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## Enhancing the Legitimacy of the World Trade Organization

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# Enhancing the Legitimacy of the World Trade Organization: Why the United States and the European Union Should Support the Advisory Centre on WTO Law

## ABSTRACT

*The World Trade Organization (WTO) has faced harsh criticism from developing nations in recent years. Many developing nations feel that the promises they received when they joined the WTO have not been fulfilled. These nations feel that wealthy, industrialized nations like the United States and the members of the European Union are the only ones that have benefited from the organization. Moreover, they feel that these developed nations have benefited at their expense through the WTO's dispute settlement process. Many improvements to the WTO have been proposed. However, the one that seems the most able to help developing nations, the Advisory Centre on WTO Law (ACWL), has not received support from either the United States or the European Union.*

*The Advisory Centre was established in 2001 and is the first center for legal aid in the international system. The goal of the Advisory Centre is to provide developing nations with training and legal assistance in WTO matters. The WTO is an intricate system of rights and obligations, supported by a binding dispute settlement mechanism to ensure compliance. Meaningful participation in the WTO requires a good understanding of these rights and obligations and the ability to participate in its dispute settlement mechanism. The ACWL has the potential to benefit every nation that participates in the WTO, not just developing nations. The ACWL legitimizes the WTO as a whole. When parties are equally represented, the entire system is legitimated. Therefore, both the United States and the European Union would ultimately benefit from supporting this organization.*

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## I. INTRODUCTION

A new non-governmental international organization has been established to provide developing and least-developed countries with high-quality legal advice for disputes involving the World Trade Organization (WTO).<sup>1</sup> This organization, the Advisory Centre for World Trade Law (ACWL), was first conceived by a trade delegate from Colombia.<sup>2</sup> Many developed and developing countries have contributed both financial and moral support to the organization,<sup>3</sup> which has been quite successful in its first years of operation.<sup>4</sup> Surprisingly, however, neither the United States nor the European Union has shown interest in supporting the organization.<sup>5</sup>

This lack of support does not make sense for several reasons. First, the lack of support from the United States and the European

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1. Establishing the Advisory Centre on WTO Law, *available at* <http://www.itd.org/links/acwladvis.htm>.

2. Frieder Roessler, Executive Director of the Advisory Centre on WTO Law, Address at the Inauguration of the ACWL (October 5, 2001), *available at* [http://www.acwl.ch/e/tools/news\\_e.aspx](http://www.acwl.ch/e/tools/news_e.aspx).

3. Thaddeus McBride, *Rejuvenating the WTO: Why the U.S. Must Assist Developing Countries in Trade Disputes*, 11 INT'L LEGAL PERSP. 65, 69-70 (1999).

4. See *infra* Part III.B and accompanying notes.

5. See *infra* Part IV and accompanying notes.

Union contravenes their national and supranational policies regarding fair representation.<sup>6</sup> The justice systems in both the United States and the European Union are seen by many nations as models of equal justice because of their commitment to ensuring that defendants are adequately represented.<sup>7</sup> Second, the WTO has faced substantial criticism in recent years primarily because many developing countries feel that they are not getting what they were promised when they joined the WTO.<sup>8</sup> By ensuring that developing countries are on equal footing with developed nations in the dispute settlement process, the ACWL has helped stem this criticism and given developing countries hope for their future in the WTO.<sup>9</sup> For example, Peru, represented by the ACWL, has received a favorable Appellate Body decision in a dispute with the European Union, something that may not have been possible without the help of the Centre.<sup>10</sup> Finally, providing developing countries with equal access to the WTO dispute settlement process provides the legitimacy to the WTO.<sup>11</sup> However, before it is possible adequately to explain the many advantages of the ACWL, it is first necessary to provide a preliminary explanation of the WTO and its dispute settlement process.

#### A. *The Structure of the WTO*

The WTO Agreements provide the legal basis for the multilateral trading system that was established on January 1, 1995.<sup>12</sup> It is also the preliminary text of the Uruguay Round agreements signed on April 15, 1994 in Marrakesh.<sup>13</sup> The process and substance envisioned under these agreements extends far beyond that included in the General Agreement on Tariffs and Trade (GATT), the predecessor of the WTO.<sup>14</sup> While the GATT dealt only with trade in goods, the new WTO expanded the scope to trade in services and trade-related intellectual property.<sup>15</sup>

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6. See *infra* notes 255-62 and accompanying text.

7. See *id.*

8. See *infra* text accompanying notes 71-86.

9. See *infra* notes 273-75 and accompanying text.

10. See generally European Communities—Trade Description of Sardines, Report of the Appellate Body (AB-2002-3), ¶ 195, available at [http://www.worldtradelaw.net/reports/wtoab/ec-sardines\(ab\).pdf](http://www.worldtradelaw.net/reports/wtoab/ec-sardines(ab).pdf).

11. See *infra* notes 268-69 and accompanying text.

12. WTO SECRETARIAT, GUIDE TO THE URUGUAY ROUND AGREEMENTS 1 (2002) [hereinafter WTO SECRETARIAT].

13. *Id.* at 1.

14. *Id.* at 1-2.

15. *Id.* at 2.

At the initiation of the Uruguay Round of negotiations, the need to establish a new international organization was not anticipated.<sup>16</sup> However, as the Round drew to a close, the results of the debates and discussions were increasingly seen as a coherent agreement to which all countries that had participated in the Round should adhere.<sup>17</sup> Of special interest to the participants was the creation of a dispute settlement system that would govern issues arising under the many agreements.<sup>18</sup> Most participants "saw great advantage in giving a clear, logical, and strong institutional structure to the post-Uruguay Round trading system."<sup>19</sup> The end result is the WTO, composed of sixteen short articles and four annexes.<sup>20</sup> The annexes include other Uruguay Round agreements and GATT provisions that have been carried over into the WTO.<sup>21</sup>

Article III of the WTO agreement defines its five primary functions. The first function is "to facilitate the implementation, administration and operation, and further the objectives, of this Agreement and of the Multilateral Trade Agreements, and also to provide the framework for the implementation, administration and operation of the Plurilateral Trade Agreements."<sup>22</sup> The second is to be a "negotiating forum."<sup>23</sup> The administration of the "arrangements in Annexes 2 and 3 for the settlement of disputes that may arise between members and for the review of trade policies" are respectively the third and fourth functions.<sup>24</sup> Finally, the WTO is to cooperate with the International Monetary Fund and the World Bank in order to attain greater policy-making coherence.<sup>25</sup>

A country becomes a member of the WTO in two ways.<sup>26</sup> The first way, "Original Membership," applied solely to nations that were members of the GATT, and was open to these nations for a limited time.<sup>27</sup> Original Members were required to accept the WTO agreement without reservations and to make "concessions and commitments for goods and services, embodied in schedules that had been duly accepted and annexed."<sup>28</sup> Least-developed countries (LDCs) that became original members were essentially subject to the same conditions, but were "only required to take commitments and

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16. *Id.*  
 17. *Id.*  
 18. WTO SECRETARIAT, *supra* note 12, at 2.  
 19. *Id.*  
 20. *Id.*  
 21. *Id.*  
 22. *Id.* at 4.  
 23. *Id.*  
 24. WTO SECRETARIAT, *supra* note 12, at 4.  
 25. *Id.*  
 26. *Id.* at 11.  
 27. *Id.*  
 28. *Id.*

concessions to the extent consistent with their individual development, financial or trade needs, or their administrative and institutional capabilities.”<sup>29</sup> The second means by which a country may become a member of the WTO is through the process of “accession.”<sup>30</sup> Accession is open to any nation indefinitely, and essentially means that terms of membership are negotiated between the nation wishing to join and the nations that are already members.<sup>31</sup> These terms are unspecified but are intended to put the joining country on equal footing with that of other members.<sup>32</sup> Once membership is realized, all states have the same rights and privileges, and the manner by which a nation joined is irrelevant.<sup>33</sup> All countries must pay their share of expenses, and all must conform their government’s laws and regulations to the WTO rules.<sup>34</sup>

The backbone of the WTO is the Ministerial Conference, which is composed of all WTO members and meets at least biannually.<sup>35</sup> When the Ministerial Conference is not in session, the WTO is led by the General Council, which is also composed of all members.<sup>36</sup> The Council is responsible for the continuous management of the WTO, meeting regularly to supervise all its work.<sup>37</sup> It is also responsible for convening as the Dispute Settlement Body (DSB) and as the Trade Policy Review Body.<sup>38</sup> Meetings of these bodies take place quite frequently; the DSB meets, on average, once a month and the Trade Policy Review Body meets even more often.<sup>39</sup> In the main, decision making in the WTO is done on the basis of consensus.<sup>40</sup> When there is formal voting, each member of the WTO has one vote, and the general rule is that the decisions of the Ministerial Council or the General Council are made by the majority of votes cast.<sup>41</sup>

### B. *The WTO Dispute Settlement Process*

Article 3.2 of the WTO Agreement states, “The dispute settlement system of the WTO is a central element in providing

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29. WTO SECRETARIAT, *supra* note 12, at 11.

30. *Id.*

31. *Id.* at 11-12.

32. *Id.* at 12.

33. *Id.* at 11.

34. *Id.* at 12.

35. WTO SECRETARIAT, *supra* note 12, at 6.

36. *Id.*

37. *Id.*

38. *Id.*

39. *Id.*

40. *Id.* at 13.

41. WTO SECRETARIAT, *supra* note 12, at 13.

security and predictability to the multilateral trading system.”<sup>42</sup> The Dispute Settlement System outlined by the WTO is a “single set of rules to cover disputes that may arise under any element of the Uruguay Round package,” including the WTO itself and annexes including the GATT.<sup>43</sup> The detailed rules are designed to ensure a speedy settlement process that cannot be blocked by individual countries.<sup>44</sup>

The function of the dispute settlement system is to preserve and clarify the rights and obligations of WTO member states.<sup>45</sup> Moreover, dispute settlement procedures are calculated to “secure a positive, and if possible, mutually acceptable, solution to a dispute.”<sup>46</sup> Preferably, the solution is to withdraw the measures that are inconsistent with obligations under the WTO Agreement.<sup>47</sup> If the withdrawal is not accomplished, compensation is a possible, although less satisfactory result.<sup>48</sup> Retaliation, wherein the injured nation, with authorization, suspends trade concessions or obligations to the offending member, is the least desirable outcome.<sup>49</sup> Unilateral action taken by one country to redress what it views as violations of the WTO is strictly forbidden; members are required to use the dispute settlement procedures.<sup>50</sup>

The dispute settlement system is governed by the single DSB, composed of all of the members of the WTO.<sup>51</sup> This body alone has the authority “to establish panels, adopt panel and appellate reports, maintain surveillance and implementation of rulings and recommendations, and authorize suspension of concessions and obligations.”<sup>52</sup> Panels created by the DSB are an important part of the structure of the dispute settlement process, and are convened to carry out specific tasks, dissolving upon the completion of these tasks.<sup>53</sup> There are “elaborate provisions on the composition, mandate, tasks and procedures of panels.”<sup>54</sup> For example, the panel must be composed of three to five “well qualified governmental or non-governmental individuals,” from diverse backgrounds, and not from the nations involved in the dispute, unless those nations so agree.<sup>55</sup>

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42. *Id.* at 19-20.

43. *Id.* at 17.

44. *See id.*

45. *Id.* at 20.

46. *Id.*

47. WTO SECRETARIAT, *supra* note 12, at 20.

48. *Id.*

49. *Id.*

50. *Id.*

51. *Id.*

52. *Id.*

53. WTO SECRETARIAT, *supra* note 12, at 21.

54. *Id.*

55. *Id.*

The task of the panel is to “examine the matter referred to it ‘in the light of relevant provisions’ of the agreements cited by the parties, and ‘to make such findings as will assist the DSB in making recommendations or rulings under those agreements.’”<sup>56</sup> Upon making its finding, the panel circulates a report to the DSB.<sup>57</sup>

After circulation of the panel report, the parties to the dispute are afforded the opportunity to appeal the issues of law and legal interpretations developed by the panel.<sup>58</sup> This appeal is heard by three members of the seven-member Appellate Body, which has the option of upholding, modifying, or reversing the legal conclusions of the panel.<sup>59</sup> However, the report, “once adopted by the DSB, is to be unconditionally accepted by the parties to the dispute.”<sup>60</sup> The Appellate Body is established by the DSB and consists of “persons of recognized authority, with demonstrated expertise in law, international trade and the subject mater of the covered agreements generally and unaffiliated with any government . . . and broadly representative of the WTO itself.”<sup>61</sup> These members currently serve four-year terms.<sup>62</sup>

The progress of this dispute settlement process cannot be blocked unless there is consensus by the DSB to do so.<sup>63</sup> Thus, if a panel is established and a panel report is approved, an Appellate Body decision will be adopted and approved unless there is consensus to the contrary.<sup>64</sup> Such a consensus would be extremely rare because the nation that requested the panel, for example, would be unlikely to change its mind.<sup>65</sup>

## II. THE NEED FOR WTO REFORM: ENSURING THAT DEVELOPING COUNTRIES HAVE EQUALITY OF ACCESS TO THE DISPUTE SETTLEMENT PROCESS

While the WTO is technically one of the most democratic of global organizations because it has a one-country, one-vote system, a recent U.N. report cautions that, “superficial equality masks the deep inequalities created by a system in which there exists severe

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56. *Id.*

57. *Id.*

58. *Id.* at 22.

59. WTO SECRETARIAT, *supra* note 12, at 22.

60. *Id.*

61. *Id.*

62. *Id.*

63. *Id.* at 23.

64. *Id.*

65. WTO SECRETARIAT, *supra* note 12, at 23.



disparities in bargaining power of the member countries.”<sup>66</sup> Many of the trade rules are presumed to be unfair because of the large disparities in income and development between countries.<sup>67</sup> The smaller economies that are typical of developing countries make them “uniquely vulnerable” in the area of trade: “In other words, international trade exacerbates existing problems in the distribution of resources, and creates new ones—the rich can get richer, and the poor poorer.”<sup>68</sup> One of the biggest accusations leveled at the WTO is that developed nations are “manipulating international trade and economic policies to [their] sole benefit, with little regard for the needs of developing states.”<sup>69</sup>

Both the original GATT agreement and the WTO include express recognitions that these agreements should be used to help developing countries. For example, the preamble to the Agreement establishing the WTO recognized the “need for positive efforts designed to ensure that developing countries, and especially the least developed among them, secure a share in the growth in international trade commensurate with the needs of their economic development.”<sup>70</sup> Despite this lofty goal, the actual experience of developing countries involved in the GATT and WTO has been disappointing.<sup>71</sup>

Many developing countries have tried to discuss their concerns at WTO meetings but feel that developed nations have either ignored their proposals, or worse, rejected them altogether. For instance, at the WTO’s Third Ministerial Meeting held in Seattle, Washington in 1999, trade representatives from developing countries indicated that their interests and participation in the WTO were being “marginalized by developed nations, and that those already holding an unequal share of the world’s natural and social resources continue to receive an unequal share of the gains from trade.”<sup>72</sup> Developing countries drafted a list of their priorities for the Seattle meeting agenda in which they “determined to rectify what they see as a bias in current trade rules that have benefited larger economic powers at

66. Padideh Ala’i, Symposium, *Global Trade Issues in the New Millennium: A Human Rights Critique of the WTO: Some Preliminary Observations*, 33 GEO. WASH. INT’L L. REV. 537, 541 (2000) (citing U.N. Commission on Human Rights, 52d Sess., Provisional Agenda Item 4, P15, U.N. Doc. E/CN.4/Sub.2/2000/13).

67. See generally Isabella D. Bunn, *The Right to Development: Implications for International Economic Law*, 15 AM. U. INT’L L. REV. 1425 (2000).

68. Frank J. Garcia, *Trade and Inequality: Economic Justice and the Developing World*, 21 MICH. J. INT’L L. 975, 979 (2000).

69. McBride, *supra* note 3, at 68.

70. General Agreement on Tariffs and Trade–Multilateral Trade Negotiations (the Uruguay Round): Final Act Embodying the Results of the Uruguay Round Trade Negotiations, Dec. 15, 1993, 33 I.L.M. 1 (1994).

71. McBride, *supra* note 3, at 65.

72. Garcia, *supra* note 68, at 977.

their expense.”<sup>73</sup> However, their list of priorities “was mysteriously deleted from the first formal draft of the agenda that was circulated at the organization’s Geneva headquarters.”<sup>74</sup> Members of the developing countries were irate, especially in light of the fact that the Seattle meeting had been hailed by the WTO’s new Director General, Mike Moore, as a forum meant for them.<sup>75</sup> Although no countries were blamed publicly for the elimination of the developing countries’ agenda, the United States was mentioned and “accused of bullying tactics.”<sup>76</sup> As one representative noted, “It was too convenient. Every single item developing countries wanted was eliminated.”<sup>77</sup>

Kofi Annan, the Secretary General of the United Nations, later criticized the developed nations for the eventual breakdown of the Seattle trade talks.<sup>78</sup> Annan noted that “[d]eveloping nations played a more ‘active and united role’ in the Seattle talks than ever before . . . while the industrial powers bickered among themselves and showed that they did not have the will to carry out reforms in the rules that govern the international trading system.”<sup>79</sup> He further criticized industrialized nations for excluding developing countries from the benefits of global trade through the use of protectionist trade barriers.<sup>80</sup>

In February 2000, the U.N. held a conference on developing countries. While there were “expressions of good will,” there was “no real narrowing of the differences that split a meeting of the World Trade Organization in Seattle in December.”<sup>81</sup> Shri Suresh Pachouri, a delegate from India, stated that, “The rules of the WTO have been framed mainly keeping in view the interests of the industrialized countries.”<sup>82</sup> He asserted that guidelines and rules established by the WTO “ignored the political, social and economic conditions of developing countries.”<sup>83</sup> In a keynote address, the crowd applauded when President Abdelaziz Bouteflika of Algeria declared, “The haves-nots are funding the haves.”<sup>84</sup> Bouteflika was at the U.N. conference speaking as a representative of African nations, and said that Africa,

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73. Elizabeth Olson, *Anger on Agenda for World Trade Meeting*, N.Y. TIMES, Oct. 14, 1999, at C9.

74. *Id.*

75. *Id.*

76. *Id.*

77. *Id.*

78. *U.N. Chief Blames Rich Nations for Failure of Trade Talks*, N.Y. TIMES, Feb. 13, 2000, Sec. 1, at A12.

79. *Id.*

80. *Id.*

81. Seth Mydans, *U.N. Trade Meeting Brings Rich and Poor No Closer*, N.Y. TIMES, Feb. 20, 2000, at A16.

82. *Id.*

83. *Id.*

84. *Id.*

still recovering from centuries of colonialism “was now being crushed by a new world order of international trade.”<sup>85</sup>

The relationship between the developing and developed countries within the WTO has been an issue of major international concern for years. One of the most important problems is that developing countries do not feel that they have equal access to the dispute settlement system process:

[The] participation of the developing countries in this system is, in the opinion of many, absolutely vital to the long term durability and effectiveness of the WTO dispute settlement system, and therefore, probably the WTO itself. If the WTO is seen to be tilted, or unbalanced with respect to an important attribute of membership, namely access to the dispute settlement procedures, this undermines the sense of fairness and, to some extent the essential value of being a member.<sup>86</sup>

Developing countries have made more use of the WTO rules and dispute settlement process than they did under the GATT.<sup>87</sup> They still do not bring a significant number of complaints. As of 1999, developing countries initiated only forty-one dispute proceedings, despite the fact that they make up three-quarters of the trade body’s membership.<sup>88</sup> In contrast, during the same period of time, the United States initiated sixty proceedings, nearly one third of the total, and the European Union initiated forty-five.<sup>89</sup> Moreover, one commentator noted that, “a price for using the system as a complainant is that other countries began to feel that it is okay to bring cases against these complainants” and developing countries became targets.<sup>90</sup> From 1980 to 1994, developing states were appellees in approximately thirteen percent of panel hearings, however, since 1995 (the year the WTO entered into force) that number has tripled.<sup>91</sup> Developing countries were targets of both the United States and the European Union, with the United States bringing three cases against them, and the European Union four.<sup>92</sup> It is believed that the dramatic increase in proceedings brought against developing countries “is a clear response to the effort, initiated in the

85. *Id.*

86. John H. Jackson, *Perceptions About WTO Trade Institutions*, Keynote Address at the Inauguration of the Advisory Centre for WTO Law (Oct. 5, 2001), available at [http://www.acwl.ch/e/tools/news\\_e.aspx](http://www.acwl.ch/e/tools/news_e.aspx).

87. Symposium, *International Economic Conflict and Resolution, Questions for William J. Davey*, 42 S. TEX. L. REV. 1209, 1213 (2001).

88. Daniel Pruzin, *Advisory Center on WTO Law Proposed as Resource for Poorer Member Nations*, 16 INT’L. TRADE REP. (BNA), No. 23, at 970-71 (June 9, 1999).

89. *Id.* at 970.

90. Symposium, *supra* note 87, at 1213.

91. McBride, *supra* note 3, at 84.

92. See generally Young Duk Park & Marion Panizzon, *WTO Dispute Settlement 1995-2001: A Statistical Analysis*, 5 J. INT’L ECON. LAW 221 (2002).

Uruguay Round, to increase the legal discipline of developing states.”<sup>93</sup>

Although participation of developing countries in the dispute settlement process appears to be on the rise, for the most part, developing countries have familiarized themselves with the appellate review process through participation as third party participants, rather than as targets or complainants.<sup>94</sup> While developing countries that have been third parties have likely enhanced their knowledge of the functioning of the dispute settlement process through third-party participation, only eleven developing countries have appeared before the Appellate Body as appellants or appellees.<sup>95</sup> This is a major problem because there is “more to participation in the WTO dispute settlement system than the preservation of the rights of *individual* Members.”<sup>96</sup> Another important function of the dispute settlement system is to clarify existing WTO provisions, and “it is only through engagement with the system that WTO members can influence the outcome of rulings and recommendations, and thus contribute to the growing body of WTO law.”<sup>97</sup> Finally, even when developing countries appear before the Appellate Body, their interests may be subjugated to those of Western nations.<sup>98</sup>

The primary reason that developing countries have had trouble participating in the system is a lack of funding.<sup>99</sup> The cost of initiating or defending a dispute is considerable and not easily borne by developing countries and, particularly, least-developed countries.<sup>100</sup> It has been noted that there are multiple dimensions to these costs. One problem is that many of the developing countries that would like to participate in the dispute settlement process find that they do not have the expertise in their government service and ministries effectively to represent them in connection with the WTO

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93. McBride, *supra* note 3, at 84.

94. Claus-Dieter Ehlermann, Address at the Inauguration of the Advisory Centre of WTO Law (Oct. 5, 2001), available at [www.acwl.ch/e/tools/news\\_e.aspx](http://www.acwl.ch/e/tools/news_e.aspx).

95. *Id.*

96. *Id.*

97. *Id.*

98. See McBride, *supra* note 3, at 68 (noting that in European Community—Bananas, Report of the Appellate Body, AB-1977-3, for instance, the debate between the United States and the European Community obscured the fact that the developing countries of Africa, Latin America and the Caribbean were influenced most by the ultimate outcome of the dispute).

99. Symposium, *supra* note 87, at 1213; see also Christopher Parlin, *Review of the Dispute Settlement Understanding (DSU)*, 31 LAW & POL'Y INT'L BUS. 565, 570 (noting that “[d]uring the DSU Review, Egypt, Guatemala, India, and Venezuela, joined by Japan, said that the WTO’s dispute settlement mechanism, including its consultation process, failed to provide adequate access to developing countries [citing] resource constraints and expense as the primary problems”).

100. Jackson, *supra* note 86.

procedures.<sup>101</sup> “States need sophisticated expertise to modernize their trade regulatory systems, comply with complex trade agreements, and in general capitalize on the opportunities which trade liberalization . . . make available.”<sup>102</sup>

Due to the lack of expertise within their own governments, developing countries have been forced to look to outside legal assistance. However, WTO procedures initially either prohibited or greatly inhibited the use of private counsel by nation states, either hired to work with them on cases, or to present cases in the WTO procedures.<sup>103</sup> These prohibitions were eventually eradicated in *European Communities—Regime for the Importation, Sale and Distribution of Bananas*, wherein the Appellate Body ruled that private lawyers could represent the WTO Members in dispute settlement proceedings.<sup>104</sup> This ruling was praised as allowing access to the dispute settlement system by developing country members who lacked the ability or necessary expertise to represent themselves.<sup>105</sup>

Currently, it is common for governments especially those of smaller and developing countries to retain outside counsel to advise them during disputes.<sup>106</sup> This said, the fees of such outside representation can be staggering. The country must take into account several considerations when determining whether to go to the expense of hiring outside law firms or independent consultants, including:

- (1) the relative importance of the case, both politically and economically;
- (2) the complexity of the case;
- (3) the importance of winning—where a case is marginal, there is advantage in having an outside agency to absorb any blame for failure; or if losing is necessary to make an internal change, a arms length relationship with private parties can be helpful.<sup>107</sup>

At times, a private entity that is concerned with the outcome of the dispute will pay for the attorneys, but often there is not private concern for the outcome, “or there is a change in government policy

101. *Id.*

102. Garcia, *supra* note 68, at 1028.

103. Jackson, *supra* note 86.

104. Ehlermann, *supra* note 94.

105. *Id.*; see also McBride, *supra* note 3, at 90 (noting that in *European Community—Bananas*, Report of the Appellate Body, AB-1997-3, “the Appellate Body explicitly recognized the importance of having competent legal counsel in all dispute hearings, especially in matters brought before the Appellate Body. The Body also stressed the importance of letting all states participate in matters pertinent to them.”).

106. Jackson, *supra* note 86.

107. Agency for International Trade Information and Cooperation Documents, *Reports on Meetings, Improving Developing Country Access to the Dispute Settlement Mechanism of the WTO* (Feb. 25, 2000), available at [http://www.acici.org/aitic/documents/reports/reports5\\_eng.html](http://www.acici.org/aitic/documents/reports/reports5_eng.html) [hereinafter AITIC Documents].

and the new government does not care about what the old government did, and so the case is not adequately pursued.”<sup>108</sup>

If the government does decide to pursue the dispute with the help of outside counsel, it is generally forced to resort to law firms in Washington, Geneva, or Brussels.<sup>109</sup> These firms may demand fees matching those charged to their other clients which often include corporations and wealthy governments.<sup>110</sup> Hourly rates for these services may range from \$200-\$450 per hour.<sup>111</sup> There are often incidental costs on top of this, including telephone calls, postage, travel costs, and hotel bills.<sup>112</sup> The total cost of taking a dispute before the DSB can be upwards of \$300,000, an amount that is beyond the means of many developing countries.<sup>113</sup>

### III. THE SOLUTION: THE ADVISORY CENTRE ON WTO LAW

Many proposals have been suggested to “level the playing field” and to help the developing countries take a more active role in the WTO through skilled and cost-efficient legal service. For instance, a group of nine developing countries, including India, Pakistan, Cuba, and Malaysia have recently suggested that wealthy nations who lose disputes to developing countries should be forced to pay part of their costs.<sup>114</sup> The idea that garnered the most attention and support, however, was conceived of by Claudia Orozco of Colombia, who believed that international legal assistance would be the most effective way to help developing countries.<sup>115</sup>

Several developing countries supported her proposal calling for the establishment of an “independent legal center to provide advice to developing countries in trade-related matters.”<sup>116</sup> They reasoned that “due to disparities in the finances and trade-related knowledge of developing countries, such a center is necessary to allow these states to participate fairly in WTO disputes.”<sup>117</sup> As one diplomat from India

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108. Symposium, *supra* note 87, at 1214.

109. *Id.*; Jackson, *supra* note 86.

110. Jackson, *supra* note 86.

111. AITIC Documents, *supra* note 107.

112. *Id.*

113. Frances Williams, *WTO Minnows Cry Foul on Mediation: Poor Countries Claim the System to Challenge Unfair Practices by Richer Nations is Stacked Against Them*, FIN. TIMES (London), Oct. 24, 2002, at 8.

114. *Id.*

115. Roessler, *supra* note 2.

116. McBride, *supra* note 3, at 69-70.

117. *Id.* at 70.

noted, “[o]nce you join [the WTO] you have to run, if you don’t run, you fall aside. For running you need to have enough strength.”<sup>118</sup>

In Geneva on June 7, 1999 an official proposal for an Advisory Centre on WTO Law was sponsored by a group of industrialized and developing countries.<sup>119</sup> The proposed Centre would provide advisory and legal assistance to developing countries in the WTO dispute settlement process.<sup>120</sup> The sponsors hoped to attract enough founding members and money to be able to launch it at the Seattle Ministerial Meeting in November of that same year.<sup>121</sup> Nestor Osario, the Columbian Ambassador, said that the Centre “would need as founding and contributing members, some six to eight industrial countries and some twenty developing countries to achieve the critical mass to launch the initiative.”<sup>122</sup> In addition, an initial fund of \$8 million and a donor contribution of \$6 million for each of the first five years would be needed to make the center viable and self-supporting beginning in the sixth year.<sup>123</sup>

The object of the Centre is to provide developing countries “with the capacity in their own administrations, through training programs, and to give at affordable costs legal assistance to pursue and defend their rights in the dispute settlement process.”<sup>124</sup> The ACWL sponsors said that the center would take up all defensive panel cases (where the developing countries are defending themselves against complaints), but would pursue complaints made by developing countries only on merit, paying particular attention to Article 3 of the DSU, which prefers that mutually agreed solutions be reached.<sup>125</sup>

On Tuesday, November 30, 1999, during a ceremony in Seattle, the ministers of Bolivia, Canada, Columbia, Demark, Dominican Republic, Ecuador, Egypt, Finland, Guatemala, Honduras, Hong Kong China, Ireland, Italy, Kenya, the Netherlands, Nicaragua, Nigeria, Norway, Pakistan, Panama, Paraguay, Peru, Philippines, Sweden, Thailand, Tunisia, the United Kingdom, Uruguay, and Zimbabwe signed the “Agreement establishing the Advisory Centre on WTO Law.”<sup>126</sup> This agreement entered into force on July 15, 2001,

118. *Poor States join hands at WTO*, BAHRAIN TRIB. DAILY NEWS., Sept. 2, 2002, available at [http://www.bahraintribune.com/mon/busi.asp?Art\\_No\\_5751](http://www.bahraintribune.com/mon/busi.asp?Art_No_5751).

119. Chakravarthi Raghavan, *Advisory Trade Law Centre Proposal Unveiled*, SOUTH-NORTH DEV. MONITOR, available at The Third World Network Online, <http://www.twinside.org.sg/title/advisor-cn.htm>.

120. *Id.*

121. *Id.*

122. *Id.*

123. *Id.*

124. *Id.*

125. Raghavan, *supra* note 119.

126. The Advisory Centre on WTO Law, *supra* note 1. Despite a great deal of support, some of the developed nations, however, have remained less than enthusiastic

and the constituent meeting of its General Assembly was held on July 17, 2001.<sup>127</sup> Thirty-two countries signed the agreement: nine developed countries, twenty-two developing countries, and one economy in transition.<sup>128</sup> The United Nations has designated forty nations as “least-developed,” and these nations do not have to accept the Agreement establishing the Centre in order to use its services.<sup>129</sup>

The creation of the ACWL marks the establishment of the “first true center for legal aid within the international system.”<sup>130</sup> Domestic legal clinics, however, have been in existence for decades in recognition of an unbalanced system that fails to allow the economically disadvantaged equal access to justice.<sup>131</sup> Mike Moore, the Director-General of the WTO noted that this inequality is result of two factors:

- (i) . . . increased sophistication of the legal system and also of the court system in most countries, and certainly in developed countries . . . [which] has led to increased costs of litigation; (ii) continuing social inequality which, combined with the increased costs just mentioned, made for a restriction of access to justice for large parts of the population, often precisely those social lawyers that were supposed to be supported by new rules.<sup>132</sup>

These same factors contribute to inequality in access to justice on the international level, with its many rules and courts:

The WTO is a case in point: it has expanded the rules of international trade manifold compared to the GATT and created a new “court” system with a possibility of appeal. Accordingly, legal advice in this

about the development of the center. See McBride, *supra* note 3, at 92-93 (“Some individual member states of the EU support the Centre, but the EU as a whole does not . . . . The United States, for its part, has not clearly defined its position . . . it seems safe to infer that the U.S. is against the institution.”).

127. Press Release, *Inauguration of the Advisory Centre on WTO Law*, available at [http://http://www.acwl.ch/e/tools/news\\_e.aspx](http://http://www.acwl.ch/e/tools/news_e.aspx).

128. *Id.*

129. *Id.*

130. Mike Moore, Address at the Official Opening of the Advisory Centre for WTO Law (Oct. 5, 2001), available at [http://http://www.acwl.ch/e/tools/news\\_e.aspx](http://http://www.acwl.ch/e/tools/news_e.aspx). Moore stated that:

[I]ndividuals appearing as defendants before War Crimes Tribunals have always been able to call upon pro bono legal aid. The International Court of Justice has a small fund out of which costs of legal assistance can be paid for countries that need such help. But today marks the first time a true legal aid center has been established w/in the international legal system, with a view to combating the unequal possibilities of access to international justice as between States.

131. *Id.*

132. *Id.*



sector is very expensive. Thus creating considerable problems of access to justice for developing countries.<sup>133</sup>

The goal of the Advisory Centre is to provide "training and legal assistance in WTO matters to its developing country Members and all least developed countries."<sup>134</sup> The WTO is a complex system of rights and obligations, supported by a binding dispute settlement mechanism to ensure compliance. Meaningful participation in the WTO requires an understanding of these rights and obligations and the ability to participate in its dispute settlement mechanism.<sup>135</sup> The enforcement of rights should not depend upon economic strength, but upon the validity of a legal claim under the WTO Agreement.<sup>136</sup> Unfortunately, many Members face considerable problems making these legal claims due to "lack of expertise and human resources in this particular field of international law."<sup>137</sup> The Centre is a response "to the urgent need of developing countries and economies in transition to build up their legal expertise in order to be able to participate more fully in the WTO."<sup>138</sup>

#### A. *The Logistics of the ACWL*

The Advisory Centre is currently established in Geneva as an international organization independent from the WTO.<sup>139</sup> Although the ACWL is described as part of the dispute settlement system of the WTO, "it must also remain independent of the WTO and its Members if it is to fulfill its role effectively."<sup>140</sup> Frieder Roessler, the Executive Director of the ACWL, describes the Centre as, "a masterpiece of checks and balances," while the ACWL retains financial independence through its large endowment fund of nearly twenty million Swiss francs, it is also subject "to close budgetary scrutiny by its Members."<sup>141</sup>

In addition to providing legal advice, the Centre organizes seminars and offers internships to government officials from developing country members and least-developed countries.<sup>142</sup> The purpose of these seminars, and especially the internships, is to provide continuing education to individuals in developing country governments in hopes that they can develop the level of expertise

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133. *Id.*

134. *Id.*

135. Establishing The Advisory Centre on WTO Law, *supra* note 1.

136. Kim Van der Borgh, *The Advisory Center on WTO Law: Advancing Fairness and Equality*, 2 J. INT'L ECON. LAW 723, 723 (1999).

137. Establishing the Advisory Centre on WTO Law, *supra* note 1.

138. *Id.*

139. *Id.*

140. Roessler, *supra* note 2.

141. *Id.*

142. Establishing the Advisory Centre on WTO Law, *supra* note 1.

necessary to represent themselves in the future.<sup>143</sup> As the executive director of the ACWL stated at its inauguration:

I believe the Centre's comparative advantage will be its day-to-day involvement in WTO dispute settlement proceedings. Its niche may therefore very well be on-the-job training of interns as well as information sessions, circulars and seminars to disseminate the knowledge that the Centre acquires through its own practical experience.<sup>144</sup>

The executive director believes that "the Centre should remain a relatively small organization and rely on outside expertise whenever the demand for its services exceeds its capacity to provide them to best achieve the ACWL's aims"<sup>145</sup> The small size will help maintain the desired flexibility and enable it to quickly respond to the requests of clients.<sup>146</sup> Despite the small number of full-time staff members, the Centre will still have the ability to obtain the expertise necessary best to serve its users:

The Centre may finance not only the services of legal experts but also those of technical experts. Its founders have created a Technical Expertise Trust Fund to help defray part of the costs of technical expertise to prepare the underlying technical dossier in fact-intensive dispute settlement proceedings.<sup>147</sup>

The ACWL's Charging Policy (Annex IV) explains the way that the countries using the Centre are expected to pay for its services.<sup>148</sup> The billing policy reflects an attempt to strike a balance between several of the goals of the Centre: the ability to pay on the basis of an objective scale, promoting settlement of disputes and avoiding frivolous cases, and creating incentives to become ACWL members.<sup>149</sup> Incentives to become founding members include discounts on services, and a higher priority when the Centre is asked to assist multiple parties to a dispute.<sup>150</sup> The fees for the Centre are "set at

143. See Jackson, *supra* note 86, noting that:

[O]ne of the ingenious facets of the procedures established by the new Advisory Center is that it combines its assistance for advocacy with a moderate mission of training. Part of this training can be accomplished by asking an assisted country to provide a person who will be a sort of 'intern,' working with the Advisory Centre staff on the case for his or her country, and thus receiving experience in that process.

*Id.*

144. Roessler, *supra* note 2.

145. *Id.*

146. *Id.*

147. *Id.*

148. Power Point Presentation on the Advisory Centre on WTO Law, available at <http://www.itd.org>.

149. *Id.*

150. See Van der Borgh, *supra* note 136, at 725.

levels sufficiently low to ensure that also [sic] poor countries can assert their WTO rights but also high enough to ensure that the Centre's services are not wasted."<sup>151</sup> One basic rule is that no country will be entitled to free service.<sup>152</sup> However, free counseling and pre-trial consulting is available for founding members and for least-developed countries for a certain fixed number of hours per year.<sup>153</sup> Developing countries that are founding members are "classified according to their share in world trade (using data for calculating WTO contributions) with an upward correction for GNP per capita as classified by the World Bank in three categories."<sup>154</sup> Least-developed countries are in a separate category.<sup>155</sup> The following is a chart established by the Centre to assess fees.<sup>156</sup>

Hourly Rates		
<b>ACWL MEMBERS</b>	<b>Base Rate- \$250</b>	<b>Discount Rate</b>
Category A	\$200	20%
Category B	\$150	40%
Category C	\$100	60%
Least Developed	\$25	90%
<b>NON-FOUNDING USERS</b>		
Category A	\$350	Access but no Priority
Category B	\$300	
Category C	\$250	

The annual expenditure for the ACWL is estimated at \$1.7 million.<sup>157</sup> The funding for the Centre will come from three main sources: user fees, revenues from the endowment fund beginning in year six, and multiyear donor contributions for the first five years.<sup>158</sup> There may also be voluntary contributions from not-for-profit private organizations for specific activities.<sup>159</sup> The Advisory Centre is expected to be financially independent in the sixth year.<sup>160</sup>

The Advisory Centre is managed by a General Assembly, consisting of developing countries, economies in transition, and developed countries that make contributions to the endowment fund

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151. Roessler, *supra* note 2.

152. Power Point Presentation on the Advisory Centre on WTO Law, *supra* note 148.

153. Van der Borgh, *supra* note 136, at 726.

154. *Id.*

155. *Id.*

156. Power Point Presentation on the Advisory Centre on WTO Law, *supra* note 148.

157. *Id.*

158. *Id.*

159. *Id.*

160. *Id.*

or multi-year contributions.<sup>161</sup> Three countries represent the group of least-developed nations that are not founding members.<sup>162</sup> The General Assembly meets annually to assess the activities of the ACWL, to elect the Management Board, and to adopt the budget proposal.<sup>163</sup> The management board consists of one person for each of the four established user groups, a person that represents developed founding members, and an Executive Director.<sup>164</sup> The term of the Board is two years, and each person is eligible for re-election.<sup>165</sup> The Director-General of the WTO is also invited to partake in the annual Management Board meeting in order to guarantee coordination between the Centre and the WTO.<sup>166</sup> The main responsibilities of the Management Board include: "strategic direction, financial accountability, regular monitoring of activities, reviewing the decisions of the Executive Director on appeal where assistance has been denied, appointing the Executive Director (in consultation with the founding members), and supervising the endowment fund that [is] managed by a professional fund manager."<sup>167</sup>

The current staff of the ACWL consists of an Executive Director, four lawyers, one office manager and one secretary.<sup>168</sup> These attorneys have been recruited internationally<sup>169</sup> and the selection criteria are quite stringent.<sup>170</sup> Each member of the staff is paid a competitive salary and must adhere to a code of conduct.<sup>171</sup> There is no incentive to prolong any cases or to solicit business.<sup>172</sup> The Centre's Management Board has appointed Frieder Roessler, who was previously a professor as well as the Director of the Legal Affairs

161. Van der Borght, *supra* note 136, at 726.

162. *Id.*

163. *Id.*

164. *Id.*

165. *Id.*

166. *Id.*

167. Van der Borght, *supra* note 136.

168. Press Release, *supra* note 127.

169. Power Point Presentation on the Advisory Centre on WTO Law, *supra* note 148.

170. See, e.g., Advisory Centre on WTO Law, Vacancies for Junior and Senior Lawyers, available at <http://www.itd.org> (noting that employment requirements include an advanced university degree in law, professional experience as a legal practitioner, including experience in international trade law, good knowledge of economic issues underlying WTO law, ability to write accurately, concisely and quickly, good communication and presentation skills in at least 2 of the 3 WTO working languages, ability to work independently and cooperate with others in a diverse international setting, interest in the advancement of developing countries, and a sense of public international service).

171. Power Point Presentation on the Advisory Centre on WTO Law, *supra* note 148.

172. *Id.*

Division of the GATT and the WTO, as the Executive Director.<sup>173</sup> While the Centre employs only a few full-time attorneys, this is an improvement over the previous situation as “nearly one-quarter of WTO members cannot afford to keep a single permanent representative in Geneva, where the WTO is headquartered.”<sup>174</sup> The plan is to increase the staff and capacity of the ACWL in accordance with demand for services.<sup>175</sup>

### B. *The Work of the ACWL in its First Year of Operation*

The ACWL was able to do a substantial amount of work during its first year in operation.<sup>176</sup> For instance, during this time period the Centre supplied written analysis to six different nations, three of them members of the ACWL, one least-developed country, and two non-member developing countries.<sup>177</sup> Three members requested the Centre analyze the merits of potential WTO cases.<sup>178</sup> One member made two separate requests for such analysis and after careful examination of the issues, the ACWL recommended that the member not bring either case to the DSB.<sup>179</sup> On a separate file, the ACWL suggested that the scope of the potential case was too broad, and the issue would be better resolved if it were narrowed.<sup>180</sup> Finally, on a fourth file brought to the Centre, which involved a challenge to the GATS, the ACWL was examining the merits of the case at the time the report on operations was made available.<sup>181</sup> The least-developed country that solicited the ACWL was able to obtain advice on bringing an anti-dumping case, as well as on its rights under Art. XVIII of the GATT.<sup>182</sup> Two non-member countries have also asked for legal opinions: one country “requested an opinion on the WTO consistency of trade policy proposals that its government was considering tabling legislation.”<sup>183</sup> On that matter, the ACWL provided the nation with a written response on the potential susceptibility of their proposed legislation to challenge by other WTO member nations.<sup>184</sup> Another nation “received a written opinion on the

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173. Press Release, *supra* note 127.

174. McBride, *supra* note 3, at 95.

175. Press Release, *supra* note 127.

176. Advisory Centre on WTO Law, *Report on Operations, July 2001 to July 2002*, available at <http://www.itd.org>.

177. *Id.*

178. *Id.*

179. *Id.*

180. *Id.*

181. *Id.*

182. *Report on Operations*, *supra* note 176.

183. *Id.*

184. *Id.*

relationship between the GATS and the proposed investment provisions in the FTA.”<sup>185</sup>

In the first year of operations the ACWL’s legal advice was also solicited by four different nations in six different WTO cases:

1. By Pakistan in the Appellate Body proceedings in *United States–Transitional Safeguard Measure on Cotton Yarn*.
2. By Peru in the panel proceedings in *EC–Trade Description for Sardines*
3. By India in:
  - a. the case against the United States on *Rules of Origin for Textiles and Apparel Products*
  - b. the case against the European Community on *Conditions on the Grant of Tariff Preferences to Developing Countries*
  - c. the case brought by the European Community and the United States at the panel stage and the appeal of the panel report on *India–Measures Affecting the Automobile Industry*.
4. By Ecuador in the panel proceedings in *Turkey–Certain Import Procedures for Fresh Fruit*.<sup>186</sup>

In India’s complaint against the European Union and the United States involving the automotive sector, a case that began in 1998-99 and lasted until 2001, Delhi paid the ACWL an hourly rate of \$150 to prepare submissions and statements.<sup>187</sup> An Indian diplomat said that this was a savings of at least \$100 an hour compared with the fees of a private firm.<sup>188</sup>

### C. A Case Study in Depth: European Communities–Trade Description of Sardines

The Peruvian government solicited the help of the ACWL in a dispute involving the European Community. The dispute between the two governments involved the labeling of sardines for sale in the European Community.<sup>189</sup> Two species of sardines were involved; one species, *Sardinops sagax* is found mainly in the eastern Pacific off the Peruvian and Chilean coasts.<sup>190</sup> The other species, *Sardina pilchardus* Walbaum, is found mainly in European waters.<sup>191</sup> Until 1989, all species “of fish belonging to a large group of clupeid marine fish sharing the characteristics of young pilchards” could be marketed

185. *Id.*

186. *Id.*

187. Kate Millar, *Poorer WTO Countries Club Together as Trade Disputes Multiply*, AGENCE FRANCE PRESSE, Aug. 29, 2002 (on file with author).

188. *Id.*

189. European Communities–Trade Description of Sardines, First Submission of Peru, WT/DS231, ¶ 3.

190. *Id.*

191. *Id.*

to the European Community under the term "sardines."<sup>192</sup> However, in 1989, the European Community changed this standard, adopting Council Regulation (EEC) 2136/89 that held that only *Sardina pilchardus* Walbaum could be labeled as "sardines."<sup>193</sup> *Sardina pilchardus* Walbaum "happens to be of a species that populates mainly European waters."<sup>194</sup>

The origin of the dispute stems from a change in the German labeling of Peruvian sardines.<sup>195</sup> A German company bought sardines from Peru that were of the species *Sardinops sagax* and called them "Pazifische Sardinen" (Pacific Sardines).<sup>196</sup> The label also indicated the country of origin and the species of sardines.<sup>197</sup> In July 1999, the company was told by German officials that it could not longer market that species of fish under the name "sardines" because Article 2 of Council Regulation No. 2136/89 mandates that only *Sardina pilchardus* can be marketed as "sardines."<sup>198</sup>

The German company complained to the Director General Cavaco of the Directorate General XIV, Fisheries, of the European Commission that their label was consistent with an international food-labeling standard and clearly indicated the pertinent information to the consumer.<sup>199</sup> The Director General rejected the company's complaints and noted that a failure to comply with the rule might constitute a fine of DM 20,000.<sup>200</sup> Thus, the German company was forced to stop labeling the Peruvian fish as sardines.

In their first submission to the WTO, Peru noted that according to Article 12.2 of the WTO Agreement on Technical Barriers to Trade (TBT Agreement), the members of the WTO "shall give particular attention to developing country Members' rights under that Agreement and shall take into account the trade needs of those countries in the implementation of that Agreement."<sup>201</sup> Peru went on to suggest that the European Community has not observed the principles of that Article because it has "deliberately creat[ed] a labeling requirement designed to protect its producers at the expense of producers in developing countries in South America."<sup>202</sup> Peru complained that the EC regulation has "contributed to a significant

192. European Communities—Trade Description of Sardines, WT/DS231, Statement of Peru at the First Meeting of the Panel, ¶ 4.

193. European Communities—Trade Description of Sardines, Report of the Appellate Body, AB-2002-3, ¶ 3.

194. Statement of Peru, *supra* note 191.

195. First Submission of Peru, *supra* note 189, ¶ 5.

196. *Id.*

197. *Id.*

198. *Id.*

199. *Id.* ¶ 7.

200. *Id.*

201. First Submission of Peru, *supra* note 189, ¶ 71.

202. *Id.*

decline in the activities of sardine processing plants and a rise in unemployment, coupled with the corresponding adverse social effects, in many towns dependent upon this industry.”<sup>203</sup> Moreover, Peru alleged that the EC regulation was a violation of several provisions of the WTO Agreement.<sup>204</sup> The thrust of Peru’s legal argument was that the EC labeling requirement is contrary to Article 2.4 of the TBT Agreement:

Where technical regulations are required and relevant international standards exist or their completion is imminent, Members shall use them, or the relevant parts of them, as a basis for their technical regulations except when such international standards or relevant parts would be an ineffective or inappropriate means for the fulfillment of the legitimate objectives pursued, for instance because of fundamental climatic or geographical factors or fundamental technological problems.<sup>205</sup>

Peru’s first submission to the panel purported to demonstrate three main points regarding how the labeling of sardines is inconsistent with Article 2.4 of the TBT agreement:

- (a) it constitutes a technical regulation within the meaning of the TBT Agreement; (b) international standards relevant to regulation exist; and (c) the EC failed to base the regulation on those standards even though they would be an effective and appropriate means for the fulfillment of the objective of market transparency that the EC claims to pursue.<sup>206</sup>

The international standard referred to by Peru is the “CODEX STAN 94” adopted by Codex Alimentarius Commission of the Food and Agriculture Organization and the World Health Organization.<sup>207</sup> The standard for sardines is set out in paragraph 6 and states:

#### 6. LABELING

In addition to the provision of the Codex General Standard for the Labeling of Prepackaged Foods (CODEX STAN 1-1985, Rev. 3-1999) the following provisions shall apply:

##### 6.1 NAME OF THE FOOD

The name of the products shall be:

- 6.1.1 (i) “Sardines to be reserved exclusively for *Sardina pilchardus* (Walbaum); or
- (ii) “X Sardines” of a country, a geographic area, the species, or the common name of the species in accordance with the law and custom of the country in which the product is sold, ad in a manner not to mislead the consumer.<sup>208</sup>

203. Minutes of Meeting held on July 24, 2001, WT/DSB/M/106,107 ¶ 53.

204. *Id.*

205. First Submission of Peru, *supra* note 189, ¶ 10.

206. *Id.* ¶ 11.

207. *Id.* ¶ 4.

208. *Id.*



The dispute over the labeling went on for some time before Peru went to the DSB. Beginning early on, Peru felt that they were putting far more effort into resolving the dispute than the European Community, which Peru felt was being uncooperative.<sup>209</sup> Peru formally requested that the European Community hold consultations regarding their dispute.<sup>210</sup> These consultations, which were held on May 31, 2001, failed to resolve the labeling issue.<sup>211</sup> Peru then requested that the DSB convene a Panel to examine the matter on July 24, 2001.<sup>212</sup> The European Community and Peru then entered into agreements regarding the composition of the panel.<sup>213</sup> However, these negotiations were also unsuccessful, and Peru was forced to request that the Director-General of the WTO determine the composition of the panel pursuant to Article 8:9 of the DSU.<sup>214</sup>

In Peru's first submission to the DSB, Peru noted that for two years it had "attempted to resolve the dispute amicably."<sup>215</sup> Peru claimed that the European Community "ignored" all of its proposals and "did not once respond to Peru's request for an explanation of the justification of the labeling requirement in terms of paragraphs 2 to 4 of Article 2 of the TBT Agreement, notwithstanding the EC's obligation to provide such an explanation under Article 2.5 of the TBT Agreement."<sup>216</sup>

In the same submission, Peru told the panel that it felt that the European Community was disingenuous in several of its statements.<sup>217</sup> Peru was primarily concerned with the fact that after two years of failed attempts to reach a solution, when Peru finally requested that the DSB establish a panel, the European Community claimed that it was ready to seek a solution, but that they were in the process "of collecting all the necessary information concerning this matter in order to respond to the questions asked by Peru [but were] disappointed about Peru's *hasty* decision to request establishment of a panel."<sup>218</sup> The European Community went on to oppose the establishment of the panel and claimed that they "hoped that the delay would enable the parties to find a mutually agreed solution."<sup>219</sup>

Peru claimed that there was a "glaring discrepancy" between the European Community's conduct in the case and their assertions:

209. *Id.*

210. *Id.*

211. First Submission of Peru, *supra* note 189, ¶ 1.

212. *Id.*

213. *Id.*

214. *Id.*

215. *Id.* ¶ 71.

216. *Id.*

217. First Submission of Peru, *supra* note 189, ¶ 71.

218. Minutes, *supra* note 203, ¶ 54 (emphasis added).

219. *Id.*

Peru was surprised that, in spite of recent statements by the EC Trade Commissioner reaffirming the EC's commitment to ensuring that the interests and needs of developing countries were a core component of the multilateral trading system and were fully incorporated in the context of a fresh round of trade negotiations, the EC was implementing the provision which was not only in breach of WTO commitments, but was also severely detrimental to Peru's fishing industry, which was one of the key sectors of its economy and a major source of employment.<sup>220</sup>

Peru felt that the EC's statement regarding its commitment to the needs of developing countries was insincere in that it did not "even attempt to justify in terms of WTO law the impediments it creates to the exports of developing countries."<sup>221</sup> Furthermore, because the EC consumes more sardines than it is able to produce, Peru believed that its lack of compliance with the WTO obligations was not only legally and politically unacceptable, but that it was also commercially unsound.<sup>222</sup>

After the Panel considered all of the evidence brought by Peru, the European Community, and several third-party participants, the Panel distributed its decision to members of the WTO on May 29, 2002.<sup>223</sup> The Panel held that the EC regulation was inconsistent with Article 2.4 of the TBT Agreement, and exercised judicial economy with respect to Peru's claims under Articles 2.1 and 2.2 of the TBT Agreement and III:4 of the GATT 1994.<sup>224</sup> In light of its findings, the Panel recommended that the DSB request the European Community bring its measure into conformity with its obligations under the TBT Agreement.<sup>225</sup>

On June 25, 2002, the European Community notified the DSB of its intention to appeal certain issues of law and legal interpretations developed by the Panel.<sup>226</sup> Peru, in return, requested that the Appellate Body exclude four of the nine issues raised by the European Community in its Notice of Appeal, as Peru did not feel that they met the requirements of Rule 20(2)(d) of the *Working Procedures for Appellate Review*.<sup>227</sup> On appeal, the most important issues were whether the Panel erred in finding the EEC 2136/89 is a "technical regulation" within the meaning of Annex 1.1 of the TBT Agreement; whether the panel erred by finding that Article 2.4 of the TBT Agreement applies to existing measures, such as the EC regulation;

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220. *Id.* ¶ 53.

221. First Submission of Peru, *supra* note 189, ¶ 72.

222. *Id.*

223. Report of the Appellate Body, *supra* note 193, ¶ 10.

224. *Id.*

225. *Id.*

226. *Id.* ¶ 11.

227. *Id.*

whether the panel erred by finding that CODEX STAN 94-1981, Rev.1-1995 (Codex Standard 94) is a “relevant international standard” within the meaning of Article 2.4; whether the panel erred in finding that Codex Stan 94 was not used “as a basis for” the EC regulation; and whether the Panel correctly interpreted and applied the second part of Article 2.4, which allows members not to use international standards “as a basis for” their technical regulations “when such standards or relevant parts would be an ineffective or inappropriate means for the fulfillment of legitimate objectives pursued.”<sup>228</sup>

In its decision written on September 26, 2002, the Appellate Body upheld the Panel’s ultimate conclusion that the EC regulation violated the TBT Agreement. It upheld the Panel’s finding that the EC regulation is a “technical regulation” for purposes of the TBT Agreement.<sup>229</sup> It also upheld the Panel’s finding that the TBT Agreement applies to existing measures that were adopted before the TBT Agreement and that have not ceased to exist, such as the EC regulation.<sup>230</sup> Additionally, the Appellate Body agreed with the Panel’s finding that Codex 94 is a “relevant international standard” for purposes of Article 2.4 of the TBT Agreement, and that it was not used “as a basis for” the EC regulation.<sup>231</sup> Finally, while the Appellate Body reversed the Panel’s finding that the European Community had to prove that Codex Stan 94 is an “ineffective or inappropriate” means to fulfill the “legitimate objectives” pursued by the European Community,<sup>232</sup> it held that Peru had produced sufficient evidence and legal arguments to show that Codex Stan 94 is not “ineffective or inappropriate” to fulfill the “legitimate objectives” of the EC regulation.<sup>233</sup> Thus, the Appellate Body recommended that the DSB request the European Community bring the EC regulation into conformity with Article 2.4 of the TBT Agreement.<sup>234</sup>

Peru, with the help of the Advisory Centre, was successful in proving that the European Community had violated the WTO Agreement.<sup>235</sup> This decision marked the first Appellate Body proceeding in which a nation was represented by the ACWL.<sup>236</sup> The dispute between Peru and the European Community was the first major victory for the Advisory Centre, and its outcome was very

228. *Id.* ¶ 134.

229. Report of the Appellate Body, *supra* note 193, ¶ 195.

230. *Id.* ¶ 216.

231. *Id.* ¶¶ 233, 258.

232. *Id.* ¶ 282.

233. *Id.* ¶ 291.

234. *Id.* ¶ 316.

235. See Report of the Appellate Body, *supra* note 193, ¶ 316.

236. Raj Bhala & David A. Gantz, *WTO Case Review 2002*, 20 ARIZ. J. INT’L & COMP. L. 143, 286 (2003).

significant to the Peruvian economy. This success has been called “a landmark case in the fight against protectionism,”<sup>237</sup> and has shown “that smaller countries can benefit from WTO rulings if they have the legal firepower to match the bigger power blocs.”<sup>238</sup> Moreover, one author has noted that this case proves that Roessler, the Executive Director of the ACWL, has “few equals as a litigator before WTO panels and the Appellate Body.”<sup>239</sup>

#### IV. THE REACTION OF THE EUROPEAN UNION AND THE UNITED STATES TO THE ACWL

Despite the success of the Advisory Centre, both the United States and the European Union have not been forthcoming with support. In the initial political process of establishing the Centre, the European Union was asked to support the organization but “did not like the idea very much.”<sup>240</sup> In fact, developing countries have even charged that the European Commission, the executive arm of the European Union, “has tried to sabotage the ACWL.”<sup>241</sup> These countries suggest that the Commission is afraid that the Centre would allow developing countries to bring claims that would challenge what many see as the European Union’s protectionist policies embodied in its Common Agricultural Policy or “the environmental and social conditions applied to its preferential trade arrangements for poor nations.”<sup>242</sup> The European Union’s reaction to the Centre has been widely criticized:

The European Union likes to pose as an enlightened aid donor and champion of developing economies’ interests. It also regularly holds itself up as a model of the virtues of universal justice and the primacy of the rule of law. But the European Commission is making a mockery of both claims by obstinately resisting a modest proposal to help the world’s poorest countries gain a fair hearing in trade disputes.<sup>243</sup>

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237. Nikki Tait, *Of Fish and Free Trade*, FIN. TIMES, June 17, 2002, at 14.

238. Edward Fennell, *Sardines or Otherwise*, TIMES (London), June 18, 2002, Features, at 1.

239. Bhala & Gantz, *supra* note 236, at 287-88.

240. E-mail from Genee Otto, Dutch Foreign Minister of Trade, to Andrea Greisberger, author (Feb. 27, 2003) (on file with author).

241. Frances Williams, *Advice On WTO Law Centre would Help Poor Countries Involved in Trade Disputes*, FIN. TIMES (London), Feb. 17, 1999, at 4; see also *Rich Men’s Rules*, FIN. TIMES (London), Feb. 18, 1999, at 15 (“Against the wishes of the Netherlands and several other EU members, [the Commission] is fighting the proposed legal aid center . . . Brussels’ ploy looks suspiciously like a sabotage mission.”).

242. Williams, *supra* note 241.

243. *Rich Men’s Rules*, *supra* note 241.

It is charged that the Commission's opposition to the Centre stems in part from its desire to assert its authority as an institution over member states in matters of policy.<sup>244</sup> In fact, when the Centre was initially being discussed, the Commission was said to be willing to sue members for contributing funds to the ACWL, claiming that these donations would "weaken co-operation in the common EU interest."<sup>245</sup> However, some trade officials claim that the Commission's real goal in attempting to prevent members from supporting the Centre was to leave it under-funded and unable to get off the ground.<sup>246</sup>

The Commission, for its part, has said that it is opposed to the ACWL simply because better solutions are available, and because an independent center is unnecessary.<sup>247</sup> Instead, the Commission has suggested strengthening the ability of the WTO itself to give legal advice to developing countries.<sup>248</sup> Its proposal entails establishing a separate "independent unit" within the WTO Secretariat to assist the developing countries in the dispute settlement system.<sup>249</sup> The Commission says that although the WTO currently lacks the technical capacity to provide legal services to its members, this capacity can, and should, be increased by adding more legal counselors.<sup>250</sup> These services, unlike the Advisory Centre, would be available through the WTO under Article 27.2 of the DSU rather than independent of it.<sup>251</sup>

The Commission's proposal has been met with considerable criticism. First, it is argued that the lack of technical capacity of the WTO is not the only issue, or indeed the most relevant or important issue.<sup>252</sup> Many developing countries argue that the Commission's proposal could not possibly meet the needs of the developing countries because WTO officials, such as the Secretariat must necessarily remain neutral.<sup>253</sup> The United States, a vocal opponent of the EU proposal, noted that if the Secretariat provides "case-specific advise on the strengths and weaknesses of particular arguments, that appears to risk jeopardizing the neutrality of the WTO Secretariat

244. *Id.*

245. *Id.*

246. Williams, *supra* note 241.

247. *WTO's Dispute Settlement System and the Proposed Centre on WTO Law*, available at [www.twinside.org](http://www.twinside.org).

248. Williams, *supra* note 241.

249. Congressional Testimony of the American Bar Association Section of International Law and Practice, Mar. 28, 2000, available at 2000 WL 11070371 [hereinafter ABA Testimony].

250. *WTO's Dispute Settlement System and the Proposed Centre on WTO Law*, *supra* note 247.

251. *Id.*

252. *Id.*

253. *Id.*

that is guaranteed by DSU Art. 27.2.”<sup>254</sup> As one critic explained, “Developing countries need partisan legal advice . . . [b]y definition that cannot be given by the WTO.”<sup>255</sup>

Moreover, scholars have noted that the WTO as a body still lacks credibility in the eyes of many developing countries.<sup>256</sup> There is a general distrust of the WTO and a feeling that the Secretariat “is too weak to resist pressures from its more powerful members, especially the United States and the European Union.”<sup>257</sup> A final criticism of the Commission’s proposal is that it does not allow developing countries to receive legal advice in the most expensive and difficult DSU process:

Under the proposal . . . the unit would not represent WTO Members in panel proceedings, but only in the pre-panel stages. This limitation raises serious questions about whether the proposal would adequately address the constraints on developing country participation in the DSU, since panel proceedings are the most resource-intensive phase of the proceeding.<sup>258</sup>

To make matters worse, some officials have accused the European Commission of being aware of all of these problems when it made its proposal, lending support to the view that the Commission’s opposition to the Advisory Centre is disingenuous or even mischievous.<sup>259</sup>

While the United States has been a less vocal opponent of the Advisory Centre it has not supported the ACWL. Prior to the unveiling of the Centre, the United States refused to commit any money,<sup>260</sup> and its response to the Centre’s proposal can best be characterized as “lukewarm.”<sup>261</sup> Dutch Foreign Trade Minister Otto Genee said that his ministry and the Columbian Minister for Trade both sent the United States letters explaining the ACWL and urging them to join, but the United States has “never shown any interest in becoming a member of the ACWL.”<sup>262</sup> In an e-mail correspondence, Genee noted, “The idea of funding an organization that may attack the United States in dispute settlement is apparently abhorrent and

254. ABA Testimony, *supra* note 249.

255. Williams, *supra* note 241.

256. *WTO’s Dispute Settlement System and the Proposed Centre on WTO Law*, *supra* note 247.

257. *Id.*

258. ABA Testimony, *supra* note 249.

259. *WTO’s Dispute Settlement System and the Proposed Centre on WTO Law*, *supra* note 247.

260. McBride, *supra* note 3, at 70.

261. *Id.* at 92.

262. E-mail from Genee Otto, *supra* note 240.

too much.”<sup>263</sup> One author has suggested that the United States should not support the ACWL for that very reason.<sup>264</sup> He notes that:

It would be difficult for any U.S. administration to defend to its taxpayers or the U.S. Congress a proposal to spend tax dollars on an institution created to assist others in challenges to U.S. trade law or regulations, or to resist the U.S. trade complaints filed with the WTO.<sup>265</sup>

While the United States has not yet contributed funds to support the Centre, government officials are nonetheless being presented with information regarding the Centre and its work. Congress recently heard testimony by the American Bar Association Section of International Law and Practice, about the Centre, its neutrality with regard to the WTO, and its advantages to developing countries:

Developing countries' inability to make full use of the DSU undermines the legitimacy of the DSU and the world trading system and may frustrate efforts to amicably settle disputes . . . current statistics suggest, at the very least, a strong possibility of relative underutilization of the WTO dispute settlement mechanism by the developing world.<sup>266</sup>

## V. CONCLUSION

It does not make sense that neither the United States nor the European Union has shown any interest in supporting the Advisory Centre on WTO Law. Both the United States and the European Union have a history of providing equal access to their domestic justice systems to the poor. Some feel that this equality of access legitimizes their justice systems in these countries and sets them apart from most other countries.

The United States is a country that prides itself on offering all persons a chance to attain justice in the court system, despite the financial situation of the individual. In fact, “U.S. national rhetoric is replete with guarantees the United States provides equal justice . . . the entrance frieze of the U.S. Supreme Court building bears the promise of “Equal Justice Under the Law,” which appears constantly on television and other media.”<sup>267</sup> Furthermore, the programs that guarantee equal justice “occupy a unique status among the many

263. *Id.*

264. See Olin L. Wethington, *Commentary on the Consultation Mechanism Under the WTO Dispute Settlement Understanding During its First Five Years*, 31 *LAW & POL'Y INT'L BUS.* 583, 590 (2000).

265. *Id.*

266. ABA Testimony, *supra* note 249.

267. Earl Johnson, Jr., *Equal Access to Justice: Comparing Access to Justice in the United States and Other Industrial Democracies*, 24 *FORDHAM INT'L L.J.* 83, 86 (2000).

social programs and other societal goals our government is asked to pursue . . . equal justice is at the essential core of the American system of government.”<sup>268</sup>

Likewise, equal justice has a long history and occupies a central role in Europe. In England, the right to counsel dates back centuries. The English Parliament enacted a statute in 1495 guaranteeing free counsel for impoverished litigants in common law courts: “This ‘Statute of Henry VII’ created a right to free counsel for indigent English litigants and empowered the courts to appoint lawyers to provide the representation without compensation.”<sup>269</sup> European countries have now gone farther than the United States in the field of equal justice, offering free legal service to indigent persons in civil as well as criminal cases.<sup>270</sup> The right to free legal advice in civil cases is now a “supra-national” constitutional right based on the outcome of *Airey v. Ireland*, a case decided in 1979 by the European Court of Human Rights.<sup>271</sup>

The European Court of Human Rights “interpreted the fair hearing guarantee of the European convention on Human Rights to require that member governments appoint free counsel for poor litigants engaged in civil cases.”<sup>272</sup> The only exception to this rule is if the forum is “simple enough to afford a fair hearing without legal assistance.”<sup>273</sup> The result in *Airey* was partially predicated on the fact that Europe’s justice system is based upon the social contract theory of government:

One of the fundamental tenets of social contract theory is that citizens would not voluntarily surrender their natural right to resolve their disputes with others through force unless they were guaranteed fairness in the sovereign’s forum. The government violates this compact if the forums set up to resolve disputes deny a fair chance to those who cannot afford lawyers and fail to provide lawyers to those citizens. To live up to the equal justice prerequisite of the social contract the government must either simplify the forums drastically or provide lawyers to those who cannot afford them.<sup>274</sup>

Despite the fact that the United States and the European Union have not financially contributed to the Advisory Centre, many other developed nations have realized that supporting the Centre will be beneficial to all members of the WTO, including wealthy

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268. Earl Johnson, Jr., *Toward Equal Justice: Where the United States Stands Two Decades Later*, 5 MD. J. CONTEMP. LEGAL ISSUES 199, 203 (1994).

269. *Id.* at 204.

270. *Id.* at 206.

271. *Id.*

272. *Id.* at 206-07 (citing 2 Eur. Ct. H.R. Rep 305 (1979); European Convention on Human Rights, art. 6, § 1.

273. *Id.* at 207.

274. Johnson, *supra* note 267, at 209-10.



industrialized nations. The reasoning that the United States and the European Union cannot justify supporting an organization that will challenge their trade laws ignores the fact that aiding the ACWL would lend legitimacy to the WTO as a whole, benefiting all its members. As one author notes, “[the ACWL] offers the very services that overcome serious trepidations by developing and least-developed states regarding the cost and procedural concerns of defending and pursuing complaints under the DSU.”<sup>275</sup> This criticism also ignores the fact that one of the primary functions of the ACWL is to train the developing countries to represent themselves and to aid them in defending complaints brought by other nations. Moreover, the Centre carefully screens potential complaints, and has proven that it will not bring every complaint suggested by developing countries.<sup>276</sup> The Centre’s practice of careful screening may even reduce complaints leveled at the United States and the European Union.

While the European Union as a whole has not contributed any money, several individual members of the European Union have donated a substantial amount: “The Netherlands is the main financial backer of the [Advisory Centre], providing the Centre with \$2.25 million in initial support, with Denmark, Norway, Sweden, and the United Kingdom providing an additional \$1 million apiece.”<sup>277</sup> Ireland, Italy, Finland, and Canada have also joined and made contributions to the ACWL.<sup>278</sup> Other industrialized nations such as Japan and New Zealand have also shown interest in supporting the Advisory Centre.<sup>279</sup>

Important legal organizations within the United States have also recognized the importance of legitimizing the WTO in the eyes of developing countries and seem to endorse the United States contributing to the Centre. When testifying before Congress, the American Bar Association did not unequivocally recommend that the United States support the ACWL, but they did note the importance of ensuring that developing countries have access to the DSU:

Because the support of developing countries for WTO dispute settlement is a crucial element in their support for the WTO as an institution, the ABA/SILP believes that it is important for the United States to work with other WTO members to address seriously and

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275. Lawrence D. Roberts, *Beyond Notions of Diplomacy and Legalism: Building a Just Mechanism for WTO Dispute Resolution*, 40 AM. BUS. L.J. 511, 554 (2003).

276. See *supra* notes 176-77 and accompanying text.

277. Pruzin, *supra* note 88.

278. *Founding Members of the Advisory Centre on WTO Law*, available at [www.itd.org/links/acwladvis.htm](http://www.itd.org/links/acwladvis.htm).

279. *WTO Members to Help Poorer Countries*, AP Online, June 7, 1999, available at 1999 WL 17811447.

promptly additional ways to enhance the ability of developing countries to participate in WTO dispute settlement.<sup>280</sup>

Furthermore, the ABA noted that, "Promoting effective participation of the developing countries in WTO dispute resolution would be consistent with the U.S. government's traditional role in promoting the rule of law in international trade."<sup>281</sup>

Although the establishment of the Advisory Centre is a fairly recent development, many developing countries are already recognizing the valuable help that the Centre can provide. The Centre's victory before the Appellate Body in the Peruvian sardines case has been especially instrumental in bringing the work of the Centre to the attention of nations that can use the Advisory Centre's help the most. In a recent interview, Yasuhei Taniguchi, a trade diplomat, said that, "it has been proven in the case of Peru that the Geneva-based advisory law center could help developing countries in the fight to protect their trade rights against disputes with developed countries."<sup>282</sup> He went on to note, "Yes (the system really works)."<sup>283</sup>

Some developing countries have already taken note of the Centre's ability to assist them in disputes against wealthy nations. One of the biggest recent developments, and likely a direct result of the Centre's work, involves a planned complaint by western and central African nations over cotton.<sup>284</sup> If the case is brought to the WTO, it would be the first time that the least-developed countries have been involved in a dispute before the WTO.<sup>285</sup> The agriculture ministers of the countries said that they are working with the ACWL and would begin the process for presenting a complaint to the DSB.<sup>286</sup> The target of their complaint will be the United States and the European Union.<sup>287</sup> The African nations complain that while their cotton is priced competitively, they are suffering because the United States and the European Union pay their cotton producers large subsidies.<sup>288</sup> Frieder Roessler, director of the ACWL, acknowledged the importance of this case saying that due to a lack of funds and information, "[t]here's never been a case brought, or brought against [least-developed countries] so far."<sup>289</sup>

280. ABA Testimony, *supra* note 249.

281. *Id.*

282. Cecille S. Visto, *RP Told to Take Advantage of WTO Legal Office Service*, BUSINESSWORLD, Sept. 11, 2002, at 8.

283. *Id.*

284. *West, Central African Cotton Complaint Would Be a First at WTO*, AGENCE FRANCE PRESSE, June 27, 2002, Financial Pages.

285. *Id.*

286. *Id.*

287. *Id.*

288. *Id.*

289. *Id.*

The ACWL has the potential to benefit every nation that participates in the WTO, not just developing countries. The ACWL legitimizes the WTO as a whole. When parties are equally represented, the entire system is legitimated, and legitimacy, especially in the eyes of developing countries, has been a problem that has plagued the WTO for years: "If the independent way of arbitrating is such an important feature of the WTO, which it is, then we also have to make sure that its access and affordability is such that all members can take advantage of that so-called jewel in the crown."<sup>290</sup>

The ACWL is, so far, the best way for developing countries to participate in the system because it allows them to receive quality legal advice on trade matters that they would not otherwise be able to afford. It is the best way for them to participate in a system that, in their view, has not been giving them what they were promised. This is an organization that the United States and the European Union should be proud to support.

*Andrea Greisberger\**

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290. Millar, *supra* note 187.

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