

ICTSD Project on Dispute Settlement



ACCESS TO JUSTICE IN THE WORLD TRADE ORGANIZATION



The Case for a Small Claims Procedure
A Preliminary Analysis

By **Håkan Nordström**, Kommerskollegium, National Board of Trade
Gregory Shaffer, Loyola University Chicago School of Law



International Centre for Trade
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ABBREVIATIONS AND ACRONYMS

ACWL	Advisory Centre for WTO Law
CAP	Common Agricultural Policy
COMTRADE	United Nations Commodity Trade Statistics Database
DS	dispute settlement
DSU	WTO Understanding on the Settlement of Disputes
GATT	General Agreement on Tariffs and Trade
GDP	Gross Domestic Product
GNP	Gross National Product
H & M database	Dispute Settlement Data Set assembled by Horn & Mavroidis for the World Bank
HS	Harmonised System
LDC	least developed countries
Ln	the natural logarithm
R ²	statistical measure of the «fit» (explained variation) of the regression
SCM Agreement	Agreement on Subsidies and Countervailing Measures
UNSTAT	United Nations Statistics Division
WITS	World Integrated Trade Solution
WTO	World Trade Organization

AUTHORS

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FOREWORD

The creation of the WTO dispute settlement system is hailed as one of the major achievements of the multilateral trading system. It is unique among international tribunals adjudicating disputes among sovereign States in that it is generally able to enforce, in an economically and politically meaningful way, rulings sufficient to compel a violating party to reform its act or omissions. By improving the prospect of compliance with rulings, the WTO Dispute Settlement Understanding (DSU) constitutes an essential element in ensuring the legal certainty and predictability of the multilateral trade system. With more rigorous disciplines and a growing body of jurisprudence, the dispute settlement system has however become significantly more legalistic and consequently more arduous to navigate. WTO Member countries which are keen to avail of the system to protect or advance their trade rights and objectives face the daunting challenge of grasping and keeping pace with its increased complexity. While developing countries' participation in trade disputes has increased considerably since the days of the old dispute settlement system under the GATT, most disputes are still confined to a small number of 'usual suspects' - countries such as the US, the EC, Canada, Brazil, India, Mexico, Korea, Japan, Thailand and Argentina. So far, 76% of all WTO disputes have been initiated by this group of Members. Given that the countries facing possible undue trade restrictive measures certainly extends beyond this group, it begs the question of engagement of other Members, particularly developing countries.

Various reasons have been propounded for this lack of active participation. These include, among others, a lack of sufficient awareness of WTO rights and obligations; inadequate coordination between the government and private sector; difficulty in determining the existence of undue trade barriers and the feasibility of legal challenge; financial and human resource constraints in lodging disputes; and an oft-cited lack of political will to pursue trade disputes due to fear that trade preferences or other forms of assistance will be withdrawn, or some form of retaliatory action will be taken, if developing countries pursue cases against certain major trading partners. While these constraints need to be addressed at the national level, the WTO membership nonetheless need to continue considering ways to improve the functioning of the dispute settlement system. In this regard, the current review process of the DSU offers a potential avenue to facilitate access to the system.

The DSU is in principle blind to the commercial stakes involved in a dispute between its Members in that it makes no distinction between a claim of 100,000 dollars and a claim of 100,000,000 dollars. Arguably, a system where the procedures are the same while the stakes differ makes it less attractive for Members to engage, especially for smaller trading countries whose trade volumes may not, from their governments' perspective, merit a full-blown dispute under the current set-up. In this sense, the impartiality in the system impedes less developed countries' willingness and ability to pursue their trade interests and sustainable development objectives through the existing procedures.

Proceeding from a review of the rationale and practices of small claims procedures at the national level, the paper explores whether a similar institution can be adopted at the WTO to offset the disproportionate element of the system. The paper does not attempt to propose a specific model or to draw a direct parallel between small claims procedures at the national level and those proposed at the multilateral level; rather, the paper employs the underlying philosophy of the former to think through a creation of the latter with an aim to encourage a policy discussion.

While cognisant of the legal and political challenges involved in establishing such an institution, the paper posits the need for creative thinking and poses a series of questions to launch the debate. For instance, is it in fact possible to define a "small claim" in a meaningful way in a context where

government policies are being disputed? Will a dispute ever be considered “small” no matter the monetary value? And can it really be expected of a government to honour a ruling by an international small claims panel with no possibility of appeal?

The paper does not purport to deny that many arguments can be made against the establishment of a small claims procedure under the multilateral trading regime. Given the small nature of the claims at stake, a prejudicial issue is whether they are truly worth the cost of operating the proposed system. The risk that bigger economies will use the system against smaller and weaker ones, creating even further discrepancies in the dispute resolution system, as well as the establishment of a two-tier system that may result in a ‘second class’ form of justice being meted are also highlighted.

In the sense that, at this stage, all alternatives geared towards redressing the problems referred to in the paper are imperfect, it behooves practitioners, analysts and indeed WTO Members to consider various options that will enhance the accessibility of the DSU. Obviously, the details of the proposed small claims procedure would need to be clarified were such a procedure be adopted. However, since the primary purpose of this paper is simply to raise issues for discussion, including regarding the appropriateness of such a procedure, we leave further examination of those details for another day.

This paper is produced under ICTSD’s research and dialogue program on Trade and Dispute Settlement which aims to explore realistic strategies to optimise developing countries’ ability to avail international dispute settlement systems to pursue their trade interests and sustainable development objectives. The authors are Håkan Nordström, Chief Economist with the National Board of Trade in Stockholm and Gregory Shaffer who holds the Wing-Tat Lee Chair of International Law at Loyola University Chicago School of Law.

We hope you will find this paper a useful contribution to the debate on whether a small claims procedure should indeed be established under the WTO Dispute Settlement Understanding and, if so, the form such a mechanism should take.



Ricardo Meléndez-Ortiz
Chief Executive, ICTSD

EXECUTIVE SUMMARY

The current dispute settlement system of the WTO creates a particular challenge for small WTO Members with limited exports since litigation costs are more or less independent of the commercial stakes involved in a dispute. Small Members may therefore find it too costly to pursue legitimate claims. Reviewing the aims and practices of small claims procedures at the national level, we analyse whether a similar institution could be introduced at the WTO. While a strong empirical case can be made for such an institution, the legal and political challenges should not be underestimated. Indeed, can we at all define a “small claim” in a meaningful way in a context where government policies are being disputed? Can such disputes ever be “small” no matter the monetary value? And can we really expect a government to honour a ruling by an international small claims panel with no possibility of appeal? The answer is seemingly no on all three accounts and we have to think creatively if such an institution is to be adapted to the context of the WTO. One possibility entertained in this paper would be to limit the eligibility to cases where a WTO precedent already has been clearly established. If the small claims panel finds that the law is unclear and the precedent insufficient, the case would be transferred to the regular panel system. As an additional political safeguard, monetary damages (up to the threshold for small claims) could be considered as an alternative to compliance, so that there would be no expectation or requirement that a government must change its policy following a ruling of a small claims panel. Finally, given that a primary rationale for the procedure would be to address the challenges faced by lesser developed countries, WTO Members may wish to consider limiting availability of such procedure, as done in some national systems. Otherwise, the procedure might be used in practice primarily by larger, well-resourced countries for small claims against smaller, less well-resourced ones, replicating experiences with small claims procedures in some national systems. If use is to be restricted, WTO Members would have to determine which Members could use such procedures. This paper does not intend to propose a specific model, but rather to explore the rationale for such a procedure and its possible contours in order to provoke further discussion of this issue, as well as related ones regarding alternative means to facilitate access to the system.

1. INTRODUCTION

The law and legal system of the World Trade Organization (WTO) are in principle blind to the commercial stakes involved in a dispute between its Members. As laid down by the WTO Understanding on the Settlement of Disputes (DSU), “[t]he prompt settlement of situations in which a Member considers that *any benefits* accruing to it directly or indirectly under the covered agreements are being impaired by measures taken by another Member is *essential* to the effective functioning of the WTO and the maintenance of a proper balance between the rights and obligations of Members” (emphasis added).¹ The law makes no distinction between a claim of 100 thousand dollars and a claim of 100 million dollars. In practice, however, it may be difficult to enforce a 100 thousand dollars claim because of the substantial resource commitments involved in a legal dispute. Under the current dispute settlement system it can take up to three years to settle a dispute and cost more than half a million dollars in legal fees, as well as requiring significant time commitment for a bureaucracy that may already be severely under-resourced. Small claims are therefore unlikely to be pursued unless some important principle is at stake.

This is all as it should be, some would argue. If there were no implicit “user fees,” the dispute settlement system would implode. It has to cost something to keep out nuisance cases of insignificant value. Perhaps this is what the drafters had in mind when they, in one of the first articles of the DSU, wrote: “Before bringing a case, a Member shall exercise its judgment as to whether action under these procedures would be fruitful.”²

This interpretation is not without problem, however. What is insignificant for some Member states is highly significant to others. A million dollars in foregone export revenue may not matter much for the European Union or the United States; it would only be a few seconds worth of exports. For small developing countries like Burundi, Gambia and Guinea-Bissau, on the other hand, one million dollars corresponds to about 1.45 percent of annual exports, or put in relationship to national income, between 0.17 and 0.42 percent of GDP. A foregone export revenue of this order would not be a small order for them.

Table 1 *The relative importance of USD 1 million of export (2003)*

Rang	Member	Share of export (%)	Share of GDP (%)
1	Burundi	1,47	0,17
2	Gambia	1,45	0,27
3	Guinea Bissau	1,43	0,42
4	Solomon Islands	1,01	0,41
5	Rwanda	0,86	0,06
6	Dominica	0,84	0,38
7	Djibouti	0,80	0,16
8	Central African Republic	0,79	0,09
9	Saint Kitts and Nevis	0,66	0,27
10	Sierra Leone	0,63	0,09
	Saint Vincent and the		
11	Grenadines	0,60	0,27
12	Grenada	0,57	0,27
13	Mauritania	0,28	0,09
14	Burkina Faso	0,27	0,03
15	Belize	0,27	0,11
16	Saint Lucia	0,26	0,14
17	Niger	0,24	0,04
18	Antigua and Barbuda	0,22	0,15
19	Haiti	0,22	0,03
20	Lesotho	0,19	0,09
21	Malawi	0,18	0,05
22	Maldives	0,17	0,14
23	Chad	0,15	0,04
24	Guinea	0,15	0,03
25	Togo	0,15	0,06
...
145	Canada	0,000318	0,000117
146	China	0,000206	0,000071
147	Japan	0,000183	0,000023
148	United States of America	0,000099	0,000009
149	EU25*	0,000025	0,000009

Own calculations based on data from the WTO and UNSTAT.

**Including intra-EU25 export*

What is small is thus a relative concept. Yet the WTO dispute settlement (DS) system of today pays no attention to the inherent variation in exports across the WTO's membership. A case worth one million dollars is treated in the very same way as a case worth one billion dollars. The timetable is the same; the submission requirements are the same; the standard of proof is the same; the appeal procedures are the same; *everything* is the same unless the parties opt for the alternative resolution mechanisms offered by the DSU, including mediation and arbitration, or the 1966 fast track procedures for cases brought

by developing countries against developed ones. The alternative tracks of mediation and arbitration have only been used twice, suggesting that they are poor substitutes for the regular panel process. Part of the problem is that both parties, including the respondent, must approve the use of mediation or arbitration. Use of such procedure conflicts with the longer term strategic interest of respondents. By never yielding a case without a legal battle and never granting simplified procedures, respondents can develop a reputation for being tough and costly to challenge, which will discourage price-sensitive

complainants to take legal action subsequently. As regards the 1966 fast-track procedures, they have never been used since the WTO's creation, seemingly because shorter time lines are not practical in light of the complexity of the current dispute settlement process. We address parties' experiences with these options further in section 2.3 below.

Thus, where the procedures are the same while stakes differ, the system is not neutral to size. Notionally equal litigation rules provide unequal opportunities for WTO Members. Small trading nations are effectively constrained from being able to use the legal system to the full extent, constituting, in practice, a form of inbuilt discrimination.

One solution to this dilemma, if viewed as such by the membership, is to reduce the system's "user fees" for smaller trading nations. This can be done in three principal ways. The *first* way is to create a WTO public prosecutor with objectives and powers similar to those of the European Commission within the EU legal system.³ The public prosecutor would have the right and obligation to initiate legal proceedings against defiant governments in the general interest of upholding the treaties.⁴ A *second* way is to provide greater legal aid through the WTO, for example, by offering Member states legal counsel funded out of the regular WTO budget or a designated legal aid fund. The desirability and political feasibility of these alternatives, however, appear questionable, although the International Court of Justice (in contrast) has a trust from which it can fund legal assistance to developing countries who are parties before it, subject to defined criteria (O'Connell 1992; Becker 1993).

It is not just the money that is the issue - it is what the money is intended for. The EU has no interest financing a legal aid fund that most likely would be used to challenge some of its own cherished policies, including the Common Agricultural Policy (CAP). Likewise, the US government would face stiff opposition from organised labour and import competing industries if the legal aid would be used to challenge US anti-dumping policies. And in Japan, it could be tantamount to political hara-kiri to contribute funds to foreign governments with

an interest in prying open the Japanese market for rice and other culturally sensitive commodities. No surprise, then, that neither the EU, nor the US nor Japan has contributed to the funds of the *independent* Advisory Centre for WTO Law (ACWL), which is the only provider of legal aid at present, another alternative and/or complement which we review further below.⁵ A *third option* explored in this paper is to offer simplified and less costly litigation procedures for "small claims" pursuant to criteria we address.

Of course, it is not possible to draw a direct parallel between small claims procedures at the national level and a corresponding institution at the international level. The parallel lies more in the underlying philosophy (why the instrument is considered) than in the institutional and political context. The challenge is to find an appropriate model (or alternative mechanism) adapted to the WTO context. Indeed, can we define a "small claim" in a meaningful way in a context where government policies are being disputed? Can such disputes ever be "small" no matter the monetary value? And can we expect a government to honour a ruling by an international small claims panel with no possibility of appeal? The answer is seemingly no on all three accounts so that we have to think creatively if such an institution is to be adapted to the context of the WTO.

The aim of this paper is to *spur* a policy discussion on the appropriateness of a small claims procedure in the WTO context without the pretension of providing a full answer or model for such an institution. As an initial step, we must make a *prima facie* case that the current DS system effectively discriminates against small claims and hence owners of small claims, and thus, in particular, against least developed countries, small island economies and low income developing countries. This empirical task is carried out in section 2. Section 3 explores the issues raised by adding a small claims procedure at the WTO, after briefly examining the experience with small claims procedures at the national and EU levels. It then identifies ways to address some of the challenges posed.

2. THE CASE FOR A SMALL CLAIMS PROCEDURE

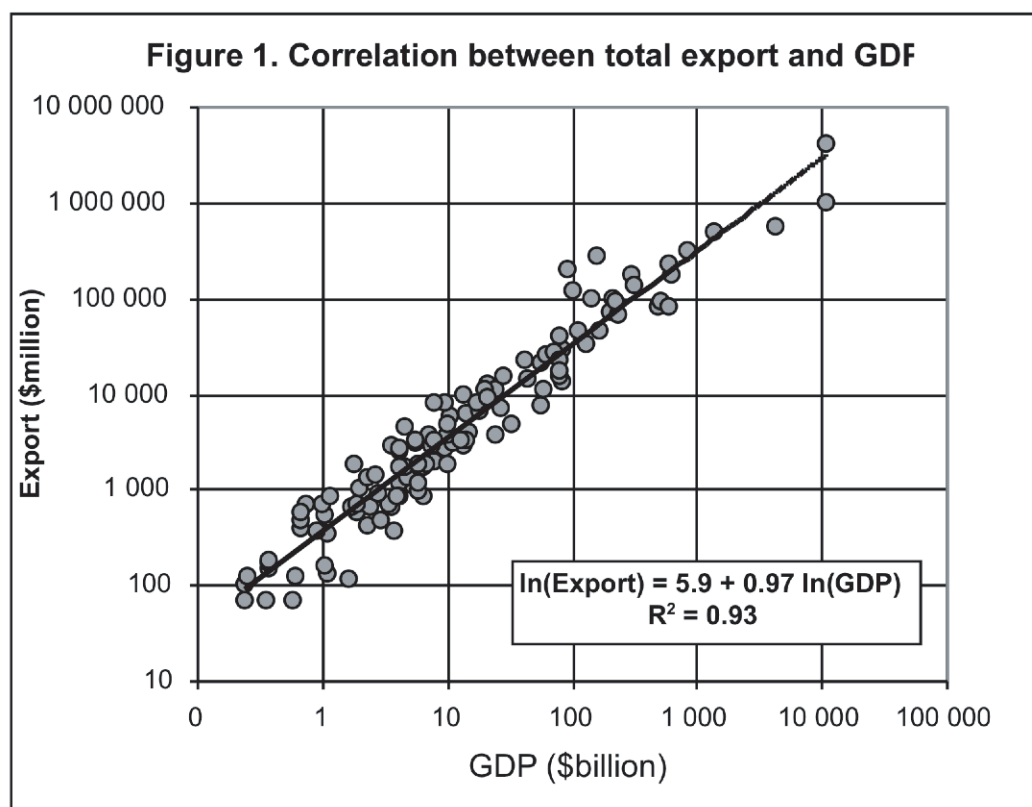
The case for a small claims procedure rests on three premises that we examine sequentially: First, trade stakes vary across the Members of the WTO. Second, claims involving smaller trade stakes are not offset by smaller litigation

costs or a reduced need for domestic WTO legal expertise. Third, the alternative dispute resolution tracks provided by the DSU today do not substitute for small claims procedures.

2.1 Trade stakes

At the aggregate level of trade, the first premise is true almost by definition. Trade varies systematically with the size of the country. The scatter plot below shows the strong correlation in data between aggregate trade and economic size measured by a WTO Member's Gross Domestic Product (GDP). It includes data for all WTO Members for 2003 apart from Liechtenstein.⁶ The

European Union is treated as a single market. On average, a one percentage difference in GDP between two Member states is associated with a 0.97 percent difference in aggregate exports. And only a few WTO Members fall outside the picture (as shown by the low spread around the fitted line and the high R^2 value).



Of course, trade disputes normally do not concern everything that is exported by a nation, but only the export of a specific product to a specific market, e.g., the export of bananas to the European Union.⁷ Any evidence of de facto discrimination against smaller trading nations because of smaller aggregate trade values must therefore be verified also at the disaggregated

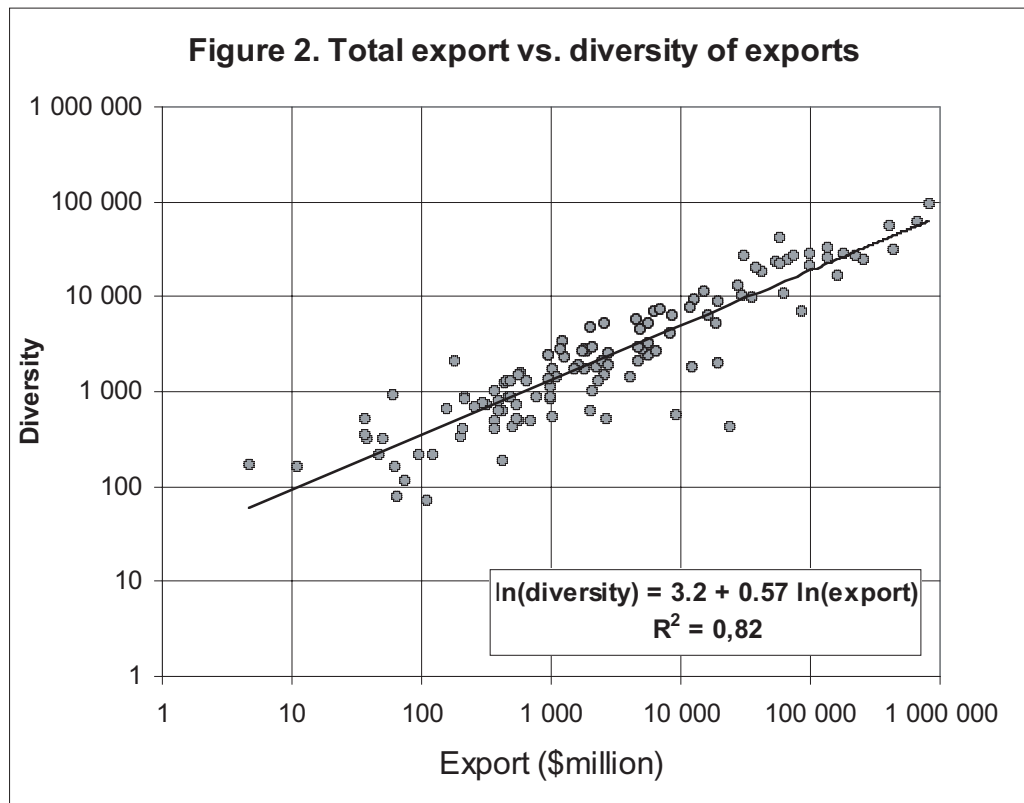
level of trade. After all, small trading nations could be large suppliers of particular products (oil, bananas, cotton, etc.) to particular markets (e.g. to neighbouring countries: Mexico to the US being a case in point) and hence be equally motivated to defend their market access under the DSU wherever it matters for that country. It is just that the number of products and markets

in which they have a strong interest is much smaller, which is one reason why small economies are less active litigants overall.⁸

In order to investigate the market situation at disaggregated levels of trade, we have extracted the 2003 trade matrix for each Member state at the 4-digit HS level.⁹ At this level of trade, the 1966 revision of the HS defines 1,241 product "headings." Cotton, sugar, bananas, coffee and milk are examples of agricultural product headings. In the industrial chapters of the HS nomenclature, we find product headings such as ships, airplanes, cars, trucks, electronic printed circuits, and so on. Many trade disputes concern this level of trade. However, a dispute can in principle cover anything from all trade to an individual tariff line. It all depends on the scope of the disputed policy measure.

The total number of data points in our dataset is close to 19 million observations, comprised of the following: 124 WTO Members (the EU is treated

as a single market) times 123 potential trading partners times 1,241 potential product headings. Only five percent of the potential observations are positive, however. Most countries export only a subset of the product range to a subset of the markets. It is only the largest Members of the WTO that have an export interest in respect of most products and markets. A Member's export diversity is calculated as the number of entries in the matrix with positive trade (entries below USD 1,000 are discarded, treated as zeros). For example, a country that exports 100 product headings to an average of ten partners receives a diversity index of 1,000. The actual export diversity ranges from 70 for Saint Kitts and Nevis to 96,011 for the EU, with an average of 7,300. The theoretical maximum is 123 partners times 1,241 product headings, equal to 152,643 positive entries in the trade matrix. When the result is plotted in Figure 2, we find strong evidence that larger countries export a greater variety of products to a greater variety of markets. The data for individual countries is reported in the Annex.



The relationship between total exports and the diversity of exports is log-linear with a slope coefficient of 0.57.¹⁰ That is, a WTO Member that exports twice as much as another Member state is on average 57 percent more diversified across products and markets. A large proportion of the variation in total exports can thus be attributed to the variation in a Member's export diversity. However, and this is an important argument for a small claims procedure in the WTO, 43 percent of the variation in aggregate exports can be attributed to variations in sales per exported product. Larger countries have, as a general rule, larger commercial stakes in absolute terms also at the product level of trade.

This finding could be a fallacy of composition, however. If large countries specialise in big-ticket

items (manufactures) and small countries in small-ticket items (agricultural products), we will observe a higher average trading stake for large countries even if the trade stakes are identical in the product range that overlap. The most neutral way of making a comparison is to go product-by-product and market-by-market. That is, if we compare sales of individual products to individual markets, can we still establish that the stakes vary with the size of the country?

The answer is in the affirmative, as shown in the statistical analysis below. We use a so-called fixed-effect panel model, where each panel is comprised of the countries that export a certain product heading to a certain market. The dataset includes 124,333 panels in total with an average of 7.2 exporters per panel.¹¹

Table 2 *The relation between bilateral export at the 4-digit HS level and the size of the exporting nation*

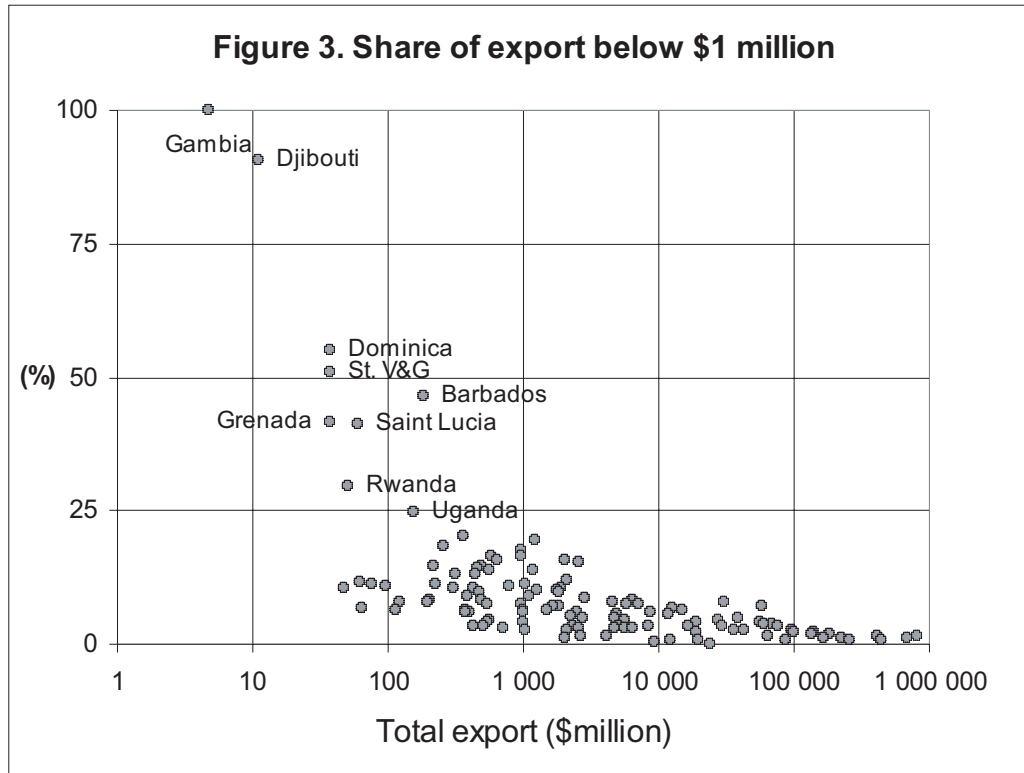
	(1)	(2)	(3)
Ln(Aggregate export)	0.557* (0.0014)		
Ln(GDP)		0.498* (0.0012)	
Ln(Population)			0.510* (0.0014)
Ln(Per capita income)			0.474* (0.0018)
R ² within	0.171	0.178	0.179

* Significant at the 1 percent level.

If the size of the supplying country were irrelevant for trade at the 4-digit product level, none of our measures of size would have any explanatory power. This is not the case. A country that exports twice as much as another country at the aggregate level of trade tends to export 55.7 percent more of those products that overlap in the export portfolio. The result is similar if we measure size in terms of GDP.

Our dataset also allows us to investigate how dependent each country is on small export lots, and indirectly then its sensitivity to high litigation

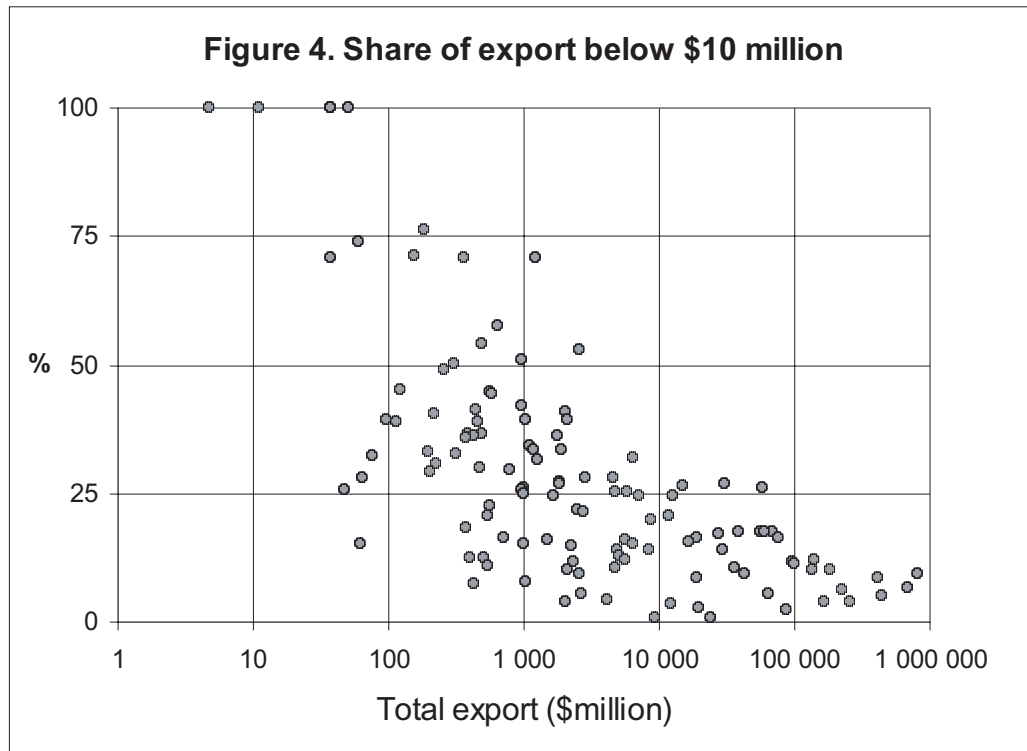
costs (including the need for internal personnel experienced with the system's complexities). Specifically, if we let the computer search through each country's trade matrix at the 4-digit level, how many entries fall below the given threshold and what share of exports do they make up in total? The basic idea is that "small" export lots may not be profitable to defend under the current DS system that treats all sizes of claims equally. Let us first consider a threshold equal to USD 1 million. The result is plotted against total exports in Figure 3. (The results are similar if instead plotted against GDP).



The scattered plot shows that most Members of the WTO sell at least 50 percent of their exports in lots exceeding USD 1 million. The share below USD 1 million falls with the size of the country in a non-linear fashion and approaches zero for countries with total exports of more than USD 100 billion. Two Members stick out as being extremely sensitive to high litigation costs (including demands on internally-developed expertise) because of the predominance of small export lots: 100 percent of Gambia's exports of goods falls below the USD 1 million mark and Djibouti is not far behind at 90.7 percent.¹² Five Caribbean countries (Dominica, Saint Vincent and the Grenadines, Barbados, Grenada and Saint Lucia) also have a large number of small export

lots that may not be worthwhile defending at the WTO under the current procedures.

If we raise the threshold to USD 10 million, the number of WTO Members that fall below the threshold in 50 percent of the export lots increases to 15. Another 45 Members fall below the USD 10 million threshold in 25 percent of the export lots. Virtually all LDCs and small island economies are at risk of being without legal protection at the WTO if this is the relevant threshold for recouping the legal expenses and other costs of a trade dispute.¹³ The situation for individual WTO Members is reported in the Annex.



In summary, we have now established that smaller trading nations have smaller trade stakes both at the aggregate and disaggregated levels

of trade. On average, they are therefore more sensitive to costly dispute proceedings than larger trading nations.

2.2 Litigation costs and internal expertise

The fact that smaller trading nations have smaller trade stakes overall and at the individual product level would not cause any particular problems from a dispute settlement point of view if it were correspondingly cheaper (including through the development of in-house expertise) to litigate small cases. We address both the cost of using external legal counsel and that of developing in-house expertise. While some may argue that litigation costs are not (or should not) be that significant of a factor, our discussions with representatives from lesser developed countries show that they are certainly perceived to be a factor. Moreover, to bring a complaint within the increasingly complex WTO legal system is not simply a matter of outsourcing a file to legal counsel. A WTO Member also needs the internal capacity to select, monitor and coordinate with outside legal counsel, including to develop the factual basis for a claim. WTO case law has been increasingly demanding on litigants in this respect.

The issue of litigation costs and the development of internal legal expertise would be reduced for individual WTO Members if the WTO provided meaningful legal aid to them. But the WTO does not have the budget or the mandate to do so. The WTO agreements rather impose an *impartiality constraint* on the WTO Secretariat (see box below). The prospect of a legal aid fund for the hiring of outside lawyers also appears bleak. It is simply not in the interest of the larger Members to “arm” the smaller ones since that would induce more claims against them.

Of course, one option for the smaller trading nations is to seek assistance from the *independent* Advisory Centre for WTO Law (ACWL) that provides legal assistance at discounted rates. The ACWL is arguably the best option for the poorest WTO Members today, and may in fact remain the best available option for them in the future. Yet the existence of the ACWL does not in itself undermine the need to assess the

rationale for adding a small claims procedure for a number of reasons. First, the ACWL has limited staff and thus is limited in its ability to handle all matters referred to it. Second, although ACWL's assistance represents a form of subsidised legal aid, it is not free. At some threshold, the demands of the process, including fees, affect a poor country's decision to bring a complaint for its claims (again, involving

low stakes in aggregate terms compared to those of other members). Third, the current system's procedures also require considerable internal work at the national level, which is not practicable for many poorer Members. A small claims procedure could reduce the demands on poorer developing countries' bureaucracies. These demands exist even when outside counsel is used.

Article 27, DSU

Responsibilities of the Secretariat

1. The Secretariat shall have the responsibility of assisting panels, especially on the legal, 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 also be a need to provide additional legal advice and assistance in respect of dispute settlement to developing country Members. 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. This expert shall assist the developing country Member in a manner *ensuring the continued impartiality of the Secretariat* (emphasis added).
3. The Secretariat shall conduct special training courses for interested Members concerning these dispute settlement procedures and practices so as to enable Members' experts to be better informed in this regard.

So what *does* professional counsel cost on the private market and is it cheaper to litigate a small case than a large one? The short and long of the answer is that we don't know with certainty. Law firms do not publicly state what they bill their clients. Fees depend on the complexity of the case and how far the case goes before a settlement is reached. A case that goes the full three-year course with appeal and subsequent wrangles over implementation may cost millions. The unofficial record is the *Japan-Photographic Film* case where the legal fees for each side are reported to have topped USD10 million for each party (Shaffer 2003a), although this amount is likely being exceeded by a wide margin in the current US-EU dispute over aircraft subsidies respectively granted to Airbus and Boeing.

One way of "estimating" the cost of legal counsel is to multiply the commercial rates charged by private law firms with the indicative time budget applied by the ACWL vis-à-vis its developing country clients. The hourly rate charged by top-notch law firms in Brussels and Washington D.C. is somewhere in the range of USD 350 to USD 750 (or more). The higher rates apply to senior lawyers and the partners of the law firm. Let's assume for the sake of this example that the average rate is USD 500 per hour, excluding other expenses, such as for travel or where outside economic consultants are needed. The time budget published by the ACWL is quite conservative according to the director of the ACWL, Frieder Roessler, and private counsel handling WTO cases. The ACWL staff, we understand, typically devotes

two-to-three times as many hours to a case as they actually bill their clients. Private law firms cannot be expected to waive costs in the same fashion since billable hours are their bread and butter.¹⁴ Accordingly, we scale up the

conservative ACWL time budget by a factor of 2.5, assuming that private law firms and ACWL are equally productive. The results of these back-of-the-envelope calculations are presented in Table 3.

Table 3 “Estimated” litigation cost

Time budget (hours)	Degree of complexity		
	Low	Medium	High
Total	643	1110	1765
Consultations	108	200	318
Panel	358	640	1028
Appeal	178	270	420
Estimated costs at \$500 per hour			
Total	321 250	555 000	882 500
Consultations	53 750	100 000	158 750
Panel	178 750	320 000	513 750
Appeal	88 750	135 000	210 000

Source: ACWL homepage and own calculations.

Factors that affect the cost include the complexity of the case, from both a factual and legal point of view, and how far the case goes before a settlement is reached. Under these back-of-the-envelope calculations, a case of average complexity would cost USD 100,000 if it ends after the initial consultations. If the case were to advance to the panel stage, it would cost another USD 320,000. And if the panel decision were appealed, the bill would rise by another USD 135,000. The total cost at the end of the day may top half a million dollars. To the extent that the ACWL is available and used, the costs would be reduced, but can still be considerable.

We wish to stress that the issue is not just litigation costs. It is also a country’s perceptions of litigation costs (including in terms of internal agency time) under uncertainty regarding the results from litigation, including the defendant’s compliance with a decision in a meaningful manner - i.e. one that actually results in increased market access. The costs are also difficult to estimate in advance since it depends on what the counterpart does. If the other party decides not to settle and the case goes to a panel after an unsuccessful consultation, the price will go up. If the other party decides to appeal the ruling, the price will increase further. If the

choice is to litigate further over compliance, the price continues to rise. Finally, if the opposing side does not comply with a ruling, then the entire litigation can be for naught. As we will see, one advantage of a small claims procedure where the remedy can be a cash payment is that a small developing country would receive some form of compensation and thus greater certainty as to whether bringing a complaint is worthwhile. Since the maximum amount of cash due would be limited by the definition of a small claim, then it may be easier to agree to (and comply with) such a remedy in this context.

A small claims procedure is needed less if small cases in commercial terms are less costly to litigate under the current system because they are less complex from a factual and legal perspective. Are they? Again, it is hard to say with certainty. Casual empiricism suggests that some high stakes cases cost more to litigate, indeed much more. The Airbus-Boeing dispute, for example, involves teams of lawyers and economists lined up on each side to gather factual evidence and prepare legal arguments. There appears to be little limit to spending money in such high profile, multi-billion dollar cases.

But such casual empiricism says little about the *inherent* relationship between litigation costs (including internal personnel time) and commercial stakes. What it tells us is that governments and their private clients are less fussy about the billable hours when the stakes are high. Yet there is no rule that factual and/or legal issues are *inherently* more complex in cases that concern a billion dollars than a million dollars. It may be true in some cases and untrue in others. Indeed, one could make the opposite case by referring to the relatively simpler rules that apply to most manufactured imports compared with agricultural imports, in spite of the fact that the former tend to involve larger values. Indeed, some of the most complex and controversial trade law issues involve relatively small commodities in value terms (compared to big-ticket manufactured products) such as bananas, sugar, rice and cotton.

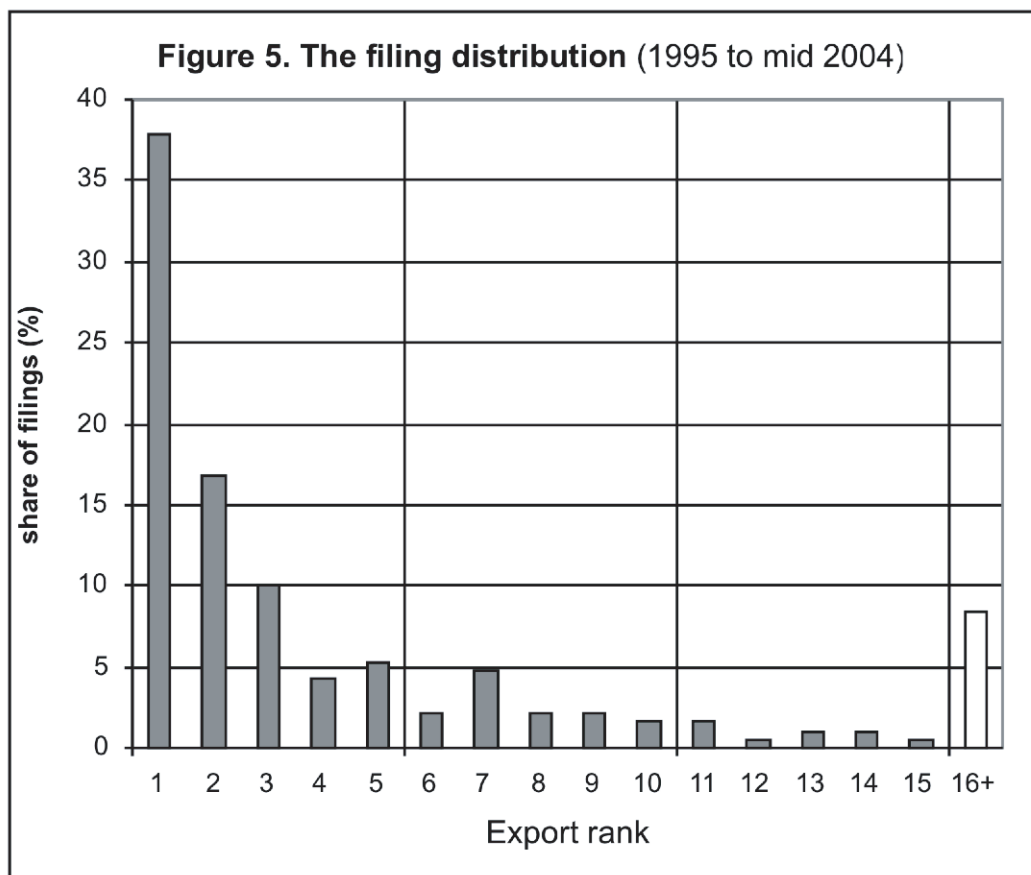
Even if one believes that small cases in commercial terms are inherently cheaper to prepare than large cases (which we doubt), the issue remains whether the offset is complete. If answered in the affirmative, both sides of the cost-benefit equation would move in tandem, maintaining the neutrality of the DS system with respect to size. But is this a plausible story?

The answer is no because of the fixed costs involved in a case. The jurisprudence must be reviewed and assessed. The consultations, the panel process and the appeals process follow a certain track regardless of the value of the case. Moreover, and perhaps most importantly, the complainant must have internal staff that follows the case and provides support to outside counsel, including the development of a factual dossier. That staff needs to be of a sufficiently high bureaucratic status that it receives the necessary political support for the case in the capital. Countries with high stakes that are repeat players before the WTO dispute settlement system are more likely to have such officials. The result of current DS procedures is to create a threshold effect that effectively

discriminates against small claims and countries that have them, even though such small claims are relatively large in relation to those countries' small economies.

This conclusion is indirectly supported by the empirical research undertaken by Bown (2005). The starting point of his research is that many disputes involve policies having a multilateral reach. Any country with a trade interest in the product(s) affected by the disputed measure could have filed the complaint.¹⁵ In fact, if the incentives to file were identical, as would be the case if stakes and costs moved in tandem, we should not see any relationship to size in the filing data. All potential litigants would be equally likely to file and the actual filing pattern would be a random draw. But this is not what the data shows. Quite the contrary, the decision to file is *systematically* related to export stakes, legal capacities and other variables that enter the cost-benefit analysis. Bown's findings suggest very strongly that the DS system is not neutral to size.

Our data compilation, using a less sophisticated method but in the same spirit, provides further evidence to this effect. Based on the product coverage reported in the Dispute Settlement Data Set assembled by Horn & Mavroidis (2006) for the World Bank, we have extracted the covered trade data from COMTRADE in the year preceding the dispute.¹⁶ Our database covers 190 disputes between 1995 and mid 2004.¹⁷ The results corroborate the findings of Bown. In 38 percent of the cases, it was the country with the highest export stake in the covered products that filed the complaint. In a further 17 percent, it was the second largest supplier that filed. And in three cases out of four, the complainant(s) belonged to the top five suppliers. The likelihood that this pattern is random and independent of the commercial stakes is nil. Figure 5 shows the relationship between the distribution of filings and the rank of the exporter in the defendant's market in the covered products.



Where a country can “piggyback” on another WTO Member’s filings, it can of course benefit (or even “free ride”). Yet small countries then become dependent on circumstance. Where a large country does not export the product, or has different interests in regards to that product, or is able to negotiate a settlement regarding the dispute that defends its interests but not that of the small country, the theoretical prospect of “piggybacking” and “free riding” provides little solace.

Taken together, the evidence suggests very strongly that the DS system is not neutral to size.

2.3 WTO alternative dispute resolution mechanisms

The final issue we need to discuss before we have established a *prima facie* case for at least considering a small claims procedure in the WTO (or some alternative reform to the same effect) is that the DSU does not offer something similar already. In fact, the DSU does offer a number of alternative tracks that at least in principle may be suitable for cases of less value.

Exporters with the highest export stakes are more likely to file a complaint. In a truly neutral system, the individual stakes should not matter. This is also the stated ambition of the DSU, laid down in Article 3.3: “The prompt settlement of situations in which a Member considers that *any benefits* [italics added] accruing to it directly or indirectly under the covered agreements are being impaired by measures taken by another Member is essential to the effective functioning of the WTO and the maintenance of a proper balance between the rights and obligations of Members.”

First, the DSU encourages parties to resolve their disputes amicably using the alternative instruments of good offices, conciliation and mediation. Good offices consist primarily of providing logistical support to the parties. It is hoped that the authority of the institution providing such offices can facilitate the resolution of the parties’ conflict. Conciliation additionally involves the direct participation of

a third person in the discussions and negotiations between the parties. In a mediation process, the mediator not only participates in, and

contributes to, the discussions and negotiations, but may also propose a solution. The parties are not obliged to accept this proposal.

Article 5

Good Offices, Conciliation and Mediation

1. Good offices, conciliation and mediation are procedures that are undertaken voluntarily if the parties to the dispute so agree.
2. Proceedings involving good offices, conciliation and mediation, and in particular positions taken by the parties to the dispute during these proceedings, shall be confidential, and without prejudice to the rights of either party in any further proceedings under these procedures.
3. Good offices, conciliation or mediation may be requested at any time by any party to a dispute. They may begin at any time and be terminated at any time. Once procedures for good offices, conciliation or mediation are terminated, a complaining party may then proceed with a request for the establishment of a panel.
4. When good offices, conciliation or mediation are entered into within 60 days after the date of receipt of a request for consultations, the complaining party must allow a period of 60 days after the date of receipt of the request for consultations before requesting the establishment of a panel. The complaining party may request the establishment of a panel during the 60-day period if the parties to the dispute jointly consider that the good offices, conciliation or mediation process has failed to settle the dispute.
5. If the parties to a dispute agree, procedures for good offices, conciliation or mediation may continue while the panel process proceeds.
6. The Director-General may, acting in an *ex officio* capacity, offer good offices, conciliation or mediation with the view to assisting Members to settle a dispute.

Second, the DSU provides for arbitration upon agreement of the parties. Arbitration is, at least potentially, a faster option than the normal panel process. It may also be a less costly one since it would not be subject to appeal, although its cost-effectiveness is not guaranteed since international arbitrations can be quite costly. Moreover, in *international commercial* arbitration the parties agree to respect the

arbitration award whatever the outcome. Enforcement could therefore be less of an issue, which clearly is an advantage to smaller players. While there is no such requirement in Article 25 of the DSU, the parties would certainly be expected to comply with the decision. Indeed, it would be disingenuous for a party to agree to arbitration pursuant to article 25 of the DSU and then renege if the outcome is unfavourable.

Article 25
Arbitration

1. Expeditious arbitration within the WTO as an alternative means of dispute settlement can facilitate the solution of certain disputes that concern issues that are clearly defined by both parties.
2. Except as otherwise provided in this Understanding, resort to arbitration *shall be subject to mutual agreement of the parties which shall agree on the procedures to be followed*. Agreements to resort to arbitration shall be notified to all Members sufficiently in advance of the actual commencement of the arbitration process. [Emphasis added].
3. Other Members may become party to an arbitration proceeding only upon the agreement of the parties which have agreed to have recourse to arbitration. The parties to the proceeding shall agree to abide by the arbitration award. Arbitration awards shall be notified to the DSB and the Council or Committee of any relevant agreement where any Member may raise any point relating thereto.
4. Articles 21 and 22 of this Understanding shall apply *mutatis mutandis* to arbitration awards.

These alternative tracks are only available, however, *if both sides concur*. We have no data regarding whether mediation or arbitration has been suggested by one party and refused by the other. What we know is that there has only been one joint request so far to the WTO Director-General for mediation, submitted by the Philippines, Thailand and the European Communities, in the special context of the launching of the Doha round of trade negotiations and the granting of a waiver for renewal of the EC-ACP preferential agreement.¹⁸ Arbitration under Article 25 has never been used as an alternative to the regular panel process.¹⁹

We can only speculate why these alternative procedures are not used more frequently. One explanation may be that it is not in the interest of the stronger party in a bilateral dispute to agree to procedures that could put the other side on a more equal footing. The possibility of raising the price for the other side by not yielding without a full-scale legal battle could induce the weaker party into a settlement on favourable terms or even discourage the case from being submitted in the first place. Why yield this advantage by agreeing to a less-

demanding mediation or arbitration? In addition, defendants may prefer to litigate than mediate WTO disputes for internal political reasons so that they can respond to their domestic constituencies protected by the trade measure that they have done everything possible to defend it, but now must comply with the legal ruling. Finally, there is no defined procedure for these alternatives so that the parties would need to define the procedure each time on an ad hoc basis. The advantage of a small claims procedure is that it could be defined in advance, possibly as an annex to the DSU. Over time, it could be viewed as a “normal” process for small claims as opposed to an exceptional one.

The *third and final* option is to invoke the accelerated procedures of the Decision of 5 April 1966 (BISD 14S/18). This option is only available to developing countries against developed country defendants. While consent is not required in this case, the accelerated timeframe was applied only once by a panel during the GATT era and has yet to be applied under the WTO.²⁰ The explanation provided on the WTO homepage for the non-use is that “developing country Members tend to prefer to have more time to prepare their

submissions.”²¹ Indeed, litigation in the WTO has become a *very* demanding exercise. The legal submissions often top 100 hundred pages, and include frequent references to previous WTO jurisprudence. These submissions are demanding to prepare even for an experienced law firm (if a Member can afford such assistance). Shorter timeframes may simply not be a viable option unless the demands on the parties are reduced correspondingly, especially for poor developing

countries that are not repeat players and thus have significantly less experience with WTO law and jurisprudence. Moreover, the shorter time lines under the 1966 procedure would only apply to the panel stage, and not to Appellate Body review, implementation panels and compliance panels, so that they should have little real impact on overall litigation costs, including in terms of personnel time.

Summary of the 1966 procedures

1. If a developing country Member brings a complaint against a developed country Member, the complaining party has the discretionary right to invoke, as an alternative to the provisions in Articles 4 (Consultations), 5 (Good Offices, Conciliation and Mediation), 6 (Establishment of Panels) and 12 (Panel Procedures) of the DSU, the accelerated procedures of the Decision of 5 April 1966.
2. The Director-General may use his good offices, and conduct consultations at the request of the developing country with a view to facilitating a solution to the dispute, where the consultations between the parties have failed.
3. If these consultations conducted by the Director-General do not bring about a mutually satisfactory solution within two months, the Director-General submits, at the request of one of the parties, a report on his action. The DSB then establishes the panel with the approval of the parties.
4. The panel must take due account of all circumstances and considerations relating to the application of the challenged measures, and their impact on the trade and economic development of the affected Members.
5. The panel should submit its findings within 60 days from the date the matter was referred to it. Where the Panel considers this time-frame insufficient it may extend it with the agreement of the complaining party.

Thus, none of the alternative routes would appear to substitute for a small claims procedure. The procedures under Article 5 (Good Offices, Conciliation and Mediation) and Article 25 (Arbitration) could in principle be used as a means to reduce costs in cases of lesser value but they require the consent of both parties. The disuse suggests that one of the parties lacks the incentive to concur, which is probably the defendant, and also (potentially) the party with the deepest pockets that is best able to absorb the costs of the regular panel process. The 1966 procedures available to developing countries

do not require any consent. The problem in this case is that developing countries with less internal legal capacity find it difficult to meet even the regular timetable. Speeding up the process is no viable option unless the demands on the parties are reduced at the same time. We conclude therefore that the alternative tracks offered by the DSU today do not provide a relevant substitute for a small claims procedure. We have thus established a *prima facie* case for consideration of a small claims procedure in the WTO.

3. SMALL CLAIMS PROCEDURES

As emphasised in the introduction, it is not possible to make a direct parallel between small claims procedures at the national level and a corresponding institution at the international level. The parallel lies more in the underlying philosophy than in the institutional and political context. The challenge is to find an appropriate model for the WTO context. Indeed, can we define a “small claim” in a context where government policies are being challenged at the international level?

Some of the issues that need careful analysis are:

- What is a “small claim” in the WTO context?
- What body should hear these claims? The same kind of ad hoc panels that hear regular cases? A new “small claims body” with professional judges? A new permanent panel body?
- Should a small claims proceeding be available to all WTO Members or only to poorer developing countries, and if

so, which ones?

- Should small claims rulings have the same precedential value as regular panel reports? Or no precedential value at all?
- Should appeals be permitted?
- Should different remedies apply, such as automatic cash compensation in the event of non-compliance?

These issues will be analysed in this section without any pretence of providing a definite answer. The aim is simply to stimulate policy debate by offering some preliminary analysis.

Let us begin, however, by explaining what small claims procedures are and what purpose they serve and how they are organised at the national level. We also discuss the proposal by the Commission of the European Communities, supported by the European Parliament, for a European Small Claims Procedure, which, to our knowledge, is the first initiative at the supranational level in this area, although once again, the proposal concerns a civil procedure to be used by persons and not states.

3.1 The national context

Most advanced national legal systems include special procedures for small claims that otherwise would be too costly to pursue.²² The primary purpose of these procedures is to provide greater access to justice to those for whom the normal civil justice system is too costly and time-consuming. These services are often provided by a division of an existing lower court of general jurisdiction, be it a municipal, county or district court, although there is great variation among jurisdictions. US state courts, for example, provide small claims proceedings for civil claims that can be satisfied by money damages below a specified dollar amount. There are also procedures for some public law claims at the US federal level, as before the US Tax Court (Whitford 1984). US states often exclude from small claims procedures, however, some categories of claims, regardless of the amount

sought, such as libel and slander actions, on the theory that these actions are quasi-criminal and are too serious to entrust to an informal procedure.

Small claims courts in the United States originated in the first two decades of the last century because reformers believed that the regular civil procedure system’s complexities and technicalities made it virtually impossible for wage earners and small businessmen to use the courts to collect wages or accounts which they were owed. Efforts have broadened since the 1960s with the rise of the consumer movement and greater demands for “access to justice.” Advocates maintain that formal civil court procedures are too cumbersome for these small cases, resulting in unreasonable delay and expense, since a lawyer is a virtual

necessity to enable litigants to find their way through the complex procedural requirements. Their primary aims have been to reduce delay by simplifying pleadings and eliminating procedural steps, and to reduce expense by reducing filing fees and eliminating the need for litigants to be represented by a lawyer because of the simplified court process.

While the adversary process is retained in the sense that each side to a dispute is responsible for presenting the arguments and facts in its favour, the judge in a US small claims proceeding often plays an active role at trial, assisting litigants in bringing out relevant facts and clarifying the legal issues involved. Court clerks also provide some basic services, such as assisting with the filing of the complaint forms and providing advice on what types of proof are needed at trial, and how to subpoena supporting witnesses when needed. To facilitate use of these procedures, for example, the state of California has created a Small Claims Legal Advisor Program (Turner & McGee 2000). Trial procedures and rules of evidence are to be informal and are left largely to the discretion of the trial judge.

While small claims courts have broadened the access to justice for ordinary people and small businesses, they have not always lived up to expectations. Some of the problems noted by Ruhnka et al (1978, p. 5-6) are:

- "Where business plaintiffs are permitted in small claims court they tend to dominate the caseload of these courts, and they usually sue individual (non-business) defendants;
- Plaintiffs almost always win and defendants almost always lose in small claims court (with the implication

being that the process is somehow arrayed against defendants or the type of people who are often defendants);

- Where lawyers are used at trial they are most often used by business plaintiffs against un-represented individual defendants (which further disadvantages defendants);
- Small claims trials are often rushed, which tends to disadvantage inexperienced defendants;
- Many litigants, particularly un-represented individuals and small businessmen, are unable to subsequently collect their small claims judgments;
- Many small claims can be factually or legally complex and they may not be adequately dealt with in an informal proceeding;
- Role conflict problems may arise when judges attempt to mediate or settle claims instead of deciding them outright."²³

Research has also shown, however, that an important benefit of small claims procedures is that claimants believe that they have been able to have access to the courts and participate effectively in proceedings where otherwise they would not. Some jurisdictions have prohibited commercial enterprises from using small claims procedures because these parties tend to be better resourced and experienced users of litigation, resulting in the potential biases indicated above (Baldwin 2002). Some of these points may also be relevant in considering whether to create a small claims procedure adapted to the WTO context, and if so, how to design it.

3.2 The European context

European member states have their own versions of small claims procedure. What is particularly noteworthy in Europe, however, is the move to create for the first time a small claims procedure at the supranational level. In 2006 the European

Parliament approved with some amendments a European Commission proposal for a European Small Claims Procedure. It covers cross-border claims of up to 2,000 Euros, other than certain categories of claims, such as for defamation.

Subject to approval by the Council, it will go into effect in all EU member states in January 2009 except for Denmark, which has opted out.²⁴ In its proposal, the Commission made the following observations as way of background to the needs of introducing European Small Claims Procedures:

“Costs, delay and vexation of judicial proceedings do not necessarily decrease proportionally with the amount of the claim. On the contrary, the smaller the claim is, the more the weight of these obstacles increases. This has led to the creation of simplified civil procedures for Small Claims in many Member States. At the same time, the potential number of cross-border disputes is rising as a consequence of the increasing use of the EC Treaty rights of free movement of persons, goods and services. The obstacles to obtaining a fast and inexpensive judgment are clearly intensified in a cross-border context. It will often be necessary to hire two lawyers, there are additional translation and interpretation costs and miscellaneous other factors such as extra travel costs of litigants, witnesses, lawyers etc. Potential problems are not limited to disputes between individuals. Also the owners of small businesses may face difficulties when they want to pursue their claims in another Member State. But

as a consequence of the lack of a procedure which is ‘proportional’ to the value of the litigation, the obstacles that the creditor is likely to encounter might make it questionable whether judicial recourse is economically sensible. The expense of obtaining a judgment, in particular against a defendant in another Member State, is often disproportionate to the amount of the claim involved. Many creditors, faced with the expense of the proceedings, and daunted by the practical difficulties that are likely to ensue, abandon any hope of obtaining what they believe is rightfully theirs.” (Article 2.1.1)

The arguments made by the Commission are parallel to those made in section 2 of this paper, with the key difference being that WTO law is not directly applicable to private subjects in the same way as the EC Treaty (at least not in Europe, the United States and, to our knowledge, in most other jurisdictions). It is therefore not possible for businesses to file a complaint before a national court arguing that this or that regulation violates a WTO provision. It is only governments that have standing at the WTO. The proposal for a European Small Claims Procedures is therefore not directly applicable to the WTO context. It is nevertheless interesting because it recognises the need for small claims procedures at the supranational level as well.

3.3 The WTO context

We now address the challenges of transposing institutions that have been developed for small claims at the national level to a setting where governments are at loggerheads over an alleged violation of a WTO agreement. Of course, behind these disputes, we often find a frustrated business that is losing market access because of a defendant government measure, such as an antidumping duty, an import quota, or a discriminatory tax or regulation. If the issue is important enough from a commercial perspective, the business *may* be able to convince the home government to bring a complaint to the WTO on its behalf. The government would typically

ask for convincing evidence since it is politically embarrassing to take another government to an international proceeding if you do not have a strong case (Shaffer 2003b; 2006b). Thus, the first thing we need to recognize is the *government-to-government* character of WTO law and the WTO dispute settlement process. Disputes in the WTO are formally between governments and not between private parties as in small claims civil court proceedings in the national context.

Second, the subject of the disputes is very different. *What is being challenged at the WTO is the law or government practice itself.*

Does this or that provision of a national law or administration of a law violate the WTO Agreements? If answered in the affirmative by a panel or the Appellate Body, the government is obliged to change the law or the administration of the law accordingly.²⁵ This process can take time and must be done in accordance with the legislative and administrative procedures in the respondent country. Design of a small claims procedure would also need to consider this factor.

Third, WTO law is complex and often open to interpretation. It has been negotiated among over 100 governments that do not typically agree on what each provision means. The art of international negotiations is creative drafting that allows everyone to sign, but which can leave significant ambiguities. Given the very nature of language, moreover, terms are often subject to interpretations with quite different implications. Legal issues thus remain open for a judicial process to consider in specific contexts. Article 3.2 of the DSU sets the mandate for the WTO dispute settlement process:

“The dispute settlement system of the WTO is a central element in providing security and predictability to the multilateral trading system. The Members recognize that it serves to preserve the rights and obligations of Members under the covered agreements, and to clarify the existing provisions of those agreements in accordance with customary rules of interpretation of public international law. Recommendations and rulings of the DSB cannot add to or diminish the rights and obligations provided in the covered agreements.”

In cases when the law is not clearly drafted and when precedents have not yet been established, some may consider small claims procedures to be inappropriate. They would, in our view, be particularly inappropriate where the preferred remedy is compliance through change of a national law or practice, as under the current system.

3.3.1 Definition of a “small claim” in the WTO context

What kind of cases should be admissible in a WTO small claims proceeding? A first criterion for using the procedure would be the monetary value of the claim. The small claims procedure would only be available for claims less than a defined amount, which would be negotiated by WTO Members.²⁶ The problem with a monetary threshold is that it can be difficult to estimate the value of a claim. Indeed, it has been notoriously difficult for arbitrators to establish the level of “nullification or impairment” in non-implementation cases. Since small claims procedures must be simple to serve their purpose, one would need some simple shorthand estimation of the value.

One solution is initially to accept the claim of the plaintiff at face value up to the defined “maximum” value for use of the procedure. As a remedy, the defendant could pay monetary damages in the amount actually determined by the small claims panel as a substitute for compliance, up to such maximum amount. The respondent would thus have a clear choice. It could comply with the ruling or pay the amount of damages determined by the panel, whichever it prefers. The political feasibility of this proposal would thus depend, in part, on whether Members will accept monetary damages (up to the maximum amount for small claims) as an alternative to compliance in small claims cases.

A second potential criterion would be for the WTO law in question to have a well-established precedent. From this perspective, a case that does not fall under clear precedent should not be admitted and should instead be referred to the regular panel system. The first and most difficult task for a small claims panel would thus be to rule on the claim’s admissibility. Does the subject matter fall under one of the established precedents? This issue could be addressed either in a preliminary hearing with the parties or be subject to an understanding that the case at any time may be transferred to the regular panel system when the panellists learn more about it.

From this perspective, a primary distinction between a small claims proceeding and the regular panel system is that the latter alone would “interpret” the WTO agreements, or using the words of DSU article 3.2, “clarify the existing provisions of those agreements in accordance with customary rules of interpretation of public international law.” The small claims procedure would only be available in cases where a clear precedent has been established. For example, WTO panels have independently established that “zeroing” violates the Anti-Dumping Agreement, which has been confirmed by the Appellate Body.²⁷ Thus, when calculating the dumping margin, at least in the contexts covered by the rulings, all transactions must be accounted for, and not just those transactions that were found to be dumped. However, should the matter arise again, a small claims panel could hear it since the illegality of zeroing has already been established. Using this criterion, the set of admissible cases might not be very large initially, but as WTO jurisprudence develops over time with new cases handled by the regular panel system, the coverage could grow and hence the usefulness of a small claims procedure.

Lawyers, however, may be quick to point out how easy it is to challenge the clarity of precedent as applied to different factual situations. As regards the example of zeroing, panellists might have to determine how to apply WTO law to address a distinct factual scenario, or in relation to a different method of antidumping calculation deployed by antidumping officials that has a similar effect but takes a different form. To the extent that the issue of “clear precedent” were to be litigated, this procedural innovation could result in increased delay and costs for the bringing of “small claims.”

In order to place limits on the ability of a small claims panel “clarifying” law through interpretation, alternative mechanisms could be used. For example, the procedures could state explicitly that an adopted small claims panel decision shall not have any precedential effect. Moreover, to further constrain the implications of such a case, the small claims procedures

could provide that a respondent has the option of paying damages up to the value of the claim (capped at the “small claims” threshold amount) in lieu of complying with the panel decision.

3.3.2. Who could bring a small claim under the procedure?

If Members were to create such a procedure, another challenging issue would be whether it should be open to all WTO Members or only smaller developing countries, and if the latter, which ones. A small claims procedure could in theory be open to all WTO Members. However, such an institutional change could, in practice, exacerbate asymmetries within the system. Since larger developed countries, are repeat users of the system for larger claims, and thus already have developed internal governmental infrastructure and know-how for making use of the system, they may more likely be the major users of a small claims procedure open to all. In this way, adoption of a small claims procedure could replicate the experience in some national civil systems in which small claims procedures have been used predominantly by wealthier and more knowledgeable creditors and landlords (repeat players) against more vulnerable parties.²⁸

If a small claims procedure is to be created, WTO Members might thus consider adopting it only for smaller developing countries as a “special and differential treatment” provision. The question then becomes which developing countries. One option would be to make the procedure available for all developing countries, as with the 1966 fast track procedures. This option may be undesirable (and politically infeasible), however, since WTO Members self-designate whether they are to be considered “developing countries,” subject to challenge by another Member. If WTO Members were to limit use of a small claims procedure to a category of countries, it would be preferable to define that category in an agreement. The easiest way would be to limit use of the procedure to “least developed countries” since this category is already a term whose definition is accepted,

linked to per capita income and related development criteria. There are currently fifty least developed countries, thirty-two of which are WTO Members. As indicated by Tables 1 and Figures 3 and 4 above, these countries generally have the lowest average trade stakes and thus are in particular need of such a procedure. This list, however, could be expanded to cover other developing countries, such as small island economies and low-income developing countries up to defined development thresholds. WTO Members agreed to an expanded list of beneficiaries in the WTO Agreement on Subsidies and Countervailing Measures, which exempts twenty developing countries (in addition to the "least developed") from the agreement's prohibition on export subsidies, so long as their per capita gross national product (GNP) remains less than USD 1,000 per year.²⁹ The ACWL also offers a potential model in its use of two proxies for a country's development status to determine the applicable legal fees charged for its services - a country's per capita GNP and its share of global trade.

3.3.3 Institutional and other aspects of interest

Finally, countries would have to determine the design of a small claims procedure. Here we offer a few points for consideration. First, what body would hear these claims? Should the WTO use its regular system of *ad hoc* panels or opt for a "small claims permanent body" with standing panellists? Our preference would be to use a pool of standing panellists for a small claims procedure, which could be part of a larger DSU reform in which a panellist body is created for all WTO disputes, as proposed by Davey (2003).³⁰ First, such a body would save time and expenses. The constitution of panels has become a very cumbersome exercise that may take months because of disagreements between the parties. In the majority of cases (and around 3/4ths of them in the 2004-2006 period), the Director-General has been asked to intervene and appoint the panel, using his mandate under DSU article 8.7. To use the same selection procedures for a small claims procedure would undermine its

purpose. Second, if a small claims procedure were to be limited to cases involving clear precedent so that the panellist(s) would have to determine whether the procedure would apply, it would be even more important to use panellists knowledgeable of WTO precedent. In any case, even were this procedure not subject to such a criterion, we believe that it would be advisable to use experienced panellists, especially since such a case would likely not be subject to appeal before the Appellate Body. If a proposal for a standing pool of panellists were accepted by WTO members in the context of the ongoing review of the DSU,³¹ there would be no need to create a special body for small claims, as the same body of panellists could hear both. Indeed, many small claims courts are organized this way in the national context and such Organisation would be the preferred solution, in our view, for the WTO.

The time period and submission demands for a small claims procedure could, of course, be reduced. Davey (2006) has already noted how the normal panel process could be expedited, as through eliminating the need for a second meeting before establishing a panel, establishing a permanent panel body, modifying and adhering to the standard time for briefings and hearings, and eliminating the interim review procedure. In addition, a small claims procedure could consist of only one filing by each side and one oral hearing, instead of two. Moreover, since a small claims panel would not create precedent, its decisions could be shorter and more to the point, saving time both in the writing of the decision and in its translation into the WTO's two other official languages.

In addition, time and costs could be saved because, in our view, these small claims would not (at least ordinarily) be subject to appeal before the Appellate Body. In this way, a WTO small claims procedure would reflect national practice, in which appeals in small claims procedure are often discouraged through procedural mechanisms and, where permitted, appear to be rare. Allowing appeals would add time and increase costs and thus partly defeat

the purpose of a small claims procedure. If WTO Members nonetheless desire to include an appeals process, the procedure could permit a party to petition the Appellate Body for a grant of *certiorari*. Petitions could only be granted on an exceptional basis if the Appellate Body found that the small claims panel either had no jurisdiction or that its ruling was clearly erroneous as a matter of law. Parties would thus no longer have an automatic right to appeal.

Finally, to the extent that countries would pay damages as determined by the panel up to the small claim threshold amount, then there would be less need for arbitration over the “reasonable period of time” for implementation, or for arbitration over compliance with the adopted ruling, as under the current system. Once again, these changes would reduce the time and cost of the proceeding.

Other issues regarding the details of the procedure would need to be clarified were a small claims procedure to be implemented. Since the primary purpose of this paper is to raise issues for discussion, including regarding the appropriateness of such a procedure, we leave further examination of such details for another day.

3.3.4. Other considerations

We realise that there are arguments against creating a WTO small claims procedure. Some may contend that more litigation facilitated by a small claims procedure could spur political contention that is simply not worth the cost to the system in light of the “small stakes” of the claim. This concern may particularly arise when politically sensitive government policies are challenged. Others may find that the introduction of a cash remedy will undermine the normative pull for compliance, resulting in a reduction of the welfare benefits from trade liberalisation. If a small claims procedure is open to all and is used primarily by large developed countries against smaller ones, some might criticise it as creating further asymmetries. If the procedure is reserved for lesser-developed countries, some might criticise it for creating a two-tier system, subjecting them to a “second class” form of justice. Others may argue that multinational companies could be behind the suit, taking advantage of a small claims procedure reserved for smaller countries, so that they might benefit “unfairly” from it. Commentators will certainly come up with other arguments as well. We simply point out, at this stage, that all alternatives are imperfect. What analysts need to consider is the relative merits of adding a small claims procedure component to the DSU (subject to different design features) compared to the reasonably available alternatives.

ANNEX 1: TRADE DATA

	Export (\$million)	HS4	Markets	Diversity	Export < \$1m	Export < \$10m
Europe and Central Asia						
Albania	433	446	25	620	10,6	36
Armenia	539	357	36	708	7,6	20,7
Bulgaria	6368	1024	105	6899	8,4	31,9
Croatia	4708	952	88	2931	4,9	25,2
EU25	826939	1240	122	96011	1,4	9,4
Georgia	262	392	40	695	18,2	49
Iceland	2308	418	58	1247	3,5	11,6
Israel	29731	961	115	10060	3,3	14,2
Kyrgyz Republic	370	229	29	405	6,1	18,2
Liechtenstein	NA	NA	NA	NA	NA	NA
Macedonia	1044	658	48	1682	11,4	39,4
Moldova	365	501	34	1018	20,1	70,8
Norway	63880	1093	118	10843	1,4	5,6
Romania	16649	1022	108	6193	3,2	15,6
Switzerland	98258	1201	122	28018	2,6	11,6
Turkey	38387	1127	120	20352	4,7	17,6
North America						
Canada	256069	1228	122	24379	0,9	3,7
United States of America	688009	1234	122	61855	1,1	6,5
East Asia and Pacific						
Australia	55416	1198	120	22668	4,2	17,6
Brunei Darussalam	4136	527	35	1403	1,6	4,3
Cambodia	2075	316	63	995	2,8	10,2
China	418786	1220	122	55750	1,5	8,7
Chinese Taipei	138602	1164	122	32594	2,3	12,1
Fiji	443	425	48	1239	13	41,4
Hong Kong	226710	1155	117	27259	1,2	6,3
Indonesia	59780	1211	121	21542	3,7	17,4
Japan	444195	1206	122	30878	0,8	5
Korea, Republic of	181653	1166	121	28579	1,7	10
Macao	2536	655	53	2099	5,9	21,6
Malaysia	101510	1164	120	20762	2,2	11,4
Mongolia	567	257	32	490	4,4	22,7
Myanmar	2764	517	61	1835	4,8	21,5
New Zealand	15174	1064	118	11190	6,3	26,5
Papua New Guinea	996	356	39	845	6	24,8
Philippines	35994	920	109	9653	2,6	10,5
Singapore	135138	1179	85	25911	2	10,3
Solomon Islands	122	130	30	217	7,7	45,3
Thailand	75381	1151	122	26413	3,4	16,5
South Asia					100	100
Bangladesh	5639	469	91	2344	3,1	11,9
India	58512	1222	122	40631	7,1	25,9
Maldives	113	20	19	70	6,2	39,1
Nepal	651	442	48	1297	15,6	57,6
Pakistan	11898	804	114	7624	5,8	20,6
Sri Lanka	4528	817	112	5595	7,8	27,9

	Export (\$million)	HS4	Markets	Diversity	Export < \$1m	Export < \$10m
Middle East and North Africa						
Bahrain	1849	552	54	1738	7,1	27,4
Djibouti	11,2	124	28	157	90,7	100
Egypt	7045	1019	90	7187	7,5	24,7
Jordan	1894	615	83	2601	10,6	33,6
Kuwait	19513	650	65	2000	0,7	2,7
Morocco	8444	827	101	4152	3,4	14,2
Oman	2826	572	77	2535	8,6	28
Qatar	12415	522	67	1754	0,9	3,4
Saudi Arabia	86185	1026	86	6999	0,6	2,4
Tunisia	6544	740	85	2626	3,1	15,2
United Arab Emirates	42321	1178	85	18518	2,8	9,3
Sub-Saharan Africa					100	100
Angola	9304	288	46	556	0,3	0,7
Benin	394	445	42	793	9,1	36,5
Botswana	2016	340	28	606	1	3,8
Burkina Faso	318	291	41	719	13	32,5
Burundi	62,5	91	29	163	11,6	15
Cameroon	2608	582	69	1449	3,1	9,5
Central African Republic	64,8	49	20	78	6,6	28,2
Chad	97,5	151	38	213	10,8	39,4
Congo	2671	275	60	509	1,4	5,5
Côte d'Ivoire	4673	659	63	2024	3	10,5
Democratic Rep of the Congo	1036	308	48	542	2,5	7,6
Gabon	303	295	58	756	10,6	50,2
Gambia	4,8	114	24	169	100	100
Ghana	2286	605	81	1800	5,2	14,8
Guinea	702	283	56	488	3,1	16,2
Guinea Bissau	76,2	95	18	114	11,3	32,3
Kenya	2035	956	109	4634	15,6	40,7
Lesotho	433	131	24	188	3,4	7,3
Madagascar	471	391	55	868	9,6	30,1
Malawi	488	428	73	1257	8,4	36,7
Mali	222	418	62	852	11,3	30,8
Mauritania	505	225	51	428	3,5	12,6
Mauritius	1838	745	87	2723	9,9	27
Mozambique	1011	420	56	805	4,2	15,2
Namibia	1280	939	63	2320	10,2	31,4
Niger	207	219	33	409	8,4	29
Nigeria	23833	195	52	420	0,1	0,6
Rwanda	50,2	144	35	310	29,7	100
Senegal	982	597	55	2382	16,4	42
Sierra Leone	217	455	49	811	14,6	40,6
South Africa	30682	1212	117	27037	8	26,8
Swaziland, Kingdom of	562	518	69	1490	13,7	44,9
Tanzania	1203	700	87	2751	13,7	33,4
Togo	485	327	66	846	14,7	54,1
Uganda	158	282	49	638	24,6	71,3
Zambia	977	555	52	1319	7,4	25,8
Zimbabwe	1753	854	61	2625	10	36,1

	Export (\$million)	HS4	Markets	Diversity	Export < \$1m	Export < \$10m
Latin America and the Caribbean						
Antigua and Barbuda	404	334	45	608	6,1	12,3
Argentina	28014	1102	112	13118	4,4	17,2
Barbados	184	539	68	2093	46,3	76,2
Belize	200	176	31	322	7,7	33,2
Bolivia	1638	550	57	1835	7	24,6
Brazil	68173	1166	121	23668	3,8	17,5
Chile	19325	1013	98	8794	4,1	16,4
Colombia	12774	1030	102	9224	6,9	24,5
Costa Rica	5762	870	82	5093	7,4	25,4
Cuba	988	464	72	1122	6,5	26,2
Dominica	37,8	130	18	321	55,1	100
Dominican Republic	5147	729	68	2736	3,2	13
Ecuador	5719	693	76	3260	4,5	16
El Salvador	1223	805	56	3266	19,3	71
Grenada	37,6	178	24	342	41,4	100
Guatemala	2573	968	76	5212	15,4	53,1
Guyana	464	421	63	1264	14,2	39,1
Haiti	371	238	48	493	6,5	35,9
Honduras	976	696	65	2336	17,7	51,1
Jamaica	1506	507	70	1733	6,5	16,1
Mexico	163494	1185	96	16556	1	3,9
Nicaragua	585	561	41	1559	16,4	44,5
Panama	785	228	43	864	10,7	29,6
Paraguay	1110	384	73	1400	9	34,1
Peru	8635	913	98	6127	5,9	19,8
Saint Kitts and Nevis	47,3	148	17	213	10,5	25,7
Saint Lucia	60,5	337	32	891	41,3	73,8
St. Vincent and the Grenadines	36,9	222	17	500	50,8	70,9
Suriname	545	304	53	511	4,1	10,8
Trinidad and Tobago	4916	771	75	4562	5,5	14,1
Uruguay	2092	644	91	2874	11,9	39,3
Venezuela	18963	879	85	5232	2,3	8,4

ENDNOTES

- 1 Article 3.3, DSU.
- 2 Article 3.7, 1st sentence, DSU.
- 3 Weiler (2001), in contrast, maintains that if the secretariat is to play an independent role in the dispute settlement system, it should do so more transparently by publishing its legal opinions, much as the European Commission does before the European Court of Justice, so that the parties may respond to them.
- 4 To the extent that one accepts the concept of “efficient breach,” then it is desirable to let parties settle a dispute without interference of a WTO public prosecutor. This debate, however, is not relevant to analysis of the desirability of a small claims procedure.
- 5 Some individual EU member states have broken rank with the European Commission and contributed national funds to the ACWL, notably the free-trade inclined members of the northern “liberal” group. Some law firms have also offered to provide some pro bono assistance.
- 6 Note that the scales on the horizontal and vertical axes are in logarithms. That is, each notch is ten times larger than the notch before it.
- 7 An example of an exception is the dispute between the European Union and the United States over the alleged export subsidies provided by the US Foreign Sales Corporation legislation. The EU maintained that these export subsidies (tax breaks on exports) put EU firms at a competitive disadvantage vis-à-vis US firms across product sectors and markets.
- 8 Horn, Mavroidis and Nordström (1999); Shaffer (2003a).
- 9 The data is extracted from United Nations Commodity Trade Statistics Database (COMTRADE), accessed through the World Integrated Trade Solution (WITS) portal. The export statistics for non-reporting countries are “mirrored” from the import statistics of reporting countries. The trade between non-reporting countries is not included since neither side of the transaction reports any trade data to the UN (or WTO for that matter).
- 10 The standard deviation is 0.024 and the t-value is 23.7.
- 11 The potential number of panels is $1,241 \times 124 = 153,884$. However, in about 20 percent of the cases, there is no recorded trade.
- 12 Services are not included in the analysis because of the shortage of data.
- 13 Again, the relevant threshold depends not only on the costs of litigation, but also on internal expertise required to select, monitor and work with outside lawyers, including to assess and develop the factual support for a claim. There may also be political costs involved if legal actions are viewed as a hostile act. Shaffer 2006a.
- 14 As indicated earlier, some pro bono assistance is available, but it is by no means guaranteed.

- 15 In fact, almost any Member of the WTO can file. The Appellate Body has established in the Bananas case that an active trade interest is not a prerequisite. (The EU was trying to remove the US from the case with the argument that the US had no direct trade interests in bananas). It suffices that a member has a potential trade interest or a "systemic interest" in the issues concerned.
- 16 We use the trade data reported by the defendant.
- 17 For about a third of the disputes we have no trade data, either because the dispute concerned services and intellectual property rights for which trade data is scant or because the coverage of the dispute was not reported in the H&M database.
- 18 Request for Mediation by the Philippines, Thailand and the European Communities, WT/GC/66, 16 October 2002.
- 19 The only recorded use of Article 25 arbitration so far is the arbitration of the level of nullification or impairment in *US Section 110(5)(B) of the US Copyright Act*, a dispute between the EU and the US. In addition, as part of the waiver granted for the EC-ACP Cotonou preferential arrangement, the EU agreed that banana exporting countries that do not benefit from such preferences could seek arbitration if they do not agree with the tariffs that the EU proposed to replace its quota system for bananas. See *ACP-EC Partnership Agreement Arbitration («Banana Tariffs Arbitration»)(WT/L/616) Brazil, Colombia, Costa Rica, Ecuador, Guatemala, Honduras, Nicaragua, Panama and Venezuela / EC* (August 1, 2005), as well as the *Second ACP-EC Partnership Agreement Arbitration* (WT/L/625) (October 27, 2005) involving the same parties.
- 20 The 1966 procedures were invoked under the GATT by Israel in 1972, by Chile in 1977, by India in 1980 and by Mexico in 1987, but the timeframes were never applied because the cases were settled. See Hudec (1987), at 66-67 & fn. 23. The procedures were applied, however, in the 1993 bananas case. See Panel Report, *EEC – Member States' Import Regime for Bananas*, WT/DS32/R (June 3, 1993). The EU, however, blocked adoption of the report. See Dunne (2002), at 295-296..
- 21 See http://www.wto.org/english/tratop_e/dispu_e/disp_settlement_cbt_e/c11s2p1_e.htm.
- 22 This presentation draws from the following sources, among others: Zucker (2003); Baldwin (2002); Ruhnka, Weller and Martin (1978); and Best et al (1994). See also Yngvesson & Hennessey (1975) and Sarat (1976).
- 23 Judges may, for example, identify more with those of a similar social class (landlords over tenants) or gender (men in divorce proceedings). As for the first point noted by Runkha, however, an empirical study of the small claims courts in Colorado showed that "the number of claims of businesses against individuals was relatively low compared to the number of claims filed by businesses against other businesses." Best (1994), at 357.
- 24 See *Judicial cooperation in civil matters: simplified and accelerated settlement of small claims litigation*, COM (2005) 87 final, Brussels, 15.3.2005 (initial Commission proposal).
- 25 Cf. Jackson (1997) & Bello (1996).
- 26 Based on the analysis in section 2, a threshold *could* be in the range US \$1 to \$10 million dollars, for example.

- 27 Under zeroing, an authority takes account of only those transactions in which dumping is found to occurred, and not all transactions. As a result of such “zeroing,” the average dumping margin and the antidumping duty are higher. See Appellate Body Report, *European Communities – Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India*, WT/DS141/AB/R, March 1, 2001 and Appellate Body Report, *United States – Laws, Regulations, and Methodology for Calculating Dumping Margins (“Zeroing”)*, WT/DS294/AB/R, Apr. 18, 2006.
- 28 But cf. Runkha (1978), at 41-48.
- 29 See Article 27.2(a) and Annex VII of the SCM Agreement.
- 30 Another option would be to include former Appellate Body members for these panels, similar to the way that retired judges are used in national systems in alternative dispute resolution mechanisms, including in small claims procedures.
- 31 See e.g. Communication from the European Communities, *Contribution of the European Communities and its Member States to the improvement and clarification of the WTO Dispute Settlement Understanding*, TN/DS/W/38 (23 January 2003).

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- Identify selected issues critical to the functioning of dispute systems;
- Assess systemic issues relevant to developing country policy-makers and influencers in the WTO;
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