SOUTH DISPUTE SETTLEMENT

In response to the consistent weakness of South-South dispute settlement in the DSB, this Part analyzes the feasibility of increasing regional cooperation as a means of spurring cooperation and resource sharing for developing states. First, this Part analyzes two existing WTO disputes between developing countries to assess the potential for enhanced regional cooperation. Second, this Part discusses concrete proposals to create regional mechanisms to support South-South DSB utilization.

A. *The Benefits of Increased Regionalism Applied to Existing WTO Disputes*

The *Dominican Republic—Plastic Bags* and *Brazil—Retreaded Tires* examples provide particularly divergent but useful case studies on the potential for increased regional cohesion to encourage South-South dispute settlement in the DSB. While *Dominican Republic—Plastic Bags* shows the existing promise of regional integration, *Brazil—Retreaded*

149. See *Chronological List of Disputes Cases*, *supra* note 10 (listing all cases and complainants).

150. See Gerhard Erasmus, *The Non-Participation by African States in the Dispute Settlement System of the WTO: Reasons and Consequences*, in *WTO DISPUTE SETTLEMENT: AN AFRICAN PERSPECTIVE* 179, 196 (Trudi Hartzenberg ed., 2008).

151. *Id.*

152. Indeed, Article 3.12 of the Dispute Settlement Understanding, *supra* note 9, gives developing states the right to ask the General Director of the WTO Secretariat to expedite panels. Erasmus, *supra* note 150, at 184. Similarly, Article 21.2 “requires that particular attention should be given to measures affecting the interests of developing countries in the procedures and to ensure implementation of rulings.” Dispute Settlement Understanding, *supra* note 9, art. 21.2.

Tires demonstrates the pitfalls of the current disconnect between the WTO and regional dispute settlement bodies.

1. *Dominican Republic—Safeguard Measures on Imports of Polypropylene Bags and Tubular Fabrics*¹⁵³

As discussed above in Part I.E, the *Dominican Republic—Plastic Bags* case was a collective litigation involving a number of developing country parties from the Caribbean and Central America.¹⁵⁴ This case is also an example of consideration of the parties' developing status by the DSB.

As required by the DSU, the DSB panel considered the parties' shared status as developing members in its findings.¹⁵⁵ Although the panel notes that neither litigant actively raised its status as part of its claim or defense, the panel did take into account the fact that the parties were developing states "when preparing the timetable for the proceedings."¹⁵⁶ Yet, extending the timetable for implementation is the only way in which the panel altered its decision to account for the developing status of the litigants.¹⁵⁷ In response to the decision, the Dominican Republic has stated that it intends to immediately implement the DSB recommendations.¹⁵⁸

Although implementation of this decision is ongoing, *Dominican Republic—Plastic Bags* is a positive example of regional cooperation. Almost from the beginning, Costa Rica, the complainant, effectively mobilized regional support.¹⁵⁹ In combining their efforts, the four Central American litigants likely permitted themselves to pool the cost of litigation and expertise.¹⁶⁰ The existence of coordination between these

153. For the full text of the WTO case report, see Panel Report, *Dominican Republic—Plastic Bags*, *supra* note 71.

154. *See id.* paras. 1.1–3 (listing the parties).

155. *See, e.g., id.* paras. 7.370–.402, 7.442–.445.

156. *Id.* para. 7.444.

157. *See id.* ("There are no other provisions on differential and more favourable treatment for developing country Members that should be the subject of special consideration by the Panel.")

158. *See Dispute Settlement: WTO Adopts Boeing Reports*, WTO (Mar. 23, 2012), http://www.wto.org/english/news_e/news12_e/dsb_23mar12_e.htm.

159. *Cf., e.g., Dominican Republic Loses on Plastic Bag Safeguards*, BRIDGES WKLY. TRADE NEWS DIG., Feb. 8, 2012, at 11, available at <http://ictsd.org/i/news/bridgesweekly/124675> (listing Costa Rica, El Salvador, Guatemala, and Honduras as the parties challenging the Dominican Republic's actions); Panel Report, *Dominican Republic—Plastic Bags*, *supra* note 71, paras. 1.1–3 (describing involvement of other Central American countries).

160. *Cf.* Panel Report, *Dominican Republic—Plastic Bags*, *supra* note 71, v–vi (referring to the complainants' joint written and oral submissions to the WTO panel). The participation of multiple complainants and third parties also helped ensure that any potential resolution would not be a "bilateral settlement[] that discriminate[s] against other members" of the WTO. Marc L. Busch & Eric Reinhardt, *Three's a Crowd: Third Parties and WTO Dispute Settlement*, 58

states indicates that, where possible, international cooperation and cross-support between developing can increase the likelihood of a favorable outcome in a South-South trade dispute. Furthermore, the involvement of multiple states may also have helped apply pressure on the Dominican Republic to comply with the panel's decision.¹⁶¹

In addition to the collective efforts of the complainants, it is important to note that the smooth adjudication of this dispute was enhanced by the ACWL assistance given to the Dominican Republic in its defense.¹⁶² This assistance allowed the Dominican government to marshal the means to hire outside counsel.¹⁶³

2. Contrasting Case—*Brazil—Measures Affecting Imports of Retreaded Tires*¹⁶⁴

In contrast to the above case, *Brazil—Retreaded Tires* is a key example of the need for greater communication and compatibility between the DSB and regional trade adjudication bodies. Specifically, this case demonstrates a conflict between Brazil's regional obligations to other developing states in MERCOSUR and potentially overlapping commitments to developed states and the WTO.

As discussed in Part I, this case involved litigation before the MERCOSUR dispute body, as well as a later WTO complaint by the European Union against Brazil.¹⁶⁵ In the MERCOSUR litigation brought by Uruguay, Brazil argued that MERCOSUR agreements permitted it to restrict trade in used goods.¹⁶⁶ The MERCOSUR tribunal, however, declared Brazil's ban on imported retreaded tires from other South American states to be an impermissible obstacle to free trade.¹⁶⁷ The tribunal emphasized the importance of economic integration in the efforts of MERCOSUR countries to develop and create a common regional market.¹⁶⁸ Importantly, the MERCOSUR court did not make a ruling regarding Brazil's ban on retreaded tires from non-MERCOSUR

WORLD POL. 446, 447 (2006) (summarizing that what other observers have argued is a benefit of third-party involvement).

161. Cf. Busch & Reinhardt, *supra* note 160, at 449 (referring to the political pressures that some observers regard as a benefit of third-party involvement).

162. See ACWL, *supra* note 77, at 16.

163. See *id.*

164. For the full text of the final WTO report, see Appellate Report, *Brazil—Retreaded Tires*, *supra* note 110.

165. See CEIL PAPER, *supra* note 113, at 1–3.

166. *Id.* at 5.

167. *Id.*

168. *Id.*

countries.¹⁶⁹ In response to the MERCOSUR ruling, Brazil created an exception on its import ban for retreaded tires from MERCOSUR states while maintaining its import ban on retreaded tires from non-MERCOSUR states.¹⁷⁰

In 2005, the European Union challenged Brazil's remaining import ban in the DSB.¹⁷¹ After the panel stage, the WTO panel assigned to the dispute found that Brazil's actual import ban was incompatible with trade norms but left the door open for a reworked ban that could be justified.¹⁷² Here, the panel addressed Brazil's MERCOSUR exception, holding that the exception "does not seem to be motivated by capricious or unpredictable reasons" but was instead "adopted further to a ruling within the framework of MERCOSUR, which has binding legal effects for Brazil."¹⁷³ The panel also acknowledged that the ruling was adopted "in the context of an agreement intended to liberalize trade" among MERCOSUR's developing members.¹⁷⁴ Importantly, the panel indicated that some discrimination that might arise as a result of conflicting MERCOSUR and the WTO obligations is not necessarily unreasonable.¹⁷⁵

Although the panel decision indicated a willingness to allow some range of independent policy action with regard to regional trade agreements, the DSB Appellate Body quickly shut the door on this reasoning. In its opinion, the DSB Appellate Body overturned Brazil's retreaded tires ban on the basis that the MERCOSUR exception undermined the public health purpose of the import ban and was applied inconsistently with the requirements of the applicable WTO law.¹⁷⁶

In eschewing Brazil's ability to engage in minimal differentiated adjudication with other developing states in its region, the DSB Appellate Body decision in *Brazil—Retreaded Tires* shows a particular tension between the current WTO dispute framework and the dispute resolution needs of developing states. While the MERCOSUR tribunal nullified Brazil's import ban in the interests of South American economic integration,¹⁷⁷ the DSB Appellate Body never cited a similar interest in al-

169. *See id.*

170. *See Current Status, supra* note 122.

171. *See id.*

172. *See* Panel Report, *Brazil—Retreaded Tires, supra* note 91, paras. 7.30, 7.212–16; *Panel's Mixed Ruling, supra* note 123.

173. Panel Report, *Brazil—Retreaded Tires, supra* note 91, para. 7.272.

174. *Id.* at para. 7.273.

175. *Id.*

176. *See* Appellate Report, *Brazil—Retreaded Tires, supra* note 110, paras. 210, 227–34.

177. *See* CEIL PAPER, *supra* note 113, at 5.

lowing autonomy for developing states.¹⁷⁸ Indeed, this decision arguably runs contrary to the special and differential treatment provisions, which mandate special considerations for developing states.¹⁷⁹ Furthermore, the DSB Appellate Body seemingly failed to give due consideration to GATT 1994 Article XXIV, which allows states some latitude to discriminate in favor of their regional trade partners.¹⁸⁰

In holding that the MERCOSUR exception undermined the public policy benefits of the entire retreaded tires ban, the DSB Appellate Body ignored the differing nature of the parties affected.¹⁸¹ As the panel notes, Brazil implemented the MERCOSUR exemption narrowly and eliminating the ban altogether would frustrate Brazil's public health policy.¹⁸² In creating the MERCOSUR exemption, Brazil was merely acting in the spirit of regional economic cooperation¹⁸³—all the more important for the developing states in South America. In holding that Brazil's agreement with other developing nations in its region undercut the purpose of its import ban, the DSB Appellate Body missed a key opportunity to support South-South regional cooperation and dispute settlement.

B. *Form and Benefits of Regional Cooperation in South-South WTO Dispute Settlement*

Considering the detrimental effects of scarce resources and overlap with regional trade bodies on South-South dispute settlement, this Note proposes the WTO pursue greater cooperation between itself and regional trade bodies to help developing states build capacity to engage in South-South dispute settlement. Specifically, the WTO should consider working with existing regional trade bodies to create dedicated regional secretariats that would coordinate the preparation and litigation of South-South trade disputes. Since most developing states are clustered in distinct regions, promoting regional cooperation will allow developing states to build capacity and share resources throughout the DSB process. As the *Dominican Republic—Plastic Bags* and *Brazil—Retreaded Tires* disputes demonstrate, regional-based support for the

178. See Appellate Report, *Brazil—Retreaded Tires*, *supra* note 110.

179. Cf. Panel Report, *Dominican Republic—Plastic Bags*, *supra* note 71, para. 7.383 (referring to special and differential treatment provisions).

180. See Panel Report, *Brazil—Retreaded Tires*, *supra* note 91, para. 7.274 (summarizing Article XXIV).

181. For the DSB Appellate Body's defense of its holding, see Appellate Report, *Brazil—Retreaded Tires*, *supra* note 110, paras. 227–34.

182. See Panel Report, *Brazil—Retreaded Tires*, *supra* note 91, para. 7.279.

183. Cf. CEIL PAPER, *supra* note 113, at 5 (describing why the MERCOSUR tribunal mandated the exemption).

WTO disputes would also lead to greater cohesion between both levels.

The most suitable form for most regional bodies to emulate would be a resource-sharing arrangement loosely similar to the E.U. approach to the WTO litigation. The European Union, which comprises sixteen percent of world trade, collectively represents all twenty-seven E.U. member states and “speaks with one voice on trade matters.”¹⁸⁴ Under the current E.U. approach, member states pool resources to maintain a permanent mission to the WTO’s headquarters in Geneva, Switzerland.¹⁸⁵ The European Union represents all E.U. members in the DSB proceedings, which allows members to pool the costs associated with the DSB litigation.¹⁸⁶ However, the strength of the E.U. unity with regard to the WTO litigations is partially based on the unprecedented political cohesion of the organization itself.¹⁸⁷ Although it would almost certainly be unworkable to suggest that developing regions form an E.U. style custom and currency union, the WTO can and should support regional trade regimes in the developing world. By doing so, the WTO would create dedicated secretariats by pooling resources to better identify and execute the DSB complaints against other developing states, whether they are within the same region or elsewhere.

The creation of dedicated regional cooperatives for the purpose of South-South WTO litigation will mitigate the problem of low financial resources and human capital, a key hindrance to South-South utilization of the WTO dispute resolution regime.¹⁸⁸ Such a reform is necessary because, as discussed above, the underutilization of the WTO dispute settlement proceedings for South-South dispute settlement is largely caused by a tremendous imbalance of human capital and financial resources rather than by specific WTO agreements.¹⁸⁹

Importantly, this proposed reform is well suited for the current inabil-

184. *EU and WTO*, PERMANENT MISSION E.U. TO WTO, http://eeas.europa.eu/delegations/wto/eu_wto/index_en.htm (last visited Mar. 15, 2014).

185. *See id.*

186. *Cf.* Christine Lagarde, *Managing the Future Challenges Facing the World Trade Organization: A European Perspective*, in *THE WTO: GOVERNANCE, DISPUTE SETTLEMENT, AND DEVELOPING COUNTRIES* 29, 30 (Merit E. Janow et al. eds., 2008) (“Trade policy is thus a policy area in which European States have decided to combine their strengths and to speak with one voice.”); *Dispute Settlement*, PERMANENT MISSION E.U. TO WTO, http://eeas.europa.eu/delegations/wto/eu_wto/dispute_settlement/index_en.htm (last visited Mar. 15, 2014) (referring to the E.U. joint actions before the DSB).

187. *Cf.* Lagarde, *supra* note 186, at 30 (referring to political procedures to approve new trade policy within the European Union). By law, the European Union is a common market with a common currency and export/import policies. *See id.*

188. For more on the benefits of increased regionalism in practice, see *supra* Part II.A.

189. See discussion on general factors depressing developing country DSB utilization *supra* Part I.F.

ity of the WTO member states to implement concrete reforms, as seen in the defunct Doha Round of trade negotiations.¹⁹⁰ First off, channeling the WTO efforts to promote the creation of regional bodies in the developing world would not require changes to any of the basic standards of the WTO founding documents because the basic format of dispute settlement under the DSU would remain intact.¹⁹¹ While this reform would, at least initially, necessitate financial and technical support from developed states, such a reform would run parallel to the stated commitment of developed countries to increase developing country access to the DSB proceedings.¹⁹²

Additionally, although limiting the scope of proposed regional DSB cooperatives to disputes between developing states may appear to be arbitrary, this limitation also aids its chances of passage and support. As noted above in Part I, the ACWL often lacks financial support from developing nations who do not want to support litigation against them.¹⁹³ Also considering the ongoing rancor between developing and developed countries at Doha,¹⁹⁴ limiting the scope to disputes between developing nations will potentially make developed states more willing to support the WTO legislation enabling such organizations. Alternatively, regional organizations could seemingly create their own cooperatives unilaterally; such behavior may even be seen as a logical extension of the ability of states to join and support ongoing WTO disputes as interested third parties.¹⁹⁵

Importantly, this reform permits developing states to build their trade-litigation capacity while focusing on important regional disputes. Many of these disputes will likely occur between states in the same region, allowing parity of access to dispute resolution resources.¹⁹⁶ This

190. See *Goodbye Doha, Hello Bali*, *supra* note 82 (explaining how talks broke down due to the large number of countries present and disagreements between developed nations regarding tariffs).

191. As discussed above, much of the reform would come at the local and regional level through pre-existing groups such as MERCOSUR.

192. See, e.g., *Dispute Settlement*, *supra* note 186 (statement of the European Union's commitment); see also *Goodbye Doha, Hello Bali*, *supra* note 82 (statement of developed country commitment).

193. Cf. Timothy Stostad, *Trappings of Legality: Judicialization of Dispute Settlement in the WTO, and Its Impact on Developing Countries*, 39 CORNELL INT'L L.J. 811, 840 (2006) (discussing the failure of the United States, Japan, and the European Union to contribute to the ACWL).

194. See McClanahan, *supra* note 68.

195. See *Dispute Settlement Understanding*, *supra* note 9, art. 10 (explaining the rights of third parties in the WTO disputes).

196. "Of the complaints brought to the WTO dispute settlement body, a majority of involved WTO member states shared at least one common affiliation as primary members of a regional or regional economic organization." Alexandra R. Harrington, *Peer Pressure: Correlations Between Membership in Regional and Regional Economic Organizations in the Context of WTO*

solution also helps prevent forum shopping between regional and the WTO bodies, which has been identified as a potential source of tension between the SADC and the DSB.¹⁹⁷ Most importantly, however, this reform will allow developing states to cultivate a stronger internal capacity that can be applied elsewhere in their trade relations with developed and developing states alike. As can be seen with Brazil—one of the few developing country success stories when it comes to the DSB litigation—developing countries can become successful and efficient litigants in the DSB through dedicating resources and working with local industry.¹⁹⁸ However, Brazil is a large country with more resources than the average developing state; allowing smaller South American countries such as Paraguay or Suriname,¹⁹⁹ for example, to partner with other developing states in their region will allow these countries to better replicate Brazil's success.

Finally, the DSB Appellate Body ruling in *Brazil—Retreaded Tires* demonstrates the need for cohesion between regional trade bodies and the WTO. The problem here was not with the poverty of the parties (Brazil is one of the wealthier developing states) but with overlapping regional systems and commitments.²⁰⁰ In this case, the WTO struck down Brazil's import ban on retreaded tires partially because prior MERCOSUR litigation with Uruguay led Brazil to create an exception for the import of tires from other South American members of the MERCOSUR trading bloc.²⁰¹ Nonetheless, if MERCOSUR did have a body dedicated to equipping member states to engage in the WTO litigation, it is possible that the Uruguayan and E.U. complaints could have been consolidated in the first place. Such an arrangement might have avoided the two-tier litigation that forced Brazil to defend itself in both the WTO and MERCOSUR—saving Brazil the cost of defending itself twice and allowing Uruguay to gain a more universally-recognized ruling on Brazil's retreaded import ban. In fact, worldwide recognition for Uruguay's initial claim, through the WTO litigation, would potentially have been more likely to exert international pressure on Brazil.²⁰²

Dispute Resolution Claims, 5 S.C. J. INT'L L. & BUS. 35, 55 (2008).

197. See Pauwelyn, *supra* note 92, at 246–48.

198. See discussion *supra* Part I.F.

199. Both of these countries have far smaller gross domestic products than Brazil and, therefore, less governmental resources to expend on trade litigation in the WTO. For comparison of gross domestic products, see *GDP (Official Exchange Rate)*, CIA WORLD FACTBOOK, <https://www.cia.gov/library/publications/the-world-factbook/fields/2195.html> (last visited Mar. 16, 2014).

200. See discussion of *Brazil—Retreaded Tires* *supra* Part II.A.2.

201. See discussion of *Brazil—Retreaded Tires* *supra* Part II.A.2.

202. Cf. Pauwelyn, *supra* note 92, at 250 (“To do so may exert more pressure on the defendant country since more countries would then be notified of the alleged violation.”).

With regard to the creation of dedicated regional bodies to support South-South trade disputes, there are a number of potential drawbacks and counterarguments that must also be addressed. Considering the proposal's limited scope of assisting developing states lodge trade disputes against other developing states, there is a legitimate concern that this will have an isolating effect, preventing developing states from addressing trade irregularities with wealthier developed countries. However, as discussed above, developing states and the LDCs seldom bring complaints against developing and developed states alike. Instead, this proposal will promote both South-South litigation and, indirectly, wider DSB utilization. As seen with Brazil, China, and India, when developing countries gain experience as litigants in trade proceedings, they gain useful expertise that can be applied in other contexts.²⁰³ In a sense, the maxim that "a rising tide lifts all ships" can be extended here: expertise gained through South-South litigation will, with time, benefit developing nations in other trade disputes.

Another potential drawback is the concern of whether encouraging regional coordination of trade litigation will discourage states from filing formal complaints against states within their region—or whether this will create a conflict of interests for the regional body. This is not an uncommon problem and is one that the ACWL has sought to avoid in its own attempts to coordinate dispute resolution for developing countries.²⁰⁴ Nevertheless, the ACWL's solution is to decline to give legal advice to different countries pursuing different objectives.²⁰⁵ To provide support to adverse developing states, the ACWL established a "Roster of External Counsel" of experienced firms and individuals that have agreed to represent developing countries and the LDCs at discounted rates.²⁰⁶ If regional bodies are concerned with providing resources when a dispute involves two member countries, a similar external arrangement would be an advantageous compromise.

Finally, some may question this proposal as an unnecessary mixing of regional and international forms. Why would a developing state engage in WTO litigation when there is a perfectly good MERCOSUR or SADC forum to litigate? Indeed, there is some wisdom in this question: it is true that regional dispute bodies often have superior knowledge of

203. Cf., e.g., Bohl, *supra* note 76, at 191 (referring to Brazil's legal expertise).

204. Cf. *LDCs Are Entitled to the Services of the ACWL Without Becoming ACWL Members*, ACWL, http://www.acwl.ch/e/ld_countries/ld_countries.html (last visited Mar. 15, 2014) (referring to screening for conflicts of interest).

205. See ACWL, *HOW TO USE THE SERVICES OF THE ACWL: A GUIDE FOR DEVELOPING COUNTRIES AND LDCS* 23 (2007), available at http://www.acwl.ch/pdf/how_to.pdf.

206. *Id.*

regional regulations.²⁰⁷ It is equally true, however, that the WTO litigation offers better enforcement outcomes due to the worldwide stage and the possibility that more countries may be put on notice of an alleged violation.²⁰⁸ Moreover, the fact that a specific South-South dispute occurs between two countries does not automatically demonstrate that the effects of this litigation will not impact other third-party countries as well. When a complaint impacts other states, “the complainant may find valuable support with other nations that it would not otherwise have” in regional mechanisms.²⁰⁹

III. CONCLUSION

As the proportion of South-South commerce grows in complexity and importance in world trade, the importance of effective dispute resolution between developing states becomes more pronounced. Unfortunately, the inability of most developing countries to engage in the WTO dispute settlement threatens to derail these advances. As a result, the WTO member states should work to promote greater cohesion between the DSB and regional trade blocs through the creation of regional dispute settlement secretariats. The WTO would do well to look to the European Union as one successful model. Such an approach would effectively minimize many of the factors hindering South-South dispute settlement, such as the lack of human or economic capital.

207. Cf. Livshiz, *supra* note 98, at 533 (comparing regional trade bodies to specialized agencies).

208. Cf. Pauwelyn, *supra* note 92, at 250 (“To do so may exert more pressure on the defendant country since more countries would then be notified of the alleged violation.”).

209. *Id.*