

## Note

### Incentivizing Access to the WTO's Dispute System for the Least-Developed Countries: Legal Flaws in Brazil's Upland Cotton Decision

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Agriculture is one of the few areas where developing countries have an advantage over developed countries due to their ability to create the same product at significantly lower prices.<sup>1</sup> Many developed countries, however, provide agricultural subsidies to their farmers in order to improve their export market and protect farmers against the volatility of crop prices, weather fluctuations and other factors.<sup>2</sup> In an export-heavy country like the United States, these subsidies often have an adverse effect on international markets by essentially creating a price guarantee for farmers.<sup>3</sup> When the government subsidizes their losses, farmers often produce despite the decreasing demand, where they would otherwise restrict production.<sup>4</sup> Such overproduction floods global markets with the subsidized crop drives down food prices and negatively affects unsubsidized farmers who have to compete with the subsidized farmers.<sup>5</sup>

Since developing countries are unable to compete on price of the crops with developed countries, they are forced to import

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1. See Kevin C. Kennedy, *The Doha Round Negotiations on Agricultural Subsidies*, 36 DENV. J. INT'L L. & POL'Y 335, 343 (2007–2008) (comparing Western and Central African countries to the U.S. in terms of cost of cotton production).

2. See generally Matthew C. Porterfield, *U.S. Farm Subsidies and the Expiration of the WTO's Peace Clause*, 27 U. PA. J. INT'L ECON. L. 999 (2006).

3. See Elizabeth Bullington, Comment, *WTO Agreements Mandate That Congress Repeal the Farm Bill of 2002 and Enact an Agriculture Law Embodying Free Market Principles*, 20 AM. U. INT'L L. REV. 1211, 1213–16 (2005) (discussing the negative effects U.S. cotton subsidies have in other parts of the world).

4. *Id.* at 1215 (explaining the connection between U.S. subsidies and U.S. farmers' overproduction).

5. *Id.*

those crops rather than grow them on their own, nullifying a potential trade advantage.<sup>6</sup> Furthermore, because agriculture plays such a significant role in alleviating poverty in developing countries<sup>7</sup>, these subsidies are not only an economic issue, but a humanitarian one.

In response to this dilemma, the World Trade Organization (WTO) has attempted to reduce agricultural subsidies and introduce free market principles into the global market in order to increase global competitiveness.<sup>8</sup> The U.S., however, has resisted these changes.<sup>9</sup> In 2003, Brazil initiated a suit against the U.S., claiming that U.S. cotton subsidies had substantially prejudiced Brazil's cotton industry.<sup>10</sup> The WTO panel ruled largely in Brazil's favor and allowed it to enact retaliatory trade measures against the U.S. until the U.S. aligns its domestic policy with WTO requirements.<sup>11</sup> While trade sanctions have had some success in the case of Brazil's cotton industry, it does not provide the same protections to the majority of developing countries.<sup>12</sup> Most developing countries do

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6. See generally Kennedy, *supra* note 1, at 336–38 (laying out the largest exporters of cotton, with the U.S. being the biggest exporter globally). For example, in the least-developed countries in Sub-Saharan Africa, outside Cape Verde and Lesotho, agriculture employs a minimum of 50% of the total labor force. See U.N. Conference on Trade and Development, 2004, *The Least Developed Countries Report 2004: Linking International Trade with Poverty Reduction*, 349, U.N. Doc. UNCTAD/LDC/2004 (May 27, 2004).

7. See U.N. CONFERENCE ON TRADE AND DEVELOPMENT, *THE LEAST DEVELOPED COUNTRIES REPORT 2004: LINKING INTERNATIONAL TRADE WITH POVERTY REDUCTION*, at 349, U.N. Doc. UNCTAD/LDC/2004, U.N. Sales No. E.04.II.D.27 (2004).

8. INFO. AND EXTERNAL RELATIONS DIV., WORLD TRADE ORG., *UNDERSTANDING THE WTO* 26–29 (5th ed. 2011) [hereinafter *UNDERSTANDING THE WTO*] (providing an overview of the WTO's mission as it pertains to agriculture).

9. See KEVIN WATKINS, OXFAM, *CULTIVATING POVERTY: THE IMPACT OF U.S. COTTON SUBSIDIES ON AFRICA* at 1 (2002) (“I told the people, I said if you give me a chance to be the President, we’re not going to treat our agricultural industry as a secondary citizen when it comes to opening up markets. And I mean that . . . . The farm bill is important legislation . . . . It will promote farmer independence, and preserve the farm way of life. It helps America’s farmers, and therefore it helps America.” (quoting George W. Bush, President, Remarks by the President on Signing the Farm Bill (May 13, 2002))).

10. Bullington, *supra* note 3, at 1219 (noting the complaint brought to the WTO by Brazil claiming that U.S. cotton subsidies violated the Agreement on Agriculture).

11. See generally Porterfield, *supra* note 2, at 1034 (describing Brazil’s threats against U.S. intellectual property and services).

12. See Bullington, *supra* note 3, at 1219 (stating that the WTO ruled, in large part, on behalf of Brazil).

not have a trade sector advanced enough to enact effective trade sanctions against the U.S.<sup>13</sup> Therefore, while WTO remedies have improved substantially, they do not provide a viable remedy for the majority of developing countries.<sup>14</sup>

This note seeks to understand the shortcomings of the current WTO dispute system and provide recommendations for its potential improvement. Part I briefly outlines the history of agricultural subsidies, their effect on developing countries, and the WTO's attempt to remedy trade imbalances. Part II analyzes the current WTO dispute system and identifies several shortcomings in the system while advocating for modifications in the dispute system and its remedies. This part also analyzes the panel's recent decision in Brazil's cotton subsidies challenge. This Note concludes that while the WTO has substantially improved enforcement of its regulations, this improvement insufficiently protects the majority of developing countries. Adequate protection requires further modification of available remedies.

## I. EFFECTS OF AGRICULTURAL SUBSIDIES ON INTERNATIONAL MARKETS AND THE RESPONSE BY THE WTO

### A. HISTORY OF U.S. AGRICULTURAL SUBSIDIES

The U.S. has a long history of subsidizing its farmers' crops to provide risk insurance for domestic farmers.<sup>15</sup> In reaction to falling grain prices after World War I, three legislative bills granted price subsidies to domestic farmers: the 1922 Grain Futures Act, the 1929 Agricultural Marketing Act and the 1933 Agricultural Adjustment Act.<sup>16</sup> In these acts, the government

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13. See generally Ousmane Badiane et al., *Cotton Sector Strategies in West and Central Africa* (Int'l Monetary Fund, Working Paper No. WP/02/173, 2002) ("The competitiveness of the region's cotton sector is evidenced by the low level of costs when compared to other countries and the strong growth in production over the last two decades.").

14. See Kennedy, *supra* note 1, at 346 (describing how sub-Saharan African cotton farmers are continually disadvantaged by U.S. agricultural policy).

15. Porterfield, *supra* note 2, at 1002–05 (discussing the expiration of the WTO's peace clause that protected countries against challenges to domestic subsidy policy).

16. See Roberta Romano, *The Political Dynamics of Derivative Securities Regulation*, 14 *YALE J. ON REG.* 279, 312–28 (1997) (discussing the history of the Grain Futures Act, Agricultural Marketing Act and Agricultural

controlled commodity prices and agricultural supply by paying farmers to leave land unused during times of low commodity prices.<sup>17</sup> Over time, the U.S. expanded methods of agricultural subsidies to include export subsidies, price supports to different crops, increased crop insurance, increases in guaranteed federal loans and replacement of some price supports with fixed payments.<sup>18</sup>

In the 1990s, the U.S. substantially changed its approach to agricultural subsidies in response to growing pressure from the international community.<sup>19</sup> In 1994, Congress ratified the Uruguay Round of negotiations, which created the World Trade Organization and placed significant restrictions on domestic subsidies.<sup>20</sup> In 1996, Congress passed the Federal Agriculture Improvement and Reform Act, which revised and simplified direct payment programs for crops and eliminated milk price supports through government purchases in an effort to keep subsidies aligned with WTO restrictions.<sup>21</sup>

However, the Farm Security and Rural Investment Act in 2002 superseded many of these provisions and instituted three programs of subsidies for domestic farmers: (1) marketing loan program payments; (2) direct payments; and (3) counter-cyclical payments.<sup>22</sup> The government provides marketing loan subsidies to farmers based on the value of the specific commodity during times when market prices are at harvest-time lows. This allows the producer to delay the sale of the commodity until more favorable market conditions emerge.<sup>23</sup> Direct payment subsidies are a fixed payment offered to qualifying farmers without regard to the economic need of the

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Adjustment Act).

17. Porterfield, *supra* note 2, at 1002.

18. *Id.*

19. *Id.*

20. *Id.*; see generally WTO Secretariat, Info. & Media Relations Div., *WTO Agriculture Negotiations – The Issues, and where we are now* (Dec. 1, 2004), available at [http://www.wto.org/english/tratop\\_e/agric\\_e/negs\\_bkgrnd00\\_contents\\_e.htm](http://www.wto.org/english/tratop_e/agric_e/negs_bkgrnd00_contents_e.htm) (giving a general overview of agricultural issues discussed in the WTO between 2000 and 2004).

21. Farm Security and Rural Investment Act of 2002, H.R. 2646, 107th Cong., (2002) (providing overview of non-recourse loan program under the 1996 and 2002 Farm Bills).

22. Porterfield, *supra* note 15, at 1004.

23. JIM MONKE, CONG. RESEARCH SERV., RS21604, *MARKETING LOANS, LOAN DEFICIENCY PAYMENTS, AND COMMODITY CERTIFICATES*, 2–3 (2004) (explaining the market loan program).

recipient.<sup>24</sup> Because the payments are fixed, direct payment subsidies are only indirectly related to the global market for crops.<sup>25</sup> Lastly, counter-cyclical subsidies provide additional assistance on top of direct payment subsidies during periods of low demand or price lows.<sup>26</sup> In these instances, a farmer receives a counter-cyclical subsidy in addition to a direct payment subsidy in order to counteract low crop prices.<sup>27</sup> Counter-cyclical subsidies significantly rely on the market and, therefore, can fluctuate considerably.<sup>28</sup>

#### B. EFFECT ON THE INTERNATIONAL MARKET

Government payments to U.S. farmers are intended to provide protection from unsustainable losses due to decreased demand or prices.<sup>29</sup> However, subsidies that encourage production without a market for that production tend to cause overproduction.<sup>30</sup> As a result, this surplus floods the domestic and international market where the demand is disproportionate to the supply, causing a drop in prices. This adversely affects farmers in developing countries who produce that commodity.<sup>31</sup> Ironically, such a drop in prices then causes a further need to subsidize domestic farmers.<sup>32</sup> This creates a cycle in which subsidized farmers overproduce in the face of a market in which they would otherwise restrict production, thereby driving down crop prices.<sup>33</sup> These price drops,

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24. Bullington, *supra* note 3, 1219–20 (claiming that the 2002 Farm Bill violated the United States's obligations under the Agreement on Agriculture in the WTO and suggesting that Congress repeal the Act and pass legislation that reduces agricultural subsidies to within WTO regulations).

25. *Id.*

26. *Id.* at 1220–22.

27. *Id.*

28. *Id.*

29. *Id.* at 1220.

30. See UNDERSTANDING THE WTO, *supra* note 8, at 26 (explaining the effect that trade-distorting policies have on international trade and the obstruction they cause in creating an international free market).

31. See 148 CONG. REC. S4029 (daily ed. May 8, 2002) (statement of Sen. Bunning) (remarking that increased government subsidies provide incentives to overproduce and will cause prices to eventually drop due to an oversupply, forcing farmers to continue to produce at unsustainable rates); see also Bullington, *supra* note 3, at 1215.

32. Bullington, *supra* note 3, at 1242–43 (explaining how domestic subsidies hurt small domestic farms).

33. *Id.* at 1241–43 (explaining that subsidies benefit larger domestic farms that receive the most subsidies).

consequently, lead to additional subsidies.

Farmers in developed countries can generally weather these price drops, because the government subsidizes a portion of their production costs. However, farmers in developing countries struggle to compete without the buoy of subsidies.<sup>34</sup> Unable to compete with subsidized farmers in developed countries, many farmers in developing countries are forced out of business.<sup>35</sup> This causes two adverse effects: (1) since the agricultural sector in developing countries accounts for a larger part of national gross domestic product<sup>36</sup>, it causes a severe adverse effect on developing countries' economies<sup>37</sup>; and (2) the lack of domestic production of crops in developing countries necessitates the importation of crops from developed countries. This exacerbates the economic dependency of developing countries on developed countries.<sup>38</sup>

Without subsidies, agriculture represents one of the few areas in which developing countries have an advantage over developed countries. In agriculture, developing countries produce essentially the same product at significantly lower prices.<sup>39</sup> For example, cotton production in the U.S. costs roughly \$0.73/lb,<sup>40</sup> whereas in Burkina Faso it costs \$0.21/lb.<sup>41</sup> However, when the U.S. subsidizes cotton farmers and drives down the international market price, farmers in Burkina Faso

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34. *Id.*

35. *Id.* (explaining the adverse effects of U.S. farming subsidies on developing nations' economies).

36. Kennedy, *supra* note 1, at 335–36 (“With the exceptions of Cape Verde and Lesotho, agriculture employs at a minimum more than 50% of the total labor force in all [sub-Saharan African least-developed countries].”).

37. Scott D. Andersen & Meredith A. Taylor, *Brazil's WTO Challenge to U.S. Cotton Subsidies: The Road to Effective Disciplines of Agricultural Subsidies*, Bus. L. Brief 2, 4–5 (2009–2010) (discussing the \$2.9 billion in price suppression that U.S. cotton subsidies created on an annual basis in the international cotton market.)

38. *See generally* Kennedy, *supra* note 1 (illustrating how agricultural subsidies not only protect domestic farmers, but increase developing countries' reliance on U.S. exports by using cotton as an example; explaining that the U.S., China and India combined produce 50% of the world's cotton and the U.S. exports 70% of its cotton).

39. *See generally* Badiane et al., *supra* note 13 (“The competitiveness of the region's cotton sector is evidenced by the low level of costs when compared to other countries and the strong growth in production over the last two decades.”).

40. All dollar amounts are in U.S. dollars, unless indicated otherwise.

41. Kennedy, *supra* note 1, at 343; *see also* WATKINS, *supra* note 9.

cannot compete with farmers in the U.S.<sup>42</sup> A cotton farmer in Burkina Faso must then either choose to produce more or find a more profitable enterprise.<sup>43</sup> Agricultural subsidies, therefore, create an imbalanced trade system that prejudicially affects developing countries.<sup>44</sup>

C. AGRICULTURAL SUBSIDIES HAVE RECEIVED SIGNIFICANT CRITICISM FROM BOTH THE DOMESTIC AND INTERNATIONAL COMMUNITY

Agricultural subsidies have received considerable domestic and international criticism for their prejudicial effect on international crop prices and their consequent impact on the agricultural sector of developing countries.<sup>45</sup> Some members of Congress vehemently opposed a proposal to move away from agricultural subsidies and slowly towards a more paradigmatic free market system.<sup>46</sup> U.S. criticism centers on the negative effects the subsidies will have on the U.S. economy, the unsustainability of subsidized farming, and on the political ramifications on trade relationships.<sup>47</sup> In the legislative history of the 2002 Farm Bill, Senator Bunning expressed his concerns:

On the one hand, [this bill] raises price supports quickly and holds out the possibility of putting a few more dollars in their pocket in [the] short run. But, on the other hand, I believe all of these extra production

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42. Jay Fabiosa et al., *The Doha Round of the World Trade Organization and Agricultural Markets Liberalization: Impacts on Developing Economies*, 27 REV. AGRIC. ECON. 317, 318 (2005) (citation omitted) (“Exports from some of these countries are subsidized explicitly or implicitly through production subsidies and are often “dumped” on world markets. The objective of income transfer to domestic farmers is not in question, but rather, the way it is accomplished with coupled and untargeted policies. These transfers frustrate competitive exporters in developing economies and compromise income generation in poor countries, such as in the case of cotton”).

43. See Bullington, *supra* note 3, at 1242 n.123 (citing *Trade: Sour Subsidies*, ECONOMIST, Apr. 17, 2004) (referring to the exportation of illegal narcotics by developing countries).

44. Kennedy, *supra* note 1 *passim*.

45. See 148 CONG. REC. S4029 (daily ed. May 8, 2002) (statement of Sen. Bunning) (expressing concern over the domestic overproduction of crops as a result of U.S. farm subsidies); see also Kennedy, *supra* note 1, at 339–340 (explaining how ninety developing countries insisted that the issues surrounding cotton subsidies be addressed).

46. *Id.* (statement of Sen. Bunning) (“I want a farm bill I can support.”).

47. *Id.*

incentives will lead to so much overproduction of crops that it will eventually drive commodity prices through the floor and cause an income disaster in the long run.<sup>48</sup>

Senator Corzine also stated:

These subsidies naturally lead to overproduction which distorts the market, unfairly benefits a limited number of the largest producers and imposes excessive costs on all consumers . . . I am also very concerned that the legislation's large increase in commodity subsidies would undermine U.S. trade policy . . . .<sup>49</sup>

Despite this opposition, the U.S. has continued its domestic policy of using agricultural subsidies to combat price lows and demand drop-offs.<sup>50</sup>

The international community has also criticized U.S. agricultural subsidies on the basis that subsidies negatively affect the economies of developing countries.<sup>51</sup> Mark Malloch Brown, the former head of the United Nations Development Program, stated, "It is the extraordinary distortion of global trade, where the West spends \$360 billion a year on protecting its agriculture with a network of subsidies and tariffs that costs

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48. *Id.*; see also *id.* (statement of Sen. McConnell) ("In fact, the commodity title essentially tells the farmer that the market doesn't matter anymore. The target prices now become the producer's price guarantee. This policy will encourage over-production which, in turn, will lead to lower prices. This, of course, favors larger farms, because the more you produce the more Federal payments you receive. The more money you have will also enable you to purchase more land to produce even more.").

49. *Id.* at S4036 (statement of Sen. Corzine) ("I also am very concerned that the legislation's large increase in commodity subsidies would undermine U.S. trade policy and make it much harder to win concession in international trade negotiations. That's because huge U.S. subsidies would drive down global crop prices, and adversely affect the economies of many other countries, especially developing nations. These nations then would be much less likely to open their markets to American companies. The end result would be that generous subsidies to a small handful of agribusinesses would end up undermining a much broader range of U.S. manufacturers and service providers, and would cost American jobs.").

50. Watkins, *supra* note 9, at 12 (explaining that farmers will receive \$.52 for every pound of cotton under new arrangements).

51. Badiane et al., *supra* note 13, at 1 (claiming that cotton subsidies adversely affect developing nations' attempts to alleviate poverty).



developing countries about \$50 billion in potential lost agricultural exports.”<sup>52</sup> The WTO has consistently criticized domestic support in trade-related matters. It reaffirmed its disapproval during the Doha round of negotiations in 2001, stating: “Building on the work carried out to date and without prejudging the outcome of the negotiations we commit ourselves to comprehensive negotiations aimed at: substantial improvements in market access; reductions of, with a view to phasing out, all forms of export subsidies; and substantial reductions in trade-distorting domestic support.”<sup>53</sup> Nonetheless, the Food, Conservation, and Energy Act of 2008 largely reaffirmed the use of domestic agricultural subsidies. Subsidies could, again, potentially be affirmed under the Agriculture Reform, Food and Jobs Act of 2012.<sup>54</sup>

#### D. RESPONSE BY THE WTO

##### 1. Agreement on Agriculture

In 1994, the World Trade Organization signed the Agreement on Agriculture [hereinafter Agreement] as part of the Marrakesh Agreement Establishing the World Trade Organization.<sup>55</sup> The Agreement’s objective is to “establish a fair and market-oriented agricultural trading system and that a reform process should be initiated through the negotiation of commitments on support and protection . . . .”<sup>56</sup> In order to advance that objective, the WTO sought to cap the amount of

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52. Mark Malloch Brown, Dev. Programme Adm’r, United Nations, *The Millennium Development Goals and Africa: A New Framework for a New Future* (Nov. 12, 2002), <http://content.undp.org/go/newsroom/2002/november/mmb-uganda.en?src=print> (discussing the development goals for Africa of poverty reduction, educational development and health reform through the means of trade concessions, debt relief and increased development assistance).

53. World Trade Organization, Ministerial Declaration of 14 November 2001, WT/MIN(01)/DEC/1, at 3 (2001) (re-emphasizing the goals expressed in the Uruguay round of trade negotiations and in the Geneva Framework regarding reduction of domestic subsidies in order to create market access for developing countries).

54. Food, Conservation, and Energy Act, 7 U.S.C.A. §§ 8701–8793 (2008).

55. See Agreement on Agriculture, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, 1867 U.N.T.S. 410 [hereinafter Agreement on Agriculture].

56. *Id.* (quoting General Agreement on Tariffs and Trade: Decisions Adopted at the Mid-Term Review of the Uruguay Round, Apr. 8, 1989, 28 I.L.M. 1023, 1027).

subsidies a nation could annually provide to domestic farmers in an effort to limit trade-distorting measures.<sup>57</sup> “Trade distortion occurs in the [international] market when an agricultural producer’s level of production or a commodity’s price is higher or lower than it would be absent government interference.”<sup>58</sup> Article 6 of the Agreement requires each WTO member to refrain from providing agricultural subsidies in any given year in excess of the maximum amount specified for that state.<sup>59</sup> The Agreement calls the amount of funds that a government actually distributes in trade-distorting subsidies the Current Total Aggregate Measurement of Support (Current Total AMS).<sup>60</sup> The WTO designated the U.S. maximum at \$19.1 billion per year for trade-distorting, agricultural subsidies.<sup>61</sup>

The WTO divides subsidies into three different categories, termed boxes, ranging from the most trade-distorting subsidies to least trade-distorting.<sup>62</sup> The WTO categorizes the most trade-distorting subsidies as “amber box” supports.<sup>63</sup> Amber box supports include domestic policies which directly affect production and trade.<sup>64</sup> Blue box supports fall in the middle

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57. *Id.* (“[r]ecalling further that ‘the . . . long-term objective is to provide for substantial progressive reductions in agricultural support and protection sustained over’ . . . the following areas: market access; domestic support; export competition; and to reaching an agreement on sanitary and phytosanitary issues;” (quoting General Agreement on Tariffs and Trade: Decisions Adopted at the Mid-Term Review of the Uruguay Round, Apr. 8, 1989, 28 I.L.M. 1023, 1027)).

58. Bullington, *supra* note 3, at 1215; *see e.g.*, UNDERSTANDING THE WTO, *supra* note 8, at 26 (“For example, import barriers and domestic subsidies can make crops more expensive on a country’s internal market. The higher prices can encourage over-production. If the surplus is to be sold on world markets, where prices are lower, then export subsidies are needed. As a result, the subsidizing countries can be producing and exporting considerably more than they normally would.”).

59. Agreement on Agriculture, *supra* note 55.

60. Bullington, *supra* note 3, at 1223.

61. Agreement on Agriculture, *supra* note 55 (explaining how a country must calculate its Current Total AMS); *see also* Robert Zoellick, U.S. Trade Representative, Office of the U.S. Trade Representative, Press Conference with USTR Zoellick at the Conclusion of WTO General Council Meeting (Aug. 1, 2004), [http://www.ustr.gov/archive/Document\\_Library/Transcripts/2004/August/Transcript\\_of\\_Press\\_Conference\\_with\\_USTR\\_Zoellick\\_At\\_the\\_Conclusion\\_of\\_WTO\\_General\\_Council\\_Meeting,\\_Geneva,\\_Switzerl.html](http://www.ustr.gov/archive/Document_Library/Transcripts/2004/August/Transcript_of_Press_Conference_with_USTR_Zoellick_At_the_Conclusion_of_WTO_General_Council_Meeting,_Geneva,_Switzerl.html) (specifying that the U.S. Allowed Total AMS is roughly \$19.1 billion per year).

62. UNDERSTANDING THE WTO, *supra* note 8, at 28–29.

63. *See id.*

64. *Id.* (“Domestic policies that do have a direct effect on production and trade have to be cut back . . . . Developed countries agreed to reduce these figures by 20% over six years starting in 1995. Developing countries agreed to

category, which provide payments to farmers but require them to limit production.<sup>65</sup> Lastly, green box subsidies have very little to no trade-distorting effects.<sup>66</sup> The Agreement only requires states to reduce their amber box subsidies.<sup>67</sup> Therefore, the U.S. needs to reduce its amber box subsidies to \$19.1 billion or less in order to comply with the Agreement.<sup>68</sup>

## 2. The Dispute Settlement Understanding (DSU) and the Agreement on Subsidies and Countervailing Measures

When the WTO was created, the Member countries established a dispute settlement body (DSB) to govern trade disputes between countries.<sup>69</sup> Article 3.2 of the DSU states, “[t]he dispute settlement system of the WTO is a central element in providing security and predictability to the

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make 13% cuts over 10 years. Least-developed countries do not need to make any cuts. (This category of domestic support is sometimes called the ‘amber box.’).”)

65. *Id.* at 29 (“Also permitted, are certain direct payments to farmers where the farmers are required to limit production (sometimes called ‘blue box’ measures), certain government assistance programmes to encourage agricultural and rural development in developing countries, and other support on a small scale (‘de minimis’) when compared with the total value of the product or products supported (5% or less in the case of developed countries and 10% or less for developing countries).”).

66. *Id.* (“Measures with minimal impact on trade can be used freely – they are in a ‘green box’ . . . . They include government services such as research, disease control, infrastructure and food security. They also include payments made directly to farmers that do not stimulate production, such as certain forms of direct income support, assistance to help farmers restructure agriculture, and direct payments under environmental and regional assistance programmes.”); see also World Trade Organization, *Agriculture Negotiations: Background Fact Sheet, Domestic Support in Agriculture* (Oct. 1, 2002), [http://www.wto.org/english/tratop\\_e/agric\\_e/agboxes\\_e.htm](http://www.wto.org/english/tratop_e/agric_e/agboxes_e.htm) (providing an overview of the three boxes and how they are defined).

67. Bullington, *supra* note 3, at 1224.

68. *Id.* (footnotes omitted) (“The Agreement on Agriculture does not require Member States to reduce the amount of any domestic subsidies except for amber box subsidies, which are the only subsidies that count toward a Member State’s spending limit. Since the U.S. Allowed Total AMS is \$19.1 billion, the total amount of amber box support the United States may spend is also \$19.1 billion.”).

69. Dispute Settlement Rules: Understanding on Rules and Procedures Governing the Settlement of Disputes, Marrakesh Agreement Establishing the World Trade Organization art. 2, Apr. 15, 1994, THE LEGAL TEXTS: THE RESULTS OF THE URUGUAY ROUND OF MULTILATERAL TRADE NEGOTIATIONS 405 (1994), Annex 2, 1869 U.N.T.S 401 [hereinafter DSU].

multilateral trading system.”<sup>70</sup> Article 3.3 further states that “the 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.”<sup>71</sup> By conferring compulsory jurisdiction on the DSB to overhear trade disputes, the DSU establishes a governing body to ensure the equitable balance of domestic and international trade policies.<sup>72</sup>

The DSU specifically focuses on incorporating the interests of developing countries. Article 4.10 of the DSU states that Members must “give special attention to the particular problems and interests of developing country Members” in the consultation process.<sup>73</sup> The DSU repeatedly notes that developing countries should be afforded preferential treatment in dispute settlement before the WTO.<sup>74</sup> The WTO thus has addressed the need to rebalance the disparity in economic power between developed and developing nations.<sup>75</sup>

The DSU also instituted harsher remedies for successful challenges to prejudicial trade policies in order to achieve stricter enforcement.<sup>76</sup> In the GATT system that preceded the DSU, remedies attempted to rebalance trade agreements between Member nations.<sup>77</sup> However, the DSU has instead taken a stricter approach by inducing compliance rather than rebalancing trade agreements.<sup>78</sup> WTO case law reaffirms this approach in every Article 22.6 report, which always state that the purpose of countermeasures, or the suspension of

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70. *Id.* art. 3.2.

71. *Id.* art. 3.3.

72. DAVID PALMETER & PETROS C. MAVROIDIS, *DISPUTE SETTLEMENT IN THE WORLD TRADE ORGANIZATION: PRACTICE AND PROCEDURE* 16 (2nd ed. 2004).

73. DSU, *supra* note 69, at art. 4.10; *see also* PALMETER & MAVROIDIS, *supra* note 72, at 174.

74. *See* DSU, *supra* note 69, at arts. 3.12 & 12.10.

75. *Id.*

76. *See* SHERZOD SHADIKHODJAEV, *RETALIATION IN THE WTO DISPUTE SETTLEMENT SYSTEM* 28 (Ross Buckley, et al. eds., 19th ed. 2009) (“In a number of arbitration cases, it was underlined that a ‘key objective’ or ‘one of the recognized purposes’ of retaliation is to induce the losing party to comply with the DSB recommendation and ruling”).

77. PALMETER & MAVROIDIS, *supra* note 72, at 301; *see also* KENNETH W. DAM, *THE GATT: LAW AND INTERNATIONAL ECONOMIC ORGANIZATION* 80 (Chicago, 1970).

78. SHADIKHODJAEV, *supra* note 76, at 28–29.

concessions, is to induce compliance, rather than to rebalance concessions.<sup>79</sup> The DSU therefore takes a stronger regulatory approach to correcting the economic power gap and to encouraging developing countries to take advantage of the dispute settlement system.<sup>80</sup>

Furthermore, the WTO instituted the Agreement on Subsidies and Countervailing Measures [hereinafter SCM Agreement] for further regulation of prejudicial subsidies.<sup>81</sup> “The underlying aim of this Agreement is to balance the concern that domestic industries should not be put at an unfair disadvantage by competition from foreign goods which benefit from subsidies, and the concern that countervailing measures offsetting those subsidies should not create unnecessary barriers to trade.”<sup>82</sup> Article 27 of the SCM Agreement also lays down special rules for developing countries.<sup>83</sup> The DSU and the SCM Agreement seek to create an equitable balance of domestic subsidies and market access for developing countries and to institute the procedures and remedies required to enforce that balance.<sup>84</sup>

#### E. BRAZIL’S COTTON SUBSIDY CHALLENGE

In 2002, Brazil initiated WTO dispute settlement proceedings against the U.S. claiming that the U.S. violated its obligations under the SCM agreement. Brazil’s claim included the proposition that, by failing to abide by WTO regulations on agricultural subsidies, the U.S. caused serious prejudice to Brazil’s cotton industry.<sup>85</sup> Brazil alleged that U.S. cotton

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79. Decision by the Arbitrators, *European Communities – Regime for the Importation, Sale and Distribution of Bananas – Recourse to Arbitration by the European Communities under Article 22.6 of the DSU*, ¶ 6.3 WT/DS27/ARB/ECU, DSR 2000:V, 2243 (Mar. 24, 2000).

80. SHADIKHODJAEV, *supra* note 76, at 28–29.

81. *Id.* at 95.

82. *Id.* at 95–96; *see also* WTO SECRETARIAT, *GUIDE TO THE URUGUAY ROUND AGREEMENTS* 96 (Kluwer Law Int’l ed., 1999).

83. Agreement on Subsidies and Countervailing Measures art. 27, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1869 U.N.T.S. 42 [hereinafter SCM Agreement] (“Members recognize that subsidies may play an important role in economic development programmes of developing country Members”).

84. DSU, *supra* note 69, at arts. 3.12. & 12.10; *see also* SHADIKHODJAEV, *supra* note 76, at 95.

85. Panel Report, *U.S. – Subsidies on Upland Cotton*, at 2-3, WT/DS267/R (Sept. 8, 2004) (requesting the DSB panel to rule that U.S. subsidies had

subsidies significantly suppress prices of cotton internationally, causing significant losses to Brazil's cotton industry.<sup>86</sup>

The WTO arbitrator ruled largely in Brazil's favor finding that the U.S. had violated its obligations under Article 6.3 of the SCM Agreement. Article 6.3 of the SCM Agreement states:

Serious prejudice . . . may arise in any case where one or several of the following apply: (a) the effect of the subsidy is to displace or impede the imports of a like product of another Member into the market of the subsidizing Member; (b) the effect of the subsidy is to displace or impede the exports of a like product of another Member from a third country market; (c) the effect of the subsidy is a significant price undercutting by the subsidized product as compared with the price of a like product of another Member in the same market or significant price suppression, price depression or lost sales in the same market; (d) the effect of the subsidy is an increase in the world market share of the subsidizing Member in a particular subsidized primary product or commodity as compared to the average share it had during the previous period of three years and this increase follows a consistent trend over a period when subsidies have been granted.<sup>87</sup>

The WTO arbitration panel found that, based on an economic analysis, U.S. counter-cyclical cotton subsidies suppressed international prices by \$2.9 billion each year.<sup>88</sup> In order to enforce the ruling, the WTO allowed Brazil to enact retaliatory trade measures against the U.S. until the U.S. either ended the counter-cyclical and marketing loan programs or remedied the prejudicial price suppression on all affected countries, not just Brazil.<sup>89</sup> However, the panel only allowed Brazil to enact trade measures in the amount that the U.S.

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suppressed cotton prices in U.S., Brazil and world markets, thereby violating SCM Articles 5(c) and 6.3(c)).

86. Appellate Body Report, *U.S. – Subsidies on Upland Cotton*, WT/DS267/AB/R (Mar. 3, 2005) [hereinafter ABR Cotton].

87. SCM Agreement, *supra* note 83, at art. 5 (stating that WTO members may not use subsidies that cause prejudice to the domestic industry of another member).

88. See ABR Cotton, *supra* note 86.

89. See *id.*

cotton subsidies affected Brazil's cotton prices, not global cotton prices. The U.S. subsidies affected global cotton prices in the amount of \$147.3 million.<sup>90</sup>

The Brazil–U.S. cotton dispute set an important legal precedent for future challenges in the WTO's dispute settlement process. First, the arbitration panel ruled that price suppression suffices to establish a violation of the SCM agreement.<sup>91</sup> Second, the panel used an economic analysis to quantify that prejudice in financial terms, which provides a basis for remedies.<sup>92</sup> Third, the WTO allowed Brazil to enact retaliatory measures against the U.S. in the amount that the U.S. cotton subsidies affected Brazil's cotton industry. It also allowed them to continue those measures until the U.S. aligned its subsidies program with WTO regulations.<sup>93</sup> The WTO's arbitration ruling on the U.S. cotton subsidies provides a blueprint for other countries initiating challenges against countries that violate WTO subsidy regulations.<sup>94</sup> In 2007, both Canada and Brazil initiated dispute settlement proceedings against the U.S. regarding its prejudicial subsidies.<sup>95</sup> Both countries, however, have agreed to postpone proceedings pending further WTO trade negotiations.<sup>96</sup>

The *Cotton* decision provides a legal precedent for countries that successfully challenge a prejudicial subsidy to retaliate with trade measures until the respondent country remedies the prejudicial effect or eliminates the prejudicial subsidies. However, the remaining question is whether these measures are sufficient to incentivize smaller developing countries to use the dispute settlement system.

## II. ANALYSIS

While the WTO has made significant strides in creating a judicial system that is more easily accessible to developing

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90. *See id.*

91. Andersen & Taylor, *supra* note 37, at 6.

92. *Id.* at 4.

93. *See id.*

94. *Id.* at 6.

95. *See generally* RANDY SCHNEPF, CONG. RESEARCH SERV., RL34351, BRAZIL'S AND CANADA'S WTO CASES AGAINST U.S. AGRICULTURAL DIRECT PAYMENTS (2010) (detailing the legal arguments made by Canada and Brazil against direct payment subsidies and the possible political and policy ramifications for Congress).

96. *Id.* at 1.

countries, it has yet to provide sufficient access to smaller developing countries. Moreover, access is irrelevant if smaller developing countries fail to use the system. The WTO therefore needs also to provide sufficient incentives in the form of remedies for smaller developing countries to encourage them to use the WTO dispute resolution system.

While the WTO has allowed Brazil to enact \$147.3 million of retaliatory trade measures against the U.S., the U.S. has yet to repeal either the marketing loan program subsidy or the counter-cyclical subsidy.<sup>97</sup> In 2007, Brazil filed an additional complaint in the WTO system over other U.S. domestic subsidy policies in frustration over the lack of cotton subsidy reforms by the U.S.<sup>98</sup> Policy reform, however, is still a work in progress. The U.S. Senate has passed the Agriculture Reform, Food and Jobs Act of 2012, which must now pass the House of Representatives.<sup>99</sup> The legislation proposes to end counter-cyclical subsidies, direct payment subsidies and alter the marketing loan program. This initiative would rein in prejudicial subsidies and would comply with the WTO's decision.<sup>100</sup> However, there has been strong opposition to the bill. Whether it will pass the House remains unanswered.<sup>101</sup> Unable to resolve issues with the bill, Congress allowed the previous farm bill to expire on September 30, 2012.<sup>102</sup>

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97. See ABR Cotton, *supra* note 86.

98. See generally SCHNEPF RL34351, *supra* note 95.

99. Agriculture Reform, Food and Jobs Act of 2012, S. Res. 3240, 112th Cong. (2012).

100. See *id.*

101. Brandon Arnold & Sallie James, *Plenty of Blame to Go Around on Farm Bill Travesty*, THE CATO INSTITUTE (Nov. 14, 2002, 2:47 PM), <http://www.cato.org/publications/commentary/plenty-blame-go-around-farm-bill-travesty> (“[T]he top House Republican, Rep. John Boehner (Ohio), has openly stated his opposition to the farm bill. ‘The [legislation] . . . extends flawed policies that keep American farmers dependent on government subsidies and discourage other countries from opening their markets to American farm export,’ he noted in a May 13 letter to a colleague. ‘This approach doesn’t help American farmers — it hurts them. We shouldn’t support it.’”); see also Keith Collins & Harun Bulut, *Crop Insurance and the Future Farm Safety Net*, 26 CHOICES: THE MAGAZINE OF FOOD, FARM AND RESOURCE ISSUES 1, 3 (2011), <http://www.choicesmagazine.org/choices-magazine/submitted-articles/crop-insurance-and-the-future-farm-safety-net> (“Sharp cuts in premium subsidies, delivery cost payments to companies, and Federal reinsurance would likely generate significant opposition from producers, companies, and farm suppliers.”).

102. Marni Salmon, *Food Fight: A Case Study of the Community Food Security Coalition’s Campaign for a Fair Farm Bill*, CAPSTONE COLLECTION 9 (July 2012) (M.A. thesis, SIT Institute) (“The Food, Conservation and Energy



While retaliatory trade measures incentivize developed countries to reform policies when the measures come from a country like Brazil with significant economic power, these measures have less influence when instituted by countries with a smaller economy.<sup>103</sup> Brazil has the seventh largest GDP in the world at \$2.32 trillion annually.<sup>104</sup> If a country with such economic clout has had trouble convincing the U.S. to change its domestic subsidy policies, how would a country like Nigeria fare with an annual GDP of roughly \$418 billion?<sup>105</sup> Nigeria is not even one of the world's least developing countries (LDC), which have barely taken advantage of the WTO dispute system.<sup>106</sup> The WTO must find some way to balance the economic power gap between larger developing countries, like Brazil, and smaller developing countries, like Nigeria.

Although the WTO initiated the DSU with the intention of encouraging use of the dispute settlement system for smaller developing countries,<sup>107</sup> it has largely failed in that goal. Developing countries have used the WTO dispute settlement system more than the GATT system,<sup>108</sup> but the statistics on access for developing countries are misleading. While 40% of the complaints filed in the dispute system have been from developing countries, only five countries account for 60% of

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Act of 2008, more commonly known as the 2008 Farm Bill, expires on September 30, 2012.”).

103. Kristin Bohl, *Problems of Developing Country Access to WTO Dispute Settlement*, 9 *CHI.-KENT J. OF INT'L & COMP. L.* 130, 131–32 (2009)

104. CIA: THE WORLD FACTBOOK, <https://www.cia.gov/library/publications/the-world-factbook/geos/br.html> (last visited Nov. 4, 2012).

105. *Id.*

106. Bangladesh is the only least-developed country to initiate dispute settlement proceedings in *India – Anti-Dumping Measure on Batteries from Bangladesh*, WT/DS306/1 (Feb. 2, 2004) [hereinafter *Anti-Dumping Measure*].

107. Bohl, *supra* note 103, at 133 (“The WTO negotiators plainly intended to encourage developing countries to use the system, as demonstrated by ‘special and differential treatment’ provisions laid out across the various WTO agreements. These provisions specifically deviate from the general rules, and they provide special rights ‘which give developed countries the possibility to treat developing countries more favorably than other WTO Members.’ The text of the DSU alone contains at least eleven such provisions by which developing countries should enjoy.”); *see also* DSU, *supra* note 69, at art. 21.2 (“Particular attention should be paid to matters affecting the interests of developing country Members with respect to measures which have been subject to dispute settlement.”); Bohl, *supra* note 103, at 32 fn.8.

108. *See generally* Bohl, *supra* note 103, at 131–33 (noting that larger developing countries have made greater use of the dispute settlement system in recent years).

those complaints. Thirteen countries account for 90% of them.<sup>109</sup> In fact, no country in Africa or in the Middle East has ever initiated a complaint in the WTO dispute system.<sup>110</sup> Currently, ninety-five of the WTO's 120 non-OECD countries have never filed a complaint before the WTO.<sup>111</sup> Only one least-developed country has ever filed a WTO complaint.<sup>112</sup> As it stands, the WTO dispute system principally benefits the most economically powerful countries.<sup>113</sup>

This problem exists for two overarching reasons: access and incentive. First, smaller developing countries do not have the same access to the WTO's dispute settlement system.<sup>114</sup> Second, the remedies that the WTO offers to successful claimants do not incentivize smaller developing countries to initiate timely and costly dispute settlement proceedings against developed countries.<sup>115</sup> The problem of access has been extensively addressed above. The second problem is a more novel concept and becomes more relevant in light of the recent *Cotton* decision.

#### A. IMPORTANCE OF ACCESS TO DISPUTE SETTLEMENT SYSTEM

Before discussing the issues of developing countries' access to and incentive to use the WTO's dispute settlement system, this Note addresses why access to the system is important. First, access to the WTO dispute system has generally worked

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109. Gregory Shaffer, *Developing Country Use of the WTO Dispute Settlement System: Why it Matters, the Barriers Posed*, in TRADE DISPUTES AND THE DISPUTE SETTLEMENT UNDERSTANDING OF THE WTO: AN INTERDISCIPLINARY ASSESSMENT, at 167, 177 (Frontiers of Econ. & Globalization vol. 6, 2009).

110. *Id.* This point is especially egregious, because African countries have the largest potential for agricultural growth, and are definitely affected. See generally World Bank, *Agriculture: Value Added (Annual % Growth)*, DATA, <http://data.worldbank.org/indicator/NV.AGR.TOTL.KD.ZG> (last visited Nov. 4, 2012) (providing each country's annual growth rate for agricultural value added).

111. Shaffer, *supra* note 109, at 177.

112. See generally *Anti-Dumping Measure*, *supra* note 106.

113. See, e.g., Bohl, *supra* note 103, at 131–32.

114. See Shaffer, *supra* note 109; see also Obijiofor Aginam, *Food Safety, South-North Asymmetries, and the Clash of Regulatory Regimes*, 40 VAND. J. TRANSNAT'L L. 1099 (2007); Bohl, *supra* note 103.

115. Shaffer, *supra* note 109, at 182.

for larger countries.<sup>116</sup> Three years after favorable adjudication by the WTO regarding the complainant's affected goods, the complainants' exports of the affected goods to the respondent countries increased substantially.<sup>117</sup> Successful claimants have used the WTO system to balance regulations affecting international trade and have increased their market access, which is essential for developing countries.<sup>118</sup> However, the successful claimants have generally been economically powerful countries.

Secondly, WTO jurisprudence not only affects the participating countries in dispute settlement, but shapes the perceptions of international trade law.<sup>119</sup> Just as with the U.S. legislation, when Congress leaves its interpretation and application to the court system, so too do international agreements require interpretation by a judicial body. Neither the legislation nor the judicial system can foresee every circumstance.<sup>120</sup> The WTO dispute system serves this function, but fails to do so if smaller developing countries do not use the system, leaving prejudicial policies unchallenged. Furthermore, when countries use the dispute system, it provides both precedent and guidelines for other countries in similar disputes.<sup>121</sup> This point is illustrated by in the *Cotton* case. Now that Brazil has navigated the complexities of challenging a domestic subsidy, other countries can use similar tools as a blueprint for successful challenges.<sup>122</sup> The WTO panel used a number of novel approaches in determining the prejudicial effect of U.S. cotton subsidies on the international cotton market, including economic models to prove price suppression.<sup>123</sup> The panel also determined that subsidies can

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116. *Id.* at 169–70; see also David Evans & Gregory C. Shaffer, *Conclusion, in DISPUTE SETTLEMENT AT THE WTO: THE DEVELOPING COUNTRY EXPERIENCE* 342, 342–43 (Gregory C. Shaffer & Ricardo Melendez-Ortiz eds., 2010).

117. Shaffer, *supra* note 109, at 171 (citing Chad Bown, *On the Economic Success of GATT/WTO Dispute Settlement*, 86 REV. ECON. & STAT. 811 (2004)).

118. *Id.* at 170.

119. Shaffer, *supra* note 109, at 172.

120. *Id.*

121. See Andersen & Taylor, *supra* note 37, at 6.

122. See *id.* at 5. (“[I]t will be considerably easier for future complaining party litigants to plan and prosecute successfully their serious prejudice challenges because of the lessons learned from the *Cotton* decisions.”).

123. *Id.* at 6 (footnote omitted) (“[T]he Arbitrators confirmed the viability and utility of particular types of econometric models to assess the effects of

substantially prejudice a well-functioning international market by significantly suppressing prices and that this can be demonstrated causally.<sup>124</sup> Both Canada and Brazil have initiated WTO disputes against the U.S. regarding its domestic subsidy policies.<sup>125</sup> The findings in the *Cotton* decision will provide significant guidance for these countries in their disputes.<sup>126</sup>

Third, a failure to participate in the WTO dispute system allows prejudicial subsidies to continue unchecked.<sup>127</sup> Price suppressing subsidies force developing countries' farmers to produce and export more commodities to keep up with the international market, which has a detrimental effect on the social welfare of a country.<sup>128</sup> By successfully challenging these prejudicial subsidies, countries can remove these effects, resulting in the improvement of both their agricultural sector and the social welfare of their country.<sup>129</sup>

Lastly, WTO law can affect domestic and bilateral political negotiations.<sup>130</sup> WTO retaliatory measures force governments to consider how costly their protective policies are in light of those retaliatory trade measures.<sup>131</sup> For example, after \$147.3 million of Brazilian trade retaliation, the U.S. will have to consider the economic and political ramifications of continuing their cotton subsidies.<sup>132</sup> While it may not unilaterally change domestic policies, it will be a significant future consideration.<sup>133</sup>

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subsidies . . . . The use of such models is crucial given the counterfactual nature of the entire serious prejudice question, i.e. whether, but for the subsidies, world prices would have been higher. Future complaining parties can adopt and adapt as necessary these models in preparing future challenges. This will significantly facilitate the defense of such models.”).

124. *Id.* at 5–6.

125. See generally RANDY SCHNEPF, CONG. RESEARCH SERV., RL 33853, CANADA CORN TRADE DISPUTE (2007) (explaining Canada's legal dispute against U.S. corn subsidies and noting possible policy ramification if the dispute should succeed).

126. Andersen & Taylor, *supra* note 37, at 6.

127. See Shaffer, *supra* note 109, at 171.

128. *Id.*

129. *Id.*

130. *Id.* at 172.

131. Cf. Robert W. Staiger & Guido Tabellini, *Do GATT rules help governments make domestic commitments?*, 11 ECON. & POL. 109 (1999) (showing that the GATT and WTO rules, including possible retaliations from trading partners in response to the violation of the rules, have influence on governments' trade policies).

132. See SCHNEPF RL 33853, *supra* note 125, at 11.

133. See Shaffer, *supra* note 109, at 173–74; see also Marc Busch & Eric

Regarding bilateral negotiations, the WTO case law significantly affects future decisions since the case law is not as developed as the U.S. common law.<sup>134</sup> Because WTO rulings can significantly affect future decisions, the most frequent complainants can shape the law, thus tipping the scales of international trade law in their favor.<sup>135</sup> This becomes a distinct advantage in negotiations following a judicial decision by the WTO, because policies are generally changed through political negotiations informed by the decision, rather than an enforcement mechanism by the WTO (the *Cotton* dispute is an exception).<sup>136</sup> Therefore, developed countries that use the WTO dispute settlement system much more frequently garner a significant political advantage over smaller developed countries that rarely use the system.<sup>137</sup> For these reasons, in order to sufficiently represent the interests of smaller developing countries, the WTO must increase their access to dispute settlement.

#### B. PRINCIPAL OBSTACLES TO DEVELOPING COUNTRIES' ACCESS TO DISPUTE RESOLUTION

In order to determine how to increase smaller developing countries' access to WTO dispute resolution, we must assess the obstacles to their access. There are several factors that affect smaller developing countries' failure to use the WTO's dispute settlement system. One of the most prohibitive factors is the cost of litigation.<sup>138</sup> In *Chile – Price Band System and Safeguard Measures relating to Certain Agricultural Products*, filed by Argentina in 2000, the Association of Argentine Edible Oil Industries paid approximately \$400,000 to a law firm just for the first draft of a demand.<sup>139</sup> Other countries willingly pay

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Reinhardt, *Bargaining in the Shadow of the Law: Early Settlement in GATT/WTO Disputes*, 24 *FORDHAM INT'L L.J.* 158 (showing that GATT/WTO adverse rulings, despite their lack of enforcement power, have induced settlements between future parties.).

134. See generally Shaffer, *supra* note 109, at 168–69 (discussing the development of international trade case law).

135. Shaffer, *supra* note 109, at 173–74.

136. *Id.* at 174.

137. *Id.* at 173.

138. See, e.g., Bohl, *supra* note 103, at 144–51; Shaffer, *supra* note 109, at 183–85.

139. Shaffer, *supra* note 109, at 183 (citing Diana Tussie & Valentina Delich, *The Political Economy of Dispute Settlement: A Case from Argentina*, Latin Am. Trade Network, Working Paper No. 33, 2004).

much more in legal fees. In the *U.S.-EC Boeing Airbus* dispute, legal fees ran up to approximately \$1 million per month.<sup>140</sup> Specifically regarding agricultural subsidies in the *Cotton* dispute, Brazil's cotton trade association paid roughly \$2 million in legal fees.<sup>141</sup> Providing sufficient evidence to prove a link between U.S. domestic policy and international price suppression required extremely resource intensive measures, including statistical analyses and quantifiable economic data.<sup>142</sup> Brazil can more easily pay these fees with its annual GDP of \$2.32 trillion, but a country like Uganda, whose annual GDP is roughly \$17 billion, will struggle to cover that cost.<sup>143</sup> The costs associated with complex dispute settlement proceedings provide a significant barrier to developing country access.<sup>144</sup>

The WTO has made strides in this area by allowing developing countries to participate in the WTO litigation at a subsidized rate through the Advisory Centre on WTO Law (ACWL).<sup>145</sup> Each member country contributes to the ACWL, which then charges developing countries with an "economy in transition" at various rates. The rates depend on the countries' size and ability to pay.<sup>146</sup> The Center also provides free legal advice on WTO law.<sup>147</sup> Moreover, it places special emphasis on the least-developed countries by automatically granting those countries access to its services.<sup>148</sup> The ACWL has had relative success thus far in the dispute system. From 2001 to 2008, it had provided support in thirty-seven dispute settlement proceedings, which constituted over 20% of the proceedings during that time.<sup>149</sup> With an emphasis on increasing participation by developing countries, the ACWL constitutes a significant step towards a more equitable judicial system in the

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140. *Id.* at 184.

141. *Id.* at 183.

142. *See generally* Andersen & Taylor, *supra* note 37.

143. CIA: THE WORLD FACTBOOK, <https://www.cia.gov/library/publications/the-world-factbook/fields/2195.html> (last visited Nov. 14, 2012).

144. *See* Shaffer, *supra* note 109, at 184–85.

145. *See* Agreement Establishing the Advisory Centre On WTO Law, Nov. 30, 1999, 2299 U.N.T.S. 249 [hereinafter ACWL Agreement]; *see also* Shaffer, *supra* note 109, at 184 ("The Advisory Centre on WTO Law enables developing countries to participate at subsidized rates and has represented an important development for the system."). *But see* Bohl, *supra* note 103, at 146–47.

146. ACWL Agreement, *supra* note 145, annex IV (explaining the various rates charged for different services).

147. *Id.*

148. Evans & Shaffer, *supra* note 116, at 347.

149. *Id.*

WTO.<sup>150</sup>

However, the prohibitive cost of litigation represents only the threshold of issues restricting smaller developing countries' access to the WTO dispute system. Even at subsidized rates, a country must have the legal resources and sophistication to engage in complex and costly litigation.<sup>151</sup> Even if a country had the necessary funds to pay the legal costs, countries with weak infrastructure lack the capacity to develop a factually sufficient case and provide the necessary support to a law firm to manage a case.<sup>152</sup> This rings especially true in factually intensive cases like the *Cotton* dispute, which required extensive economic analysis of the effects of U.S. cotton subsidies on the international market.<sup>153</sup> Performing such an analysis requires expert witness research and testimony. Smaller developing countries may not have the infrastructure to provide the WTO Advisory Centre with the necessary information to perform such analyses.<sup>154</sup> Furthermore, both extensive research and an administrative infrastructure are required to detect such prejudicial effects. Many governments of developing countries do not have the institutional capacity to investigate how foreign subsidies affect domestic industries, especially when there are more pressing domestic issues.<sup>155</sup>

Moreover, there is a wide gap in the relative stakes in WTO litigation between a developed country and a smaller developing country.<sup>156</sup> A prejudicial subsidy could affect a country like Nigeria as much as Brazil, but the relative stakes for Brazil are much higher because of its economic size. Thus, due to the aggregate stakes, the nature of the WTO system does more to encourage economically powerful countries to initiate disputes than those less powerful.<sup>157</sup> In a study of U.S.–EC trade disputes, Marc Busch and Eric Reihardt ranked

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150. *See id.*; *see also* Bohl, *supra* note 103, at 188

151. Shaffer, *supra* note 109, at 184.

152. *See* Evans & Shaffer, *supra* note 116, at 344.

153. Andersen & Taylor, *supra* note 37, at 6.

154. *See* Evans & Shaffer, *supra* note 116, at 344.

155. *See* Shaffer, *supra* note 109, at 184 (“[A] poor country must consider the greater opportunity costs confronting it on account of its scarce resources.”).

156. *See* Evans & Shaffer, *supra* note 116, at 343 (citing Hagan Nordstrom & Gregory Shaffer, *Access to Justice in the World Trade Organization: The Case for a Small Claims Procedure: A Preliminary Analysis*, 7 *WORLD TRADE REV.* 587 (2008)).

157. *See* Shaffer, *supra* note 109, at 182.

disputes that involved an excess of \$150 million in annual trade as a high stakes dispute.<sup>158</sup> However, \$150 million “only represented about .0015% of U.S. gross domestic product at that time (2001). A claim of comparable importance for Honduras would equal around \$255,000.”<sup>159</sup> A high stakes dispute for a country like Honduras, which is not even considered a least-developed country, is much lower than a high stakes dispute for a larger country.<sup>160</sup> “[A] million dollars in foregone export revenue may not matter much for the European Union or the U.S.; it would only be a few seconds’ worth of exports. Yet for small developing countries like Burundi, Gambia and Guinea-Bissau, one million dollars corresponds to about 1.45% of annual exports . . .”<sup>161</sup> It is, therefore, difficult for a smaller developing country to bring a claim of significance against a developed country like the U.S. The WTO needs to create solutions for overcoming this gap in economic power.

Smaller developing countries must also consider the opportunity cost in pursuing dispute settlement. When legal fees could cost an excess of several million dollars, a country must evaluate whether the harm to its own agricultural market justifies incurring the expense of litigation.<sup>162</sup> In the *Cotton* dispute, the WTO panel found that U.S. cotton subsidies had cost the Brazilian cotton industry roughly \$147.3 million, which arguably justifies the \$2 million it paid in legal fees. A much smaller developing country, however, may suffer a proportionately equal harm, but because of its significantly smaller cotton industry and GDP, U.S. subsidies would harm it significantly less than \$147.3 million. Nonetheless, the costs associated with litigating the claim are the same for a smaller developing country as for Brazil (notwithstanding subsidized measures by the ACWLO) This lesser remedy-same cost dynamic reduces the potential reward for a developing country from dispute settlement proceedings. Bown elaborates on this point when he states, “The formal evidence indicates that, despite market access interests in a dispute, an exporting

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158. See Marc Busch & Eric Reinhardt, *Transatlantic Trade Conflicts and GATT/WTO Dispute Settlement*, in *TRANSATLANTIC ECONOMIC DISPUTES: THE EU, THE US, AND THE WTO* 465, 475 (Ernst-Uhrich Petersmann & Mark A. Pollack eds., 2003).

159. Shaffer, *supra* note 109, at 182.

160. Evans & Shaffer, *supra* note 116, at 343.

161. *Id.*

162. Andersen & Taylor, *supra* note 37, at 5.



country is less likely to participate in WTO litigation if it has inadequate power for trade retaliation . . . ,” which is a characteristic “typically associated with developing countries . . . .”<sup>163</sup> A smaller developing country must then evaluate whether it is worth spending several million dollars to litigate a case in front of the WTO, which may take several years,<sup>164</sup> or whether it should instead import the subsidized crop at lower costs and allow its own agricultural market to suffer.<sup>165</sup>

Countries must also consider the political ramifications of initiating a dispute against a more powerful country. The WTO prohibits any non-authorized, unilateral retaliation between countries.<sup>166</sup> Under the authority of the U.S. Trade Act of 1974, however, the U.S. has in several instances enacted retaliatory trade measures against a country prior to the dispute settlement body’s authorization of those measures.<sup>167</sup> The European Community initiated dispute settlement proceedings against the U.S. after U.S. efforts to retaliate against the European Community’s banana regime.<sup>168</sup> Despite its prohibition on non-authorized trade measures, the WTO ruled in favor of the provisions in the U.S. Trade Act that allowed for retaliation prior to authorization by the dispute settlement body. It stipulated, however, that the U.S. “exercise[d] the discretion given to it by the statutory language in a way consistent WTO obligations.”<sup>169</sup> Furthermore, the *U.S. – Section 301 Trade Act* did not resolve the question of whether a country can *threaten* to retaliate against a country prior to the resolution of a trade issue by the dispute settlement body.<sup>170</sup> Korea has identified a list of retaliatory measures itemizing target goods published by the U.S.<sup>171</sup> Political retaliation thus remains a consideration for smaller developing countries in

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163. Chad Bown, *Participation in WTO Dispute Settlement: Complainants, Interested Parties, and Free Riders*, 19 THE WORLD BANK ECON. REVIEW 287, 308 (2005).

164. *Id.* at 309.

165. *Id.*

166. Panel Report, *U.S.–Import Measures on Certain Products from the European Communities*, ¶ 6.38, WT/DS165/R (July 17, 2000).

167. See SHADIKHODJAEV, *supra* note 76, at 36–37.

168. *U.S.–Import Measures on Certain Products from the European Communities*, *supra* note 166.

169. Panel Report, *U.S.–Sections 301–310 of the Trade Act of 1974*, ¶ 7.117, WT/DS152/R (Dec. 22, 1999) [hereinafter Section 301 Panel Report].

170. SHADIKHODJAEV, *supra* note 76, at 38.

171. Section 301 Panel Report, *supra* note 169, ¶ 5.309.

initiating WTO dispute resolution.

Political ramifications, however, do not end at retaliatory measures. Another political consideration for developing countries is the potential effect that dispute settlement proceedings may have on future trade negotiations with the respondent country: "If a developing country government fears that by bringing a dispute to the WTO it will jeopardize the stability of its trading relationships, it is unlikely the government will move forward."<sup>172</sup> Trade relationships are delicately formed. Trade disputes under an international body can disrupt those relationships, which may lead some developing countries to be reluctant to initiate disputes.<sup>173</sup> This reality is especially true when the developing country relies on the potential respondent for development assistance and global aid initiatives.<sup>174</sup>

For example, if Nigeria initiates a suit against the U.S. for prejudicial subsidies on sorghum, it has to consider how much it relies on U.S. imports for its own economy.<sup>175</sup> In 2011, Nigeria imported \$4.8 billion of U.S. goods, including cereals (\$1.2 billion), vehicles (\$1.1 billion), machinery (\$720 million), mineral fuel (\$597 million) and plastic (\$187 million).<sup>176</sup> Each one of these imports amounts to more than the amount of retaliatory trade measures the WTO allowed Brazil to enact against the U.S. and would be much larger than any prejudicial effects U.S. sorghum subsidies would have on Nigeria. Beyond reliance on U.S. imports, Nigeria also significantly relies on U.S. foreign aid.<sup>177</sup> In 2008, the U.S. estimated giving approximately \$490 million in foreign aid for "increasing stability through improved social sector service delivery, particularly through HIV/AIDS programs; fostering transparent and accountable governance; promoting a more market-led economy; and enhancing Nigeria's capacity as a responsible regional and trade partner."<sup>178</sup> If Nigeria were to initiate a suit against the U.S., it would have to consider the

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172. Bohl, *supra* note 103, at 163.

173. *Id.* at 163.

174. *Id.* at 164–65.

175. *Nigeria*, OFFICE OF THE UNITED STATES TRADE REPRESENTATIVE, <http://www.ustr.gov/countries-regions/africa/west-africa/nigeria> (last visited Nov. 4, 2012).

176. *Id.*

177. FOREIGN OPERATIONS, CONG. BUDGET JUSTIFICATION 286 (2009), [www.state.gov/documents/organization/101368.pdf](http://www.state.gov/documents/organization/101368.pdf) (last visited Nov. 14, 2012).

178. *Id.*

possible chilling effect on future trade negotiations with the U.S. Combined with the financial commitment required to successfully argue a case before the WTO, developing countries may be reluctant to initiate such a dispute.

These obstacles to accessing the WTO dispute settlement system have prevented many developing countries from taking advantage of the system, especially smaller developing countries. While Brazil, India and China have used the system extensively, they are also three of the world's largest economies. Due to a lack of legal and financial resources, weak infrastructure, and lack of economic and political clout, smaller developing countries have not been able to maximize the benefits of the system. However, access to the dispute system is not the only impediment preventing these countries from initiating disputes.

C. RETALIATORY MEASURES PERMITTED IN THE COTTON DISPUTE ARE INSUFFICIENT TO INCENTIVIZE SMALLER DEVELOPING COUNTRIES TO USE THE DISPUTE SETTLEMENT SYSTEM

The previous issues detail lack of access to the dispute settlement system for smaller developing countries. However, access to the system is only a threshold issue. Once these countries have access to the dispute system, there must be adequate incentives to use the system. Even if a country like Nigeria has sufficient access to the dispute settlement system, the system will not help Nigeria unless the country actually initiates disputes.<sup>179</sup> The WTO, therefore, also needs to offer sufficient incentives for smaller developing countries to use the dispute settlement system.<sup>180</sup>

Undermining the incentive to use the dispute settlement system is the lack of a reward that would justify the high costs of participation. Brazil spent roughly \$2 million and six years to effectively litigate against the U.S. over its prejudicial cotton subsidies. It has been three years since the WTO allowed Brazil to enact millions of dollars of retaliatory trade measures against the U.S. Yet there has been no change in U.S. domestic policy regarding subsidies.<sup>181</sup> The Agricultural Reform, Food

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179. See Evans & Shaffer, *supra* note 116, at 342.

180. See *id.*

181. Andersen & Taylor, *supra* note 37, at 1.

and Jobs Act of 2012 proposed to eliminate the bill has been met with significant opposition not only regarding the elimination of subsidies, but also the bill's proposal to increase federal spending by a significant amount.<sup>182</sup> If the remedies are inadequate to cure the problem, a smaller developing country would have difficulty justifying spending several years and millions of dollars litigating a case before the WTO and risking political alienation from a much more powerful country like the U.S. If the \$147.3 million in retaliatory trade measures are insufficient to alter U.S. domestic policy, what chance does a smaller developing country have?<sup>183</sup> Without significant reform of the WTO's remedies, the prohibitive cost (both financially and politically) and the minimal reward will prevent developing countries from taking advantage of the WTO's dispute system.

D. THE WTO SHOULD ALLOW COMPLAINANTS TO ENACT  
RETLIATORY MEASURES IN THE TOTAL AMOUNT THAT  
PREJUDICIAL SUBSIDIES SUPPRESS INTERNATIONAL  
PRICES

Policy officials cannot create a solution for every obstacle to access for developing countries. There will always be political risk for developing countries initiating disputes against more powerful countries. However, while there is no silver bullet solution to the problems of access and incentive for developing countries, there are opportunities for reform in the dispute settlement system that would provide a greater incentive to countries with smaller economies to initiate disputes.

Primarily, the WTO needs to make remedies for successful claimants significant enough to justify the financial and resource investment that countries have to make in complex WTO litigation.<sup>184</sup> In the *Cotton* dispute, the remedies that the arbitration panel provided set an insufficient precedent for developing countries trying to take action against prejudicial agricultural subsidies.<sup>185</sup> Brazil argued it should have been able

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182. Arnold & James, *supra* note 101.

183. See Bown, *supra* note 163, at 827 ("Our formal evidence indicates that, despite market access interests in a dispute, an exporting country is less likely to participate in WTO litigation if it has inadequate power for trade retaliation").

184. *Id.*

185. Andersen & Taylor, *supra* note 37, at 5.

to enact retaliatory measures in excess of \$1 billion, because U.S. cotton subsidies had suppressed international cotton prices by roughly \$2.9 billion each year.<sup>186</sup> However, the court determined that Brazil could only suspend concession in proportion with its market share, which at the time was roughly 5%.<sup>187</sup> Therefore, the court only allowed Brazil to enact measures up to a total of \$147.3 million per year.<sup>188</sup> While this number is not insignificant and could ultimately cause the U.S. to eliminate its prejudicial subsidies, it does not encourage smaller developing countries to initiate a dispute. In 2011, Brazil was the world's fifth largest producer of cotton, producing 8,700 bales of cotton.<sup>189</sup> If a country like Nigeria, which is the nineteenth largest producer of cotton, producing 325 bales of cotton in 2011<sup>190</sup>, were to enact retaliatory measures against the U.S., the measures would not likely induce the U.S. to change its policies. Expanding the retaliatory measures (to account for the total amount of price suppression caused by market-distorting subsidies) would provide smaller developing countries a much greater incentive to initiate dispute settlement proceedings, because the size of their economy would not serve as a cap on the amount of their damage claims.

Some might argue that countries can join litigation as a third party and receive remedy accordingly. Article 10 of the Dispute Settlement Understanding allows for third parties to join a dispute if they have a substantial interest in the matter and have notified the dispute settlement body.<sup>191</sup> Critics may argue that this provision sufficiently protects the interests of smaller developing countries. For example, if U.S. sorghum subsidies prejudice a country like Nigeria, Nigeria can join several other countries in a dispute against the U.S. for violation of its obligations under the Agreement on Agriculture

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186. *Id.*

187. *Id.*

188. *Id.*

189. *Crop Data*, NATIONAL COTTON COUNCIL OF AMERICA, <http://www.cotton.org/econ/cropinfo/cropdata/rankings.cfm> (select "2008"; then select "Production") (last visited Nov. 4, 2012).

190. *Id.*

191. DSU, *supra* note 69, at art. 10(2) ("Any Member having a substantial interest in a matter before a panel and having notified its interest to the DSB . . . shall have an opportunity to be heard by the panel and to make written submissions to the panel. These submissions shall also be given to the parties to the dispute and shall be reflected in the panel report."); *see also* PALMETER & MAVROIDIS, *supra* note 72, at 109–10.

and the SCM Agreement.

In some instances, this approach has been successful. Most notably, the European Union and ten Latin American nations just recently settled a long-standing dispute regarding EU tariffs on banana imports.<sup>192</sup> Costa Rica originally filed the complaint in 1991, but soon Brazil, Colombia, Guatemala, Honduras, Mexico, Nicaragua, Panama, Peru and Venezuela joined as well.<sup>193</sup> While Costa Rica alone could not induce the EU into negotiating for a reduction in banana import tariffs, the collective economic power of ten Latin American countries eventually compelled this result.<sup>194</sup> Critics of more stringent retaliatory measures might point to this dispute as an example of how the dispute settlement system sufficiently protects the interests of smaller developing countries.

There are several issues, however, with such a proposition. First, there is little incentive for a country to join in litigation when a larger country has already taken on the task because the damages sought are not financial damages, but rather a removal of prejudicial subsidies by the respondent party. For example, in *U.S. - Safeguard on Circular Welded Pipe from Korea*, which concerned the U.S.'s implementation of a WTO-inconsistent protectionist policy, Korea sought an elimination of the trade barrier as a remedy.<sup>195</sup> No financial damages were sought. In this instance, several other countries and regional entities did participate in the dispute, such as Japan and the EU.<sup>196</sup> However, as Bown states:

[O]ther adversely affected exporting countries, such as South Africa, Turkey, and Venezuela, did not formally participate in the dispute. Undoubtedly they hoped to free ride and enjoy market access benefits generated by the formal litigants' efforts to liberalize the safeguard-protected market . . . as WTO rules

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192. Garry White, *Banana Prices Set to Fall After 20-year Tariffs 'War' Ends*, THE TELEGRAPH, Nov. 14, 2012, <http://www.telegraph.co.uk/finance/newsbysector/retailandconsumer/9667773/Banana-prices-set-to-fall-after-20-year-tariffs-war-ends.html>.

193. Press Release, General Pascal Lamy, Former WTO Director, Lamy Hails Accord Ending Long Running Banana Dispute (Dec. 15, 2009).

194. *Id.*

195. Request for Consultations by the European Communities, *U.S. - Definitive Safeguard Measures on Imports of Steel Wire Rod and Circular Welded Quality Line Pipe*, WT/DS214/1 (Dec. 7, 2000).

196. Bown, *supra* note 163, at 813.

require.<sup>197</sup>

Similarly, Nigeria did not have to file written submissions to the WTO in the *Cotton* dispute, because its interests were already protected. Therefore, Nigeria would not have benefitted from joining in the *Cotton* dispute, even if it were adversely affected by U.S. cotton subsidies. Simply, they could achieve the same result by not joining the dispute and risking political alienation.

While in the above example Nigeria would still have its trade interests protected and, therefore, would not need further access to the dispute system, other situations could arise in which its interests would not be sufficiently protected. The WTO cannot expect smaller developing countries to continuously rely on larger countries to take up the banner for them in settlement proceedings. Policy shortcomings aside, while such an approach may work with certain crops that both larger and smaller developing countries rely on, such as cotton or corn, it could achieve undesirable results with other crops. For example, the U.S. currently subsidizes sorghum production in the same way that it subsidizes cotton production.<sup>198</sup> In 2008, the U.S. issued roughly \$314 million of sorghum subsidies to U.S. farmers.<sup>199</sup> The U.S. is the world's leading sorghum producer, producing roughly 12 million tons of sorghum in 2008, which equals approximately 18.04% of the world's market share.<sup>200</sup> The next leading producer is Nigeria, producing roughly 9 million tons of sorghum in 2008, equaling roughly 14.04% of the world's market share.<sup>201</sup> The next leading producers in 2008 were India, Mexico and (former) Sudan, with 11.95, 9.96 and 5.83% of the market share, respectively.<sup>202</sup> With the largest market share outside the U.S., Nigeria likely cannot

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197. *Id.*

198. 7 U.S.C. §§ 8702, 8713, 8714 (2008).

199. *The United States Summary Information*, ENVIRONMENTAL WORKING GROUP FARM SUBSIDIES, <http://farm.ewg.org/region.php?fips=00000&progcode=total&yr=2008> (last visited Nov. 4, 2012).

200. Food and Agriculture Organization of the United Nations, FAOSTAT, <http://faostat.fao.org/site/567/DesktopDefault.aspx?PageID=567#ancor> (under "country" select "United States of America," "Nigeria," "India," "Mexico," and "Sudan (former)"; under "element" select "Production Capacity"; under "year" select "2008"; under "item" select "sorghum" click "show data") (last visited Nov. 4, 2012).

201. *Id.*

202. *Id.*

rely on a larger developing country to initiate a dispute against the U.S. Because the world sorghum market is substantially smaller than the world cotton market,<sup>203</sup> the amount that Nigeria would theoretically be allowed to enact in retaliatory trade measures against the U.S. would be substantially smaller than the amount that Brazil was allowed to enact in the *Cotton* dispute. While the exact price suppression would have to be calculated through economic analyses, it is unlikely that such an amount would be sufficient for the U.S. to alter its domestic policy. Reliance on economically powerful countries may, in some instances, protect the interests of smaller developing countries. However, these countries cannot always rely on more economically powerful countries to fight their battles for them.

Furthermore, in order to join as a third-party to a dispute, a country must be sufficiently aware of how the dispute affects its interest. Developing countries do not necessarily have the legal knowledge to assess how a WTO suit will affect their interests before the third-party notification requirements. Such awareness requires legal resources to identify the nature of the dispute and its effect on the country. As noted previously, it is presumptuous to expect small developing countries to have the legal resources and the administrative infrastructure necessary to identify such complaints within the required time frame.

Lastly, third parties to a dispute cannot make claims of their own.<sup>204</sup> As Palmeter notes, "Third parties cannot make claims before a panel, and a complainant cannot rely on them to do so on its behalf."<sup>205</sup> If an issue arises that is not pursued by the original complainant, a third party would have to initiate separate proceedings against the respondent.<sup>206</sup> The third party then runs into all the previously discussed issues of access and incentive in initiating its own dispute. Furthermore, the WTO does not always accept a third party's request to join

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203. According to the Food and Agriculture Organization of the United Nations, in 2008, the total world market production for sorghum was 66,511,675 tons. *Id.*; see also World Cotton Supply and Distribution, USDA FOREIGN AGRICULTURE SERVICE, <http://www.fas.usda.gov/psdonline/psdreport.aspx?hidReportRetrievalName=BVS&hidReportRetrievalID=856&hidReportRetrievalTemplateID=3> (last visited Nov. 1, 2013).

204. PALMETER & MAVROIDIS, *supra* note 72, at 110.

205. *Id.*

206. DSU, *supra* note 69, at art. 10.4 ("[A] measure already the subject of a panel proceeding . . . impairs benefits accruing to it under any covered agreement, that Member may have recourse to normal dispute settlement procedures under this Understanding").



a dispute<sup>207</sup> when it does not have a substantial enough interest in the dispute. In this situation as well, the third party would have to file separate proceedings. The third party provisions of the current DSU do not provide adequate protections for smaller developing countries.

The WTO should therefore allow a successful claimant to enact retaliatory trade measures based on the amount that agricultural subsidies suppress prices in the international market, not only based on how much those subsidies affect the claimant country. Doing so would provide a significantly greater incentive to larger countries to alter their trade policies.

### CONCLUSION

The WTO has made significant strides in increasing access to dispute resolution for developing countries. Its decision in the *EC-Ecuador* banana dispute has induced a negotiated agreement to lower banana import tariffs in the EU. In the *Cotton* decision, there is a strong chance that the U.S. will comply with the panel's decision and eliminate counter-cyclical and direct payment subsidies. The dispute settlement system has provided a significant boon to the creation of equitable international trade laws.

However, larger developing countries, such as India, China and Brazil have reaped most of the benefits of this increased access to the WTO. In order to truly achieve its goal of incorporating the interests of the least-developed countries, the WTO must substantially reform its dispute resolution system. Primarily, the WTO can overrule its previous decision in the *Cotton* dispute, which only allows retaliatory measures in the amount that a country's domestic subsidies have suppressed prices in the claimant's country. The WTO should further allow a country to assume the place of other prejudiced countries and retaliate in the amount that the subsidies have suppressed global prices, not just within the petitioner's country. Stricter measures would ensure greater compliance by more powerful countries and incentivize smaller developing countries to invest time, resources and finances in challenging prejudicial subsidies.

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207. See, e.g., *European Communities – Regime for the Importation, Sale and Distribution of Bananas*, *supra* note 79 (denying Ecuador's status as a third-party petitioner in the dispute).