RIGHTS OF ACTION FOR PRIVATE NON-STATE ACTORS IN THE WTO DISPUTE SETTLEMENT SYSTEM

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I. INTRODUCTION

The WTO's Dispute Settlement Understanding (DSU),[1] and the multi-tiered dispute settlement system it governs have been heralded as lasting triumphs of the Uruguay Round.[2] Indeed, the WTO's dispute settlement system avoids many of the political pitfalls that weakened the dispute settlement system under the original GATT.[3] The WTO's dispute settlement system has also been praised as an innovation in the ability of member states, whether economic key players or much less influential members, to challenge violations of international trade law in ways that may not be practicable through pure negotiation and consultation.[4]

In spite of many positive qualities attributed to the contemporary dispute settlement system, commentators argue that developing countries find themselves at a disadvantage when it comes to effectively litigating trade disputes before dispute settlement panels and securing remedies against developed WTO member states. This article proposes and examines an alternative method of resolving disputes under the DSU. The alternative method is a proposal to give non-state actors in developing member states opportunities to initiate complaints against WTO member states. The WTO dispute settlement system would provide the framework to enable non-state actors to seek remedies for violations of international trade law through arbitration with WTO member states. The heart of the proposal is simple: private non-state actors such as firms, industrial associations, and organizations comprised of business entities of various sizes would play an important role in ensuring greater equality in the WTO dispute settlement system.

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1. Understanding on Rules and Procedures Governing the Settlement of Disputes, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, Legal Instruments--Results of the Uruguay Round, 33 I.L.M. 1125 (1994) [hereinafter DSU].

2. John A. Ragosta, *Unmasking the WTO--Access to the DSB System: Can the WTO DSB Live up to the Moniker 'World Trade Court'?*, 31 L. & POL'Y INT'L BUS. 739, 739-40 (2000).

3. G. Richard Shell, *The Trade Stakeholders Model and Participation by Non-state Parties in the World Trade Organization*, 17 U. PA. J. INT'L ECON. L. 359, 362-63 (1996).

4. *See id.* at 363.

The alternative method proposed in this article deviates from dispute settlement procedures in the DSU in that, at present, only member states may initiate complaints against other member states. This proposal has the potential to radically alter the landscape of jurisprudence relating to international trade disputes, not to mention the commonplace operation of the WTO dispute settlement system. It is also an opportunity to bolster the credibility of the WTO following the collapse of the Doha Round and improve benefits available to developing countries in the global trading system.

This article will provide a brief overview of the current dispute settlement system of the WTO in Part II. The proposal allowing non-state actors to arbitrate alleged violations of international trade law under the WTO dispute settlement system will be explained in Part III. In Part IV, a case study involving the garment export industry in Vietnam will be examined to demonstrate why rights of action for non-state actors would improve the contemporary dispute settlement system and help the WTO promote international trade between developed and developing countries.[5] Benefits of the proposal and counterarguments are discussed in Part V, with brief concluding statements in Part VI.

II. CURRENT METHODS FOR SETTLING TRADE DISPUTES UNDER THE DSU

A. Contemporary dispute settlement by WTO member states

The current system for resolving trade disputes between WTO member states constitutes an improvement over the dispute settlement system originally devised under the 1947 GATT.[6] In the early years of the GATT system, consensus among member states was required to establish a dispute settlement panel and to adopt final panel decisions.[7] This was particularly problematic for developing member states, which often lacked the political and economic clout necessary to initiate dispute proceedings on the basis of consensus among member states.[8]

The contemporary system of formal dispute settlement provides appellate review following consultations between the complaining member state and member states accused of violating obligations arising from the agreements listed in Annex 1 of the DSU.[9] The purpose of consultations is to encourage member states to voluntarily withdraw problematic trade measures without the need for formal dispute settlement proceedings. Consultation is a preferred method for resolving trade disputes because the process is more efficient and less time-consuming than litigation before a dispute settlement panel.[10] If consultations prove to be unsuccessful, the member state raising the complaint may request the

5. Marrakesh Agreement Establishing the World Trade Organization, pmbl. para. 2, 33 I.L.M. 1125, 1144 (1994).

6. Ragosta, *supra* note 2.

7. THOMAS A. ZIMMERMAN, NEGOTIATING THE REVIEW OF THE WTO DISPUTE SETTLEMENT UNDERSTANDING 50-51, 55 (2006); Glen T. Schleyer, *Power to the People: Allowing Private Parties to Raise Claims Before the WTO Dispute Resolution System*, 65 FORDHAM L. REV. 2275, 2283 (1997).

8. *See* ZIMMERMAN, *supra* note 7, at 48, 49.

9. DSU arts. 1.1, 2.1, 4, 7, 17; *see also* G. Richard Shell, *Trade Legalism and International Relations Theory: An Analysis of the World Trade Organization*, 44 DUKE L. J. 829, 849-53 (1995).

10. *See* DSU arts. 3.7, 4.

establishment of a dispute settlement panel after sixty days of the request for consultations, or within the sixty-day period if the parties jointly determine that consultations are unsuccessful.[11] The first level of review is conducted by panels established by the Dispute Settlement Body (DSB),[12] with a final level of review conducted by the Appellate Body.[13] Consensus among member states is not required to adopt decisions by the Appellate Body or DSB. Consensus is only necessary in case the DSB vetoes panel formation, rejects adoption of panel findings, or rejects judgments of the Appellate Body.[14] Under the contemporary system, only member states may raise dispute claims or defend against claims raised by other complaining member states.[15]

Remedies available to complainants may be found in Article 22 of the DSU.[16] Compensation and suspension of concessions are the chief remedies for successful complainants if respondents fail to implement panel findings after a reasonable time. However, these remedies are also described as last resorts.[17] Additionally, monetary damages are not specifically contemplated. Exclusion of monetary damages precludes damages for anticipated failures by respondents to comply with Appellate Body decisions, and eliminates the possibility of attorneys' fees.[18]

B. Roles for non-state actors in the WTO Dispute Settlement System

Although the DSU only provides for dispute settlement among member states, non-state actors such as firms and industry lobbying groups already play a significant role in the way that member states initiate and resolve trade disputes under the DSU.[19] As Gregory Shaffer has stated, "public and private actors depend on each other's resources…[and] have also adapted public-private collaborative governance modes to enforce WTO law and otherwise advance their interests…."[20]

11. *Id.* art. 4.7.

12. *Id.* arts. 6, 8, 11-12.

13. *Id.* arts. 6, 17.

14. *Id.* arts. 16.4, 17.14.

15. *See id.* arts. 2.1, 10, 17.4.

16. *Id.* art. 22.

17. *Id.* art. 22.1-22.2. Article 3, paragraph 7 also states: "In the absence of a mutually agreed solution, the first objective of the dispute settlement mechanism is usually to secure the withdrawal of the measures concerned . . . ; [t]he provision of compensation should be resorted to only if the immediate withdrawal of the measure is impracticable . . . . [t]he last resort which this Understanding provides to the Member invoking the dispute settlement procedures is the possibility of suspending the application of concessions or other obligations under the covered agreements on a discriminatory basis . . . . "

18. *See* Joel P. Trachtman, *Private Parties in EC-US Dispute Settlement in the WTO: Toward Intermediated Domestic Effect*, *in* TRANSATLANTIC ECONOMIC DISPUTES: THE EU, THE US, AND THE WTO 527, 536 (Ernst-Ulrich Petersmann & Mark A. Pollack eds., 2003); Alan O. Sykes, *Public Versus Private Enforcement of International Economic Law: Standing and Remedy*, 34 J. LEGAL STUD. 631, 641, 654 (2005). *See also* Thomas Sebastian, *World Trade Organization Remedies and the Assessment of Proportionality: Equivalence and Appropriateness*, 48 HARV. INT'L L. J. 337, 338-40 (2007). *See also* Alan Wm. Wolff, *Remedy in WTO Dispute Settlement*, *in* THE WTO: GOVERNANCE, DISPUTE SETTLEMENT & DEVELOPING COUNTRIES 783, 807-08 (Merit E. Janow et. al. eds., 2008).

19. *See* GREGORY C. SHAFFER, DEFENDING INTERESTS: PUBLIC-PRIVATE PARTNERSHIPS IN WTO LITIGATION 144-46 (2003).

20. *Id*. at 144.

These "collaborative governance modes," also labeled public-private networks by Gregory Shaffer, serve an important function in successful dispute settlement for developed countries.[21]

1. Private Actors in the United States and the European Union

Public-private networks integrate the interests of private actors and government authorities. Public-private networks are an important tool that non-state actors in the United States wield in addressing international trade disputes. Unlike other developed countries, the "approach to public-private networks [in the United States] tends to be more 'bottom-up,' with firms and trade associations playing a proactive role."[22] Public-private networks in the United States center around formal and informal channels for lobbying and consultation. Domestic firms, industry associations, and trade groups directly petition representatives of the U.S. government to combat perceived trade barriers and discriminatory policies enacted by foreign governments.[23] For some time, the WTO dispute settlement system has been acknowledged as an option that U.S. companies might use to combat trade-restricting policies enacted by foreign governments. WTO litigation has been touted as "a powerful tool in opening foreign markets to U.S. companies" which could "add significant value for companies seeking to penetrate promising new markets."[24] Over time, collaborative public-private networks have become a critical part of WTO dispute settlement strategy in the United States.

Non-state actors in the United States used formal and informal channels to influence trade dispute settlement even before the United States joined the WTO. For example, a meeting between U.S. Trade Representative Mickey Kantor, the president of the Chiquita Brands banana company, and former Senator Robert Dole significantly impacted United States policy on the decision to join the WTO and to initiate a long-running trade complaint against the European Communities (EC).[25] The meeting serves as an example of informal collaboration between senior members of the U.S. government and industry leaders where both public and private decision-makers influenced the course of United States trade policy and trade dispute settlement.[26] As a result of the informal agreement that arose among participants of the meeting, political objectives of the Clinton Administration regarding the WTO were advanced by Republican leaders in Congress. This outcome was achieved because U.S. Trade Representative Kantor, as a senior

21. *Id.*

22. *Id.* at 6.

23. *Id.* at 19.

24. Homer E. Moyer, Jr. & Hal S. Shapiro, *Are WTO Dispute Settlement Proceedings Right for Your Company?*, CORP. LEGAL TIMES, Dec. 1998, at 53.

25. Although reference to the European Union is made throughout this article, European Communities (EC) constitutes the legal name of the organization in Uruguay Round agreements and consequently WTO dispute settlement proceedings. *See* Jörn Sack, *The European Community's Membership of International Organizations*, 32 COMMON MKT. L. REV. 1227 (1995) (detailing European Communities membership in the WTO); *see also* Rafael Leal-Arcas, *Polycephalous Anatomy of the EC in the WTO: An Analysis of Law and Practice*, 19 FLA. J. INT'L L. 570, 576 nn.22-23 (2007).

26. *See* SHAFFER, *supra* note 19, at 23-24.

official in the Clinton Administration, agreed to take up a trade dispute case against the European Communities on behalf of Chiquita.[27]

Formal methods that were intended to foster public-private cooperation have also resulted in "collaborative arrangements" between non-state actors, the U.S. Department of Commerce, and the Office of the U.S. Trade Representative over trade dispute claims.[28] A significant legal mechanism was established as part of the U.S. Trade Act of 1974. Under the Trade Act, the U.S. Trade Representative is responsible for investigating and combating foreign trade barriers "in response to petitions filed by private firms and trade associations…."[29] Non-state actors in the United States may draw attention to purported violations of trade law by other WTO member states. As a result, those actors influence the types of complaints that the Office of the U.S. Trade Representative eventually raises under the DSU.[30] Under Section 302 of the 1974 Trade Act, "[a]ny interested person may file a petition… requesting that action be taken… and setting forth the allegations in support of the request."[31] As such, non-state actors in the United States have several ways to influence the course of U.S. dispute settlement. Non-state actors play an integral role in detecting purported violations of international trade law. Non-state actors also maintain political pressure to ensure that amenable outcomes are, as near as possible, achieved by government representatives at the conclusion of dispute settlement proceedings.[32]

Although public-private networks in the European Union operate differently from those in the United States, European businesses and authorities have also benefited from increased levels of collaboration with respect to WTO dispute claims and settlements.[33] The motivation to develop strong public-private collaboration is in part based on the interest of authorities in the European Union to appear responsive to the interests of European businesses due to competitiveness between similarly-tasked domestic authorities in EU member states.[34] Companies in the EU are now able to register complaints with the Commission using a centralized Complaint Register webpage.[35] The practice arose out of the consolidation of the Market Access Unit, an organization charged with developing

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27. *See id.* at 24.

28. *See id.* at 36-37, 144.

29. *Id.* at 21 (emphasis omitted).

30. *See* JAE WAN CHUNG, THE POLITICAL ECONOMY OF INTERNATIONAL TRADE 104 (2006) (detailing the responsibilities of the Office of the U.S. Trade Representative, including "[a]ll matters within the WTO.").

31. 19 U.S.C. § 2412(a)(1) (2008).

32. *See* SHAFFER, *supra* note 19, at 39-40, 49, 60. For a generalized review of the political power disparities between the United States and European Communities on the one handand developing WTO member countries on the other throughout the dispute settlement process, see Andrea M. Ewart, *Small Developing States in the WTO: A Procedural Approach to Special and Differential Treatment through Reforms to Dispute Settlement*, 35 SYRACUSE J. INT'L L. & COM. 27, 34-37 (2007).

33. SHAFFER, *supra* note 19, at 65-66.

34. Gregory Shaffer, *What's New in EU Trade Dispute Settlement?: Judicialization, Public-Private Networks, and the WTO Legal Order*, 13 J. EUR. PUB. POL'Y 832, 834, 840 (2006).

35. European Commission Market Access Database, Online Complaint Register, http://mkaccdb.eu.int/madb_barriers/complaint_home.htm (last visited Jan. 24, 2009).

public-private networks and encouraging active trade dispute resolution.[36] The European Commission and EU Trade Directorate have been quite successful in motivating European firms to communicate about potential violations by WTO member states. For example, the Market Access Unit received five to ten new contacts each month regarding alleged trade violations in 2005.[37] Proactive development of relationships with non-state actors by the European Commission Trade Directorate-General differs from the United States model because private firms in Europe have been reluctant to engage with transnational authorities.[38] The Trade Barrier Regulation has enabled European businesses to directly petition the European Commission for an investigation of trade violations by WTO member states, and has convinced non-state actors in the EU to work closely with European Commission authorities to report potential barriers to trade.[39]

These efforts have coincided with developments in the law of the European Union and expanded formal networks. Public-private networks have been encouraged under Article 133 of the Treaty Establishing the European Community of 1958, as amended by the Treaty of Amsterdam in May 1999.[40] Under Article 133, the European Commission is empowered to seek informal approval from EU member states prior to litigating alleged trade violations before dispute settlement panels.[41] Although the straight-forward operation of Article 133 requires formal consultation between the European Commission and a committee of representatives from EU member states (known as the Article 133 Committee), the *de facto* process involves direct consultation between representatives of European industry and the European Commission, requiring only informal consent by a majority of state representatives before the European Commission initiates WTO trade dispute litigation.[42]

Formal legal mechanisms such as those provided under Article 133 and the Trade Barrier Regulation have empowered European firms and industry representatives to directly complain about foreign trade barriers to authorities in the European Commission and work closely with European Commission authorities to prepare trade litigation before formal dispute settlement commences pursuant to the DSU.[43]

An example of the way that public-private networks place developing member states at a disadvantage involves disputes between the United States, Indonesia, the EC, and Argentina over duties on footwear and apparel that were promulgated by the Argentinean government in the late 1990s.[44] The United States

36. SHAFFER, *supra* note 19, at 69.
37. Shaffer, *supra* note 34, at 838.
38. SHAFFER, *supra* note 19, at 71-72, 101.
39. *Id.* at 74.
40. *Id.* at 75 n.26.
41. Shaffer, *supra* note 34, at 839.
42. SHAFFER, *supra* note 19, at 78-79.
43. *Id.* at 86; Shaffer, *supra* note 34, at 839.
44. *See* Moyer, Jr. & Shapiro, *supra* note 24, at 53; *see also* Request for Consultations by the United States, *Argentina-Measures Affecting Imports of Footwear, Textiles, Apparel and other Items*, WT/DS56/1 (Oct. 15, 1996) [hereinafter DS56 Request for Consultations]. *See* Request for

initiated a WTO complaint against Argentina regarding duties on imports in October 1996.[45] U.S. companies and the U.S. Trade Representative disputed the application of duties on textile, apparel, and footwear imports by the Argentinean government. The United States brought action under the DSU and successfully litigated a complaint before a dispute panel.[46]

Non-state actors in the American export industry became noticeably involved in the course of dispute settlement after the Argentinean government imposed duties on footwear from non-MERCOSUR countries.[47] The president of the Footwear Distributors and Retailers of America made a public statement to the effect that the organization "[would] utilize all available means to fight [Argentinean duties on footwear]."[48] Efforts by representatives of the industry did not stop with the U.S. Trade Representative, but also included efforts to influence the behavior of other governments, specifically the government of Indonesia. Lobbying by representatives of the U.S. footwear industry resulted in a separate complaint by Indonesia against Argentina.[49] The United States and Indonesia sought consultations with representatives of the government of Argentina to protest duties which allegedly prevented footwear exports from entering Argentinean markets.[50] Just as members of the footwear export industry in the United States petitioned the U.S. Trade Representative to formally dispute Argentinean duties on imported footwear, European industry associations were similarly able to petition the European Commission to take action against the leather export industries of Japan and Argentina following release of a study on the impact of foreign trade barriers to the European leather industry.[51]

Following requests for formal dispute settlement by the EC, the U.S., and Indonesia, representatives of the U.S. footwear industry continued to document the actions of the Argentinean government and informed the U.S. Department of Commerce of their continuing interest in the matter.[52] At the end of 2002, the Senior Vice President for the American Apparel and Footwear Association

Consultations by the United States, *Argentina-Measures Affecting Imports of Footwear*, WT/DS164/1 (Mar. 4, 1999) [hereinafter DS164 Request for Consultations]; Request for Consultations by Indonesia, *Argentina-Safeguard Measures on Imports of Footwear*, WT/DS123/1/Add.1 (Jan. 11, 1999) [hereinafter DS123 Request for Consultations]; Appellate Body Report, *Argentina-Safeguard Measures on Imports of Footwear*, WT/DS121/AB/R (Dec. 14, 1999) [hereinafter DS121].

45. *See* DS56 Request for Consultations para. 2; *see also* John Maggs, *U.S. Set to Penalize Argentina for Piracy; Duty-Free Trade Imports Targeted as Administration's Patience Ebbs*, J. COM., Jan. 6, 1997, at 1A; *see also* Moyer, Jr. & Shapiro, *supra* note 24, at 53.

46. Moyer, Jr. & Shapiro, *supra* note 24, at 53.

47. *See* Maggs, *supra* note 45; *see generally* DS164 Request for Consultations, *supra* note 44.

48. Maggs, *supra* note 45, at 1A.

49. *See* DS123 Request for Consultations, *supra* note 44; *see also Government Considering Taking Argentina to WTO Panel*, JAKARTA POST, Sept. 30, 1998, at 8.

50. DS164 Request for Consultations, *supra* note 44, para. 2; DS123 Request for Consultations, *supra* note 44, para. 3.

51. SHAFFER, *supra* note 19, at 88.

52. *See* Letter from Stephen Lamar, Senior Vice President, Am. Apparel & Footwear Assoc. to U.S. Dept. of Commerce, Office of Trade & Econ. Analysis (Dec. 13, 2002), *available at* https://www.apparelandfootwear.org/letters/nteaafacomments021216.pdf.

addressed a memorandum to the Office of Trade and Economic Analysis under the U.S. Department of Commerce concerning duties imposed by the Argentinean government that allegedly continued to violate WTO obligations.[53] Although no panel was composed for the U.S.-Argentina case,[54] and the Indonesian government decided not to pursue its request for a dispute settlement panel,[55] the example nevertheless demonstrates how well-connected non-state actors, in this case representatives from the U.S. footwear industry, utilized formal and informal methods to convince WTO member states to initiate dispute settlement proceedings against one developing country. The example is not unique. In other WTO member countries, non-state actors have recognized the influence exercised by strong public-private networks in the United States and the European Union. As a result, responses in developing countries such as Brazil have included efforts by non-state actors to more assertively influence dispute settlement.[56]

2. Challenges for Private Non-state Actors in Developing Countries

Formal and informal networks that enable non-state actors to exercise influence over dispute settlement are not readily available in developing countries.[57] Although examples suggest that non-state actors have begun to organize public-private collaboration, those efforts may not be enough to ensure that the WTO dispute settlement system works for developing countries.

Even if non-state actors established basic infrastructure for public-private networks within developing WTO member states, non-state actors would still face significant obstacles before they could actively assert and defend their interests. Developing countries that have recently joined the WTO occupy the least favorable position with respect to their ability to secure favorable outcomes in dispute settlement. Resources necessary for establishing public-private networks in developing countries are limited. If resources were expended to develop public-private networks, it is uncertain that non-state actors would ultimately exert the same influence in WTO dispute litigation and overall WTO policy-making that was pioneered by private actors in the United States. An alternative to more effectively level the playing field for non-state actors in developing countries

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53. *Id.*

54. World Trade Organization, Summary of the Dispute to Date, Dispute DS 164 Argentina--Measures Affecting Imports of Footwear, http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds164_e.htm (last visited Oct. 31, 2008).

55. World Trade Organization, Summary of the Dispute to Date, Dispute DS 123 Argentina--Safeguard Measures on Imports of Footwear DS, http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds123_e.htm (last visited Oct. 31, 2008).

56. Gregory Shaffer, *Can WTO Technical Assistance and Capacity-Building Serve Developing Countries?*, 23 WIS. INT'L L. J. 643, 680 (2005); *see also* Gregory Shaffer et al., *The Trials of Winning at the WTO: What Lies Behind Brazil's Success*, 41 CORNELL INT'L L. J. 383, 446 (2008).

57. *See* Gregory Shaffer, *How to Make the WTO Dispute Settlement System Work for Developing Countries: Some Proactive Developing Country Strategies, in* TOWARDS A DEVELOPMENT-SUPPORTIVE DISPUTE SETTLEMENT SYSTEM IN THE WTO, INT'L CTR. FOR TRADE AND SUSTAINABLE DEV., RESOURCE PAPER NO. 5, at 1, 27-29 (Victor Mosoti ed., 2003), *available at* http://www.ictsd.org/pubs/ictsd_series/resource_papers/DSU_2003.pdf; *see also* Shaffer, *supra* note 56, at 650; Chad P. Bown & Bernard M. Hoekman, *WTO Dispute Settlement and the Missing Developing Country Cases: Engaging the Private Sector*, 8 J. INT'L ECON L. 861, 871 (2005).

constitutes the central focus of this article. Bypassing public-private networks not only serves as a foundational premise of the proposal discussed in the later parts of this article, but also distinguishes the proposal from alternatives explored by other authors who have considered this subject. The proposal calls for changes that would affect all WTO member countries, and is not predicated solely on attempts by non-state actors or government authorities in developing countries to change the WTO dispute settlement system. Such a systemic alteration to the dispute settlement system has the potential to improve the ability of non-state actors to advance their interests from a top-down, organizational perspective. By considering the challenges facing non-state actors in developing countries that have recently joined the WTO, the advantages of modifying dispute settlement with consequences for the rights of private actors under the DSU will be illustrated, along with discussion about why potential disadvantages are not significant enough to undermine the rationale for implementing modifications.

III. PRIVATE RIGHTS OF ACTION AS A STRATEGY TO BENEFIT DEVELOPING COUNTRIES

A. Basic Background to the Proposal

The dispute settlement system of the WTO provides for dispute settlement exclusively between member states. However, enabling non-state actors to assert complaints and independently settle trade disputes would confer substantial benefits upon non-state actors in developing countries, particularly those in new WTO member states. Various proposals to provide non-state actors with direct access to dispute settlement proceedings were contemplated from the very beginnings of the WTO.[58] Past proposals were based on amendments to the DSU that would enable firms, industry organizations, and other private entities that have been adversely affected by trade policies to initiate complaint procedures under the

58. *See* Steve Charnovitz, *Participation of Nongovernmental Organizations in the World Trade Organization*, 17 U. PA. J. INT'L ECON. L. 331, 348-50 (1996) (focusing on the ability of NGOs to file amicus briefs as a practical proposal and identifying standing for NGOs as an interesting future legal question); Philip M. Moremen, *Costs and Benefits of Adding A Private Right of Action to the World Trade Organization and the Montreal Protocol Dispute Resolution Systems*, 11 UCLA J. INT'L L. & FOREIGN AFF. 189, 189, 191, 203-04 (2006) (concluding that private rights of action in the WTO dispute settlement system would ultimately force states to defect from the WTO trade system) [hereinafter Moremen--Costs and Benefits]; Andrea K. Schneider, *Democracy and Dispute Resolution: Individual Rights in International Trade Organizations*, 19 U. PA. J. INT'L ECON. L. 587, 628, 631-32 (1998); Schleyer, *supra* note 7, at 2277, 2294, 2296, 2308-09 (arguing in favor of private standing and a commission to filter "meritless claims" and mitigate political disturbances between member states); Shell, *supra* note 9, at 903, 910, 913; Shell, *supra* note 3, at 377-78. *See also* Philip M. Moremen, *International Private Rights of Action: A Cost-Benefit Framework*, 8 SAN DIEGO INT'L L. J. 5, 14, 31 (2006) (assessing the costs and benefits of promoting private rights of action in international law); Philip M. Nichols, *Extension of Standing in World Trade Organization Disputes to Nongovernment Parties*, 17 U. PA. J. INT'L ECON. L. 295, 302-03 (1996) (arguing against a proposal to expand WTO standing to private parties which would enable them to argue before the DSB and Appellate Body); Sykes, *supra* note 18, at 641 (asserting that negative responses to the participation of private parties as amicus curiae in WTO disputes indicates private standing would not be supported by WTO member states).

DSU.[59] As Gregory Shaffer succinctly describes, "[non-state actors] would act as private attorneys general to ensure governments' respect of WTO obligations. They would hold rights analogous to those held by private parties against state legislation under the commerce clause of the U.S. Constitution, and against European member state legislation under Article 28 of the EC Treaty."[60]

The proposal outlined in this article resembles past proposals to improve the ability of developing WTO member states to utilize dispute settlement procedures in some respects. Under this proposal, non-state actors would have a right to independently consider whether policies enacted by WTO member states violated international trade law. After determining that a violation had indeed taken place and impacted their businesses, non-state actors would also have the choice to initiate adjudication of alleged violations through the WTO dispute settlement system, instead of being limited to presenting their concerns to domestic authorities responsible for asserting trade dispute claims. Adjudication of alleged violations initiated by non-state actors would be predicated upon challenging the policies and activities of WTO member states. Non-state actors would be considered parties negatively affected by policies and practices of WTO member states in violation of obligations under international trade law. This outcome would logically follow from evaluating the current process of WTO dispute settlement, where member states challenge trade measures enacted by other member states that negatively impact non-state actors and constituents. Practically speaking, these reforms would reduce the importance of public-private collaboration between private actors and government representatives, providing non-state actors in developing countries with a way to directly challenge trade measures that impede their interests.

B. Practical Features of the Proposal

The proposal in this article differs from other works that advocate the ability of non-state actors to independently litigate WTO dispute settlement claims. First, the proposal is intended to keep reforms of the DSU at a minimum while maximizing the ability of non-state actors to challenge policies and practices implemented by WTO member states. Second, this article explores the benefits of the proposal with emphasis on the ramifications for non-state actors in *developing countries*. Third, the proposal supports the expansion of an existing but little-used feature of the WTO dispute settlement system. Non-state actors, particularly from developing countries that have recently joined the WTO, are the intended beneficiaries of the proposal and would have an opportunity to independently raise their own claims against alleged violations by WTO member states before

59. *See* Trachtman, *supra* note 18, at 542-45; Ernst-Ulrich Petersmann, *Why Rational Choice Theory Requires A Multilevel Constitutional Approach to International Economic Law*, 2008 U. ILL. L. REV. 359, 380 (arguing that domestic courts could offer remedies for violations of WTO rules); Ragosta, *supra* note 2, at 746-48; Joel P. Trachtman, *The WTO Cathedral*, 43 STANFORD J. INT'L L. 127, 162 (2007) (remarking on the potential use of a WTO attorney general that would be responsible for asserting trade complaints on the basis of public interest for all member states).

60. SHAFFER, *supra* note 19, at 144.

arbitration panels.[61] Under the proposal, the DSU would be amended to create arbitration panels to adjudicate alleged violations. Non-state actors in all WTO member states would have the right to request the formation of an arbitration panel. Non-state actors would initially request informal consultations with WTO member states that have implemented policies with allegedly negative impacts. This would preserve the imperative toward informal dispute resolution that has been enshrined in the DSU.

If consultations failed to resolve disputes, complainants would be able to petition for an arbitration panel under a slightly modified version of DSU Article 25. In its current form, Article 25 provides for the establishment of arbitration panels to resolve trade disputes following procedures that have been mutually accepted by member states.[62] Under this proposal, Article 25 would be modified to provide arbitral proceedings between WTO member states and non-state actors modeled after other forms of international arbitration. A key difference between other forms of international arbitration and this proposal is that arbitrators would be determining whether WTO member states violated obligations listed in Annex 1 agreements, and whether non-state petitioners would be entitled to remedies from offending WTO member states. The process of settling disputes through arbitration bridges the gap between the current WTO dispute settlement system and international legal processes that may already be familiar to public and private actors in many countries. Examples include international arbitration proceedings where public and private actors commonly resolve a wide array of commercial and economic disputes.[63] If the arbitration panel formed under Article 25 concluded in favor of non-state complainants, the decision that a violation had taken place would be binding on non-state complainants and WTO member state respondents, just as an arbitral award binds parties in other forms of international arbitration.[64] In the case of a favorable final decision, non-state complainants would seek alteration of problematic policies as a remedy. The suggested reform would prevent unsustainable growth in the number of disputes resolved by dispute settlement panels, and provide a decentralized approach to handling a potentially large growth in the total number of disputes resolved under the DSU.

Although the process may provide benefits for non-state actors with minimal changes to the DSU, it would also provide significant benefits for actors in the

61. *See generally* Shaffer, *supra* note 56 (arguing that development and the interests of developing countries can be strengthened by greater participation in the WTO).

62. DSU art. 25.2.

63. John Beechey, *International Arbitration: Evolving National Laws and Institutional Processes*, *in* AMERICAN ARBITRATION ASSOCIATION HANDBOOK ON INTERNATIONAL ARBITRATION & ADR 21, 23 (Thomas E. Carbonneau et al. eds., 2006) (arguing that governments, arbitration practitioners, and arbitral institutions recognize international arbitration as the preferred means of resolving international commercial disputes as long as arbitration "remains relevant to the needs of international commerce.").

64. The first arbitration under Article 25.2 of the DSU was conducted in November 2001. *See* Award of the Arbitrators, *United States-Section 110(5) of the U.S. Copyright Act-Resource to Arbitration under Article 25 of the DSU*, ¶ 21, WT/DS160/ARB25/1 (Nov. 9, 2001). Three arbitrators appointed by the Director-General determined that jurisdiction was proper "subject to mutual agreement of the parties." *Id.* ¶ 2.4.

developing world. To explore the reasons why the proposal would benefit developing countries, a case study involving a country that recently joined the WTO, Vietnam, is examined in Part IV.

IV. CASE STUDY: VIETNAM'S GARMENT EXPORT INDUSTRY

Vietnam's garment export industry provides an ideal subject for considering the advantages of private rights of action under the DSU. Vietnam joined the WTO on January 11, 2007, becoming the 150th member state of the WTO.[65] According to information gathered by the WTO, Vietnam did not appear as a complainant or as a respondent in any WTO dispute proceeding in its first year of WTO membership, although it did participate as a third party in two dispute settlement cases in 2007.[66]

Vietnam exported US$8 billion in goods to the United States in 2006.[67] Vietnamese garment exporters earned US$5.8 billion in 2006, with US$3.1 billion generated from export trade with the United States.[68] Export manufacturing is very important to the Vietnamese economy. Over sixty percent of the workers in the top 200 Vietnamese firms are employed by 42 footwear, textile, garment, and seafood processing companies.[69] Vietnamese firms are eager to compete in the global market for clothing, fabrics, housewares, and sundry manufactured fiber goods.[70] However, Vietnamese firms are not entering the world export market on the same footing as some of their competitors, particularly those based in developed countries such as the United States. Unlike politically-connected garment exporting firms and industry associations that command the resources necessary to advance their interests in global trade, garment firms based in

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65. Press Release, World Trade Org., Viet Nam joins WTO with Director-General's tribute for true grit, (Jan. 11, 2007), http://www.wto.org/english/news_e/news07_e/acc_vietnam_11jan07_e.htm (last visited Nov. 9, 2008).

66. World Trade Organization, Dispute Settlement Gateway--Disputes by Country, http://www.wto.org/english/tratop_e/dispu_e/dispu_by_country_e.htm (last visited on Nov. 9, 2008); World Trade Organization, Member Information-Viet Nam and the WTO, http://www.wto.org/english/thewto_e/countries_e/vietnam_e.htm (last visited Nov. 9, 2008); Panel Report, *United States--Measures Relating to Shrimp from Thailand*, ¶ 1.9, WT/DS343/R (Feb. 29, 2008), *available at* http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds343_e.htm; Request for Consultations by the United States, *India--Additional and Extra-Additional Duties on Imports from the United States*, WT/DS360/1 (Mar. 3, 2007), *available at* http://www.wto.org/english/tratop_e /dispu_e/cases_e/ds360_e.htm.

67. Trade and Tourism Promotion Center of Phu Tho Province, *Vietnam Exports to US Expected to Rise 30%*, (Feb. 7, 2007), http://www.phuthotrade-tourism.gov.vn/Newsen.asp?Subid= 13&LangID=2&NewsID=385&MenuID=0 (last visited Oct. 15, 2008); Press Release, World Trade Org., Working Party Completes Viet Nam's Membership Talks, (Oct. 26, 2006), http://www.wto.org/english/news_e/news06_e/acc_vietnam_26oct06_e.htm (last visited Nov. 9, 2008).

68. VIVEK SURI & VIET TUAN DINH, TAKING STOCK: AN UPDATE ON VIETNAM'S ECONOMIC DEVELOPMENTS 6 (2007), *available at* http://go.worldbank.org/OX50TFE870.

69. SCOTT CHESHIER & JAGO PENROSE, TOP 200: INDUSTRIAL STRATEGIES OF VIET NAM'S LARGEST FIRMS 6 (2007), *available at* http://www.undp.org.vn/undpLive/digitalAssets/7884 _Top200_e.pdf.

70. Asem Connect, Vietnam Trade Information Center, http://asemconnectvietnam.gov.vn/Companies (last visited Nov. 9, 2008) (select from "Activities" to access firms in specific export industries).

Vietnam lack the same resources and level of organization. As the country prepared to join the WTO, Vietnamese firms faced a steep learning curve with respect to understanding the complexities of the dispute settlement system. Instead of preparing to actively exercise influence in the WTO dispute settlement system, Vietnamese firms were advised to avoid trade disputes and anticipate possible challenges from WTO member states. For example, in 2007, the Mutual Trade Policy and Assistance Program (MUTRAP) toured Vietnam to provide background information on WTO dispute settlement and assist participants in gaining experience to "avoid possible trade disputes."[71]

More importantly, government officials in Vietnam lack comparable resources to those applied by the U.S. Trade Representative and U.S. Department of Commerce to monitor compliance of trade law regulations, solicit complaints from private parties, and initiate complaints against foreign governments for violations of international trade law.[72] Prior to WTO accession in early 2007, scholars highlighted Vietnam's need to "train and establish a team of highly competent, multidisciplinary experts (covering a wide range of expertise including English law, economics, and accounting) to study the anti-dumping law and to prepare for any potential anti-dumping disputes against Vietnam at the WTO."[73]

WTO accession was only one of the challenges facing state and non-state actors in Vietnam. Vietnam's rapid transition from a top-down command economy to global exporter left the country at a distinct disadvantage with respect to public-private collaboration, limiting the country's readiness to successfully initiate and defend against dispute settlement claims.[74] Beginning in 1986, Vietnam undertook fundamental political and economic reforms labeled *doi moi* (or "new changes") with the goal of transitioning the economy away from a central command model and towards a market-based model.[75] As a result of the considerable range of internal political and economic reforms, the Vietnamese government no longer exercised direct control over the economy, but retained influence through state-owned enterprises.[76] The reforms also included a transition towards formalized state oversight in the operation of the economy. Prior to the

71. *WTO dispute settlement seminar held in HCM City*, VIETNAM NEWS BRIEF, May 18, 2007.

72. *See* Press Release, Vietnam Ministry of Foreign Affairs, Local Lawyers Taught to Deal with WTO Disputes Told to Settle Early (Nov. 10, 2007), http://www.mofa.gov.vn/en/tt_baochi/nr060726082726/ns071113101427 (last visited Nov. 9, 2008).

73. Binh Tran-Nam, *Vietnam: Preparations for WTO Membership*, 2007 SOUTHEAST ASIAN AFF. 398, 401.

74. *See* CIVICUS WORLD ALLIANCE FOR CITIZEN PARTICIPATION, THE EMERGING CIVIL SOCIETY: AN INITIAL ASSESSMENT OF CIVIL SOCIETY IN VIETNAM 10 (Irene Norlund, ed. 2006), *available at* http://www.un.org.vn/undp/undp/docs/2006/06%20undp%2033120e%2001e%20 Civicuc%20report.pdf (describing historical and contemporary conditions limiting the input of the private sector in Vietnam's economic development).

75. *See* Valerie Clemen, Note, *A Briefing for American Businesses Looking to Invest in Vietnam*, 2 HASTINGS BUS. L.J. 507, 509 (2006); U.N. DEV. PROGRAMME [UNDP], UNDP VIET NAM POLICY DIALOGUE PAPER 2006/3, THE STATE AS INVESTOR: EQUITISATION, PRIVATISATION, AND THE TRANSFORMATION OF SOEs IN VIET NAM 2 (2006), [hereinafter UNDP DIALOGUE PAPER 2006/3] *available at* http://www.undp.org.vn/undpLive/digitalAssets/6155_HP_paper__E_.pdf.

76. *See* UNDP DIALOGUE PAPER 2006/3, *supra* note 75, at 1.

initiation of *doi moi*, the actual weakness of the state's involvement in the Vietnamese economy was masked by ideological primacy of the state in central economic planning.[77] Despite Vietnam's successful economic diversification and privatization efforts, cooperation and interaction between the Vietnamese government and Vietnam's fledgling civil society and private business interests still needed considerable development, particularly in the context of Vietnam's single-party political system. The struggle for political accountability and competent state involvement has included a fight to reduce latent corruption that flourished in lieu of organized political opposition to Vietnam's one-party national government.[78] Although avenues for dialogue between various levels of government and members of the business community exist, a one-way "monologue" has effectively prevented business representatives from fully communicating their complaints to government authorities.[79] This barrier is related to the government's interest in retaining significant levels of control and involvement as the major investor and capital-holding entity in a variety of economic sectors.[80] As a result of government control over industries and large firms in the Vietnamese economy, significant impediments to public-private collaboration between the government and private industry have persisted following Vietnam's accession to the WTO.[81] For example, a 2007 survey of

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77. *Id.* at 2.

78. *See* CIVICUS WORLD ALLIANCE FOR CITIZEN PARTICIPATION, *supra* note 74, at 11 ("In the last decade, Vietnam has experienced an active integration into the world economy and a multiplication of organizations within all fields of activity. The [Stakeholder Assessment Group] assessed state effectiveness as high given Vietnam's level of development. However, the general level of corruption is also deemed very high and causes problems even within organisations that handle large budgets."). *See also* Clemen, *supra* note 75, at 521.

79. GTZ-MPI SME Development Program, Provincial Business Dialogue (Sept. 17, 2007), http://www.sme-gtz.org.vn/index.php?option=com_alfadocman&&lang=en_BG (select "2007" from dropdown menu on upper right corner of the screen).

80. *See* UNDP DIALOGUE PAPER 2006/3, *supra* note 75, at 10, 23; *see also* Martin Gainsborough, *Globalisation and the State Revisited: A View from Provincial Vietnam*, 37 J. CONTEMP. ASIA 1, 14 (2007) ("Similar reservations underlie some of the arguments made about the strength of international institutions in relation to the state. [Writers] cite scholars who view state power as increasingly 'juxtaposed' with the 'expanding jurisdiction of institutions of international governance' and the constraints and obligations of international law, citing the activities of the World Trade Organisation (WTO) as an example . . . . However, this . . . seems inappropriate when trying to capture the influence of transnational actors in Lao Cai and Tay Ninh [provinces], who, like their counterparts in the foreign business community, are as inclined to highlight the obstacles to their activities put in their way by the state, including at the subnational level. This was as commonplace for the World Bank as it was for international non-governmental organisations (NGOs) . . . .").

81. CHESHIER & PENROSE, *supra* note 69, at 40. Impediments have also affected the effectiveness of collaboration between authorities and local entrepreneurs. *See also* John Gillespie, *Localizing Global Rules: Public Participation in Lawmaking in Vietnam*, 33 LAW & SOC. INQUIRY 673, 674 (2008) ("Evidence . . . suggests that Vietnamese lawmakers are enacting a commercial legislative framework that primarily reflects international treaty provisions and the interests of an elite group of state-owned enterprises (SOEs) and foreign investors. Most domestic entrepreneurs, on the other hand, struggle to communicate their preferences to lawmakers.")

Vietnam's largest domestic firms indicated that the Vietnamese government lacked the organizational resources to effectively support the expansion of Vietnamese firms in foreign export markets:

> Industrial firms have worked hard to establish themselves in foreign markets. The success of some [General Corporations] … suggest that the state has a role to play. Industry associations are also playing an increasingly important role…. However, more needs to be done, particularly in export markets themselves. *The government can increase the effectiveness of representatives overseas to raise the profile of Vietnamese industries as a whole. The government can also provide assistance to firms seeking to meet regulations and standards specific to individual markets*.[82]

Historical obstacles to collaboration between government ministries and business leaders in the garment industry have been exacerbated by challenges posed by Vietnam's accession to the WTO. In order to join the WTO, traditional subsidies to Vietnam's textile and garment industries were reduced.[83] At the same time, tariffs against imported textiles and footwear were substantially reduced.[84] Although Vietnamese garment exports surged for four months following Vietnam's WTO accession, the rapid pace of change facing the garment export industry reinforced the observation that establishing private-public collaboration between the Vietnamese government and non-state members of the Vietnamese export industry would be very difficult, even under the best of circumstances.[85] One indicator of the government's struggle to develop adequate resources for successfully litigating WTO trade disputes already suggests that the government may lack resources needed to fully develop effective public-private networks in the future. The Vietnamese Ministry of Justice announced a program in early 2008 to train Vietnamese experts in law and international trade at the cost of US$6.8 million.[86] Given the level of experience possessed by domestic legal experts in Vietnam during the year of the country's WTO accession, it would be inaccurate to say that the level of sophistication required to successfully manage an international trade claim existed in Vietnam at the time of accession, and that the situation would be better for developing countries that plan on joining the WTO in the future.

82. CHESHIER & PENROSE, *supra* note 69, at 40 (emphasis added). General Corporations are "a form of business group in which an apex or umbrella organisation supervises the activities of member companies" within the same industrial sector. *Id.* at 10.

83. Vu Long, *Textile Support Ending with WTO*, VIETNAM INVESTMENT REV., June 19-25, 2006, at 4.

84. INT'L MONETARY FUND, COUNTRY REPORT NO. 07/385, VIETNAM: SELECTED ISSUES 3-4 (2007), *available at* http://www.imf.org/external/pubs/ft/scr/2007/cr07385.pdf.

85. For an overview of the difficulties faced by small and medium enterprises in building influential connections with Vietnamese authorities through business associations, *see generally* Gillespie, *supra* note 81, at 683, 690.

86. *Ministry unveils plan to internationally train JDs*, VIETNAM NET BRIDGE, Feb. 15, 2008, http://english.vietnamnet.vn/biz/2008/02/768727 (last visited Nov. 9, 2008).

By taking into consideration the challenges faced by Vietnamese government ministries and members of the garment industry following WTO accession, it is reasonable to conclude that neither private nor public actors in Vietnam were especially well-positioned to lodge complaints under the DSU or challenge violations of international trade law at the WTO.[87]

In a hypothetical situation where firms, industry associations, and cooperative groups in the Vietnamese garment industry sought to challenge trade barriers erected by the United States or other WTO member states, what recourse would those organizations have for effectively initiating a complaint? For instance, various medium-sized garment export firms in Vietnam may be forced to curtail imports to the United States. Anti-dumping policies by the United States would force garment manufacturers to limit exports to the United States after the imposition of heightened tariff rates.[88] Indeed, additional tariffs on Vietnamese exports may have been an outcome of a review conducted in May 2008, when the U.S. Department of Commerce concluded that Vietnamese manufacturers were not dumping clothing, apparel and unfinished textile products on United States markets.[89] However, if the Department of Commerce concluded differently and the United States raised tariff rates, Vietnam would have grounds to dispute the decision made by trade officials in the United States.

Just as in the United States and other WTO member countries, non-state actors in Vietnam would work to make their complaint known to representatives of the Vietnamese government. Representatives for Vietnam would then have authority and discretion to formally initiate dispute settlement proceedings pursuant to the DSU.[90] As explained above, formal and informal methods that would otherwise allow Vietnamese garment exporters to petition the country's legal representatives were in developmental stages during the first year of Vietnam's WTO accession. Programs designed by international experts to educate local actors in the Vietnamese economy suggest that the amount of growth which would have been necessary to match the sophistication of public-private networks in the United States would have been quite substantial.[91] Although public-private networks in Vietnam would doubtlessly increase in size and sophistication over time, resources were not available at the time of accession to provide for complete preservation of the interests of private actors in Vietnam. The absence of methods

87. China's experience as a newcomer to the WTO supports the concept that new WTO member states are not generally prepared to aggressively pursue dispute settlement. *See generally* Junji Nakagawa, *No More Negotiated Deals?: Settlement of Trade and Investment Disputes in East Asia*, 10 J. INT'L ECON. L. 837, 853 (2007).

88. This has occurred between the EU and exporters in the leather footwear industry. Minh Quang, *EU duties severely cramp shoes industry,* THANH NIEN NEWS, Aug. 31, 2008, http://www.thanhniennews.com/business/?catid=2&newsid=41615 (visited Sept. 10, 2008).

89. *See* Press Release, Int'l Trade Admin., Commerce Completes Second Review of Vietnam Import Data, (May 6, 2008) http://www.trade.gov/press/press_releases/2008/vietnam_050608.asp. A similar situation has taken place with respect to Vietnamese shoe exports and the European Union.

90. SURI & DINH, *supra* note 68, at 8 (discussing a complaint by the Vietnamese steel industry about Chinese dumping).

91. *See* Shaffer, *supra* note 57, at 39.

for effectively organizing affected industry members and challenging foreign trade policies would have left firms and industry groups in Vietnam vulnerable, particularly during the first year of Vietnam's WTO membership.

V. ARBITRATION AS A SOLUTION FOR NON-STATE ACTORS

The challenges faced by developing countries like Vietnam and private actors in particular export industries are compounded by the vagaries of social, economic, and political history that are unique to each WTO member state, as illustrated in the case of Vietnam.

Instead of solely supporting the efforts of trade officials in developing countries to create formal and informal methods of public-private collaboration that would allow exporters to effectively petition the government to seek relief at the WTO, an alternative method allowing non-state actors to directly challenge policies that violate international trade law would provide several distinct advantages. The advantages that would accrue to developing countries may be considered within several conceptually distinct categories.

A. Equality

The most important set of advantages is based on the concept of equality. Non-state actors in developing countries would be placed on an equal footing with well-organized public-private networks utilized by private actors in developed countries. Allowing non-state actors to independently resolve alleged violations would enable them to organize support, consolidate resources, and obtain private legal counsel as a way to challenge discriminatory policies and practices by WTO member states. Arbitration would help non-state actors coordinate affected parties seeking to challenge policies of WTO member states that violate international trade law, especially when domestic authorities do not have the resources or experience to manage a similar campaign.[92] Even if non-state actors struggled to effectively organize opposition to trade policies enacted by developed countries such as the United States, the opportunity for private actors to initiate dispute settlement claims would nevertheless formally equalize their standing with private actors from WTO members like the EU and the United States.

Adjudication of alleged violations would also prevent developed states from disregarding their obligations as member states of the WTO. Powerful WTO member states lengthen dispute settlement proceedings to frustrate the ability of member states with fewer resources to sustain dispute settlement claims.[93] For instance, the United States pursued this strategy with respect to textile safeguard disputes with Costa Rica and Pakistan in the late 1990s and early years of the twenty-first century.[94] Reforming the dispute settlement system may eliminate the value that developed countries derive from foot-dragging tactics. With much greater numbers of potential non-state complainants and a greater number of

92. *See* Schneider, *supra* note 58, at 629 (suggesting that private parties need not rely on states or external oversight in deciding when it is appropriate to raise a complaint).

93. Shaffer, *supra* note 57, at 14-15, 19, 39.

94. *Id.* at 39-40.

potential cases to manage, powerful WTO member states may find it more costly and time-consuming to ward off disputes from a much larger and diverse range of complainants. Foot-dragging would also become more costly because authorities in developed states would be forced to grapple with an increased number of complaints about alleged violations and an accumulation of unresolved cases.

B. Independent Decisions by Non-state Actors

Non-state actors in the developing world would gain an advantage by exercising independent authority over the decision to initiate complaints over alleged violations of international trade law. Instead of working to convince domestic and ministerial authorities to initiate WTO complaints, non-state actors could decide to independently act upon substantial trade infringements and would exercise the initiative to decide whether formal arbitration best suited their needs and interests.

Providing all non-state actors with the ability to participate in dispute settlement would avoid the politically-charged task of distinguishing between special rights granted to private actors in developing and least-developed WTO member states.[95] Although non-state actors in developed countries would be afforded the same opportunity to challenge alleged violations in the WTO dispute settlement system, many of those actors already exercise considerable influence over trade dispute settlement.[96] As a result, private actors worldwide would have similar opportunities to independently challenge policies that violate member states' obligations under international trade agreements without being hindered by historical circumstances particular to each WTO member state.

C. Credibility and Transparency in the WTO system

Adjudication before arbitration panels would also bolster the credibility and transparency of the WTO dispute settlement system for a number of reasons. If this proposal were adopted, the WTO dispute settlement system would involve a far larger range of actors as potential complainants.[97] This would likely increase the total number of complaints, leading to an overall increase in the amount of scrutiny directed at the trade practices of all WTO member states.[98] This would also result in an overall increase in available information on trade policies enacted by WTO member states. An increase in the available information on international trade policies would result in greater overall transparency in the WTO dispute settlement system. WTO dispute settlement would also become more transparent because affected parties would have the opportunity to gain first-hand knowledge through involvement in adjudication. WTO dispute settlement would gain credibility not only as a result of direct participation by non-state actors, but also because the dispute settlement system would be more responsive to those who are directly affected by final decisions under the DSU. As a result of greater involvement by affected actors, along with greater visibility for international trade

95. *See id.* at 13, 40-41.
96. *See supra* text accompanying notes 20-56.
97. *See* Moremen--Costs and Benefits, *supra* note 58, at 189, 207-08.
98. *See e.g.* Shell, *supra* note 3, at 377-78.

dispute settlement, the WTO would become more transparent and credible to those who are most profoundly affected by trade policies and practices of WTO member states.[99]

D. Counterarguments

Although participation in trade dispute settlement would confer benefits for private non-state actors in developing countries, arguments may be raised suggesting that reforms would do little to remove the obstacles facing non-state actors in developing countries.

1. Scarcity of Resources Available to Non-state Actors

Public finances, political capital, and sustained levels of expert attention must be spent in significant quantities by ministerial authorities to commence dispute settlement proceedings under the DSU. Still greater resources must be spent to successfully conclude a full course of WTO dispute settlement. All member states of the WTO struggle to allocate resources in the most efficient and effective manner possible to preserve and assert interests in WTO dispute settlement proceedings. Non-state actors, especially those in new WTO member states, are unlikely to possess the same quantity of resources available to state ministries responsible for WTO matters. The logic of allowing non-state actors to independently litigate WTO complaints may seem weak, particularly if those actors are materially, politically, and experientially unprepared to independently challenge policies of WTO member states.[100] However, if non-state actors were provided the opportunity to directly contemplate the merits of formal arbitration, aided by affordable private counsel and unburdened by domestic political considerations, the difficulty of challenging violations of international trade law may be significantly reduced.

Resistance from ministerial authorities regarding dispute settlement by non-state actors may be unavoidable, particularly in situations where state authorities fear international political ramifications from actions taken by non-state actors located in their countries. However, non-state actors may be able to afford private legal counsel and allocate resources to preserve interests in the most important trade dispute scenarios. Additionally, as evident in the case of Vietnam, many of the commodities that firms export, such as garments, are relatively inelastic and require exporters to engage in robust competition.[101] Therefore, exporting firms in Vietnam and other developing WTO member states may be highly motivated to preserve their presence in international markets and commercial interests through active participation in dispute settlement and resolution.

Another variation of this argument approaches the same issue from a different direction. If non-state actors from developing countries lack experience in

99. Ragosta, *supra* note 2, at 750-52.

100. Gregory Shaffer, *The Challenges of WTO Law: Strategies for Developing Country Adoption*, 5 WORLD TRADE REV. 177, 185 (2006).

101. HARVARD VIETNAM PROGRAM, CHOOSING SUCCESS: THE LESSONS OF EAST AND SOUTHEAST ASIA AND VIETNAM'S FUTURE 34 (2008), *available at* http://www.innovations.harvard.edu/cache/documents/982/98251.pdf.

weighing the merits of trade dispute claims, what would prevent the dispute settlement system from becoming saturated with an overwhelming number of meritless claims? Would some threshold be necessary to ensure that non-state actors chose to pursue claims with unmistakable merit? Even if non-state actors became sophisticated complainants over time, would the system be abused by powerful private actors?[102]

Concerns about the ability of non-state actors to discern the merit between potential trade dispute claims are worth considering, particularly in the early period of implementing reforms to the DSU. However, even when non-state actors have not accrued significant first-hand experience in the WTO dispute settlement process, a number of factors would enable non-state actors in developing countries to avoid anticipated difficulties. It is likely that non-state actors would seek assistance from private counsel to determine the value of adjudication under the DSU, and also to determine whether claims would be worth litigating at the onset of representation. As a result of consultation with experienced legal experts, private actors may identify and avoid disputes without merit. The pressure to selectively direct resources towards adjudicating only the most promising claims would ease concerns that the WTO dispute settlement process would become encumbered with claims from non-state actors.[103]

2. Non-state Actors and the WTO

Non-state actors do not have standing to pursue complaints in the WTO dispute settlement system. Some authors have stated that simply lacking standing presents a formidable legal barrier against participation by non-state actors in WTO dispute settlement, even if the DSU was formally amended.[104] However, a number of other multilateral conventions already allow non-state actors to take action against state actors. Under the Convention on the Settlement of Investment Disputes Between States and Operation of the International Centre for the Settlement of Investment Disputes (ICSID), private actors that invest internationally may challenge actions taken by countries that violate obligations outlined in bilateral investment treaties between two states.[105] NAFTA's Chapter 11 provides the same opportunity to private actors in the United States, Canada, and Mexico.[106] Just as states must abide by international obligations to private actors under the ICSID Convention and multilateral free trade agreements like NAFTA, WTO member states should be expected to abide by agreements undertaken upon joining the WTO, regardless of the type of actor that challenges policies and practices that violate international trade law.

102. Nichols, *supra* note 58, at 327.

103. *See* Schneider, *supra* note 58, at 629.

104. *See* Trachtman, *supra* note 18, at 538; *see also* Nichols, *supra* note 58, at 327-28.

105. Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, art. 36, Mar. 18, 1965, 17 U.S.T. 1270, 575 U.N.T.S. 159.

106. *See* North American Free Trade Agreement, U.S.-Can.-Mex., Dec. 17, 1992, 32 I.L.M. 605 (1993). "An investor of a Party may submit to arbitration under this Section a claim that another Party has breached an obligation . . . and that the investor has incurred loss or damage by reason of, or arising out of, that breach." *Id.* art. 1116.

Although the DSU would have to be reformed to allow for private rights of action, Article 25 of the DSU sets forth the basic method for making adjudication by non-state actors a feasible possibility. Although commentators have even supported the ability of domestic courts to decide WTO trade disputes,[107] domestic courts in developing countries may be subject to the same shortcomings that hamper government authorities in developing countries from initiating trade disputes under the DSU. To avoid oversaturation of dispute settlement panels and overloading courts at the domestic level, international arbitration based on models in other multilateral agreements and on Article 25 may be the best way to balance the benefits that arise from modifying standing for private actors in the WTO dispute settlement system.

3. Internal Conflicts in Developing Countries

Domestic authorities may be unwilling or politically unprepared to share control with non-state actors over the types of complaints that may be initiated in WTO dispute settlement proceedings.[108] The same political considerations that hinder authorities in countries like Vietnam from asserting trade complaints and organizing effective public-private collaboration may cause authorities to fear that they will relinquish sovereignty and lose political significance if non-state actors are free to participate in dispute settlement under the DSU.[109] For domestic authorities in developing member states, non-state actors located in the same country would likely pose the same level of political threat as non-state actors based in developed countries.

It should be noted that governments in developing countries also stand to gain from economic benefits achieved by non-state actors that open new or existing foreign markets by successfully resolving trade disputes and successfully challenging violations of international trade law. Although authorities in developing countries may fear a decline in their own political credibility if non-state actors are allowed to initiate formal adjudication of alleged violations, the rewards of successfully completing dispute settlement and increased export trade may ease their concerns, particularly if they lack experience in managing complaints under standard WTO dispute settlement proceedings.

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107. Trachtman, *supra* note 18, at 538.

108. For an indication of the political disruption that non-state actors have already created for authorities in developing WTO member states with respect to the WTO dispute settlement process, see James Smith, *Inequality in International Trade? Developing Countries and Institutional Change in WTO Dispute Settlement*, 11 REV. INT'L POL. ECON. 542, 564 (2004) ("[D]eveloping countries are by far the most strident opponents of nonstate submissions, which they view as an instrument of political influence for organizations based disproportionately in advanced industrial states.").

109. For an explanation of developing state authorities' objections to the involvement of non-state actors in the WTO, see Patrizia Nanz & Jens Steffek, *Global Governance, Participation and the Public Sphere*, 39 GOV'T & OPPOSITION 314, 332 (2004) ("As many critics have remarked, the danger of 'benevolent patronizing' is imminent whenever northern-based organizations speak on behalf of the developing world. Not only but not least for this reason, official representatives of developing countries have been [skeptical] about strengthening the role of nongovernmental organizations in world trade governance.").

Governments in developing countries may also fear that powerful business interests will predominate over the rights and interests of democratically elected governments and their constituents. For instance, government authorities may argue that empowering non-state actors would reduce the authority of officials otherwise responsible for litigating dispute settlement claims. The result would be a diminution of the power exercised by elected representatives in favor of non-state actors that are not accountable to the interests of all members of society.[110] The criticism would apply not only in countries where non-state actors initiate dispute settlement claims, but also in countries where domestic authorities turn out to be unsuccessful respondents that are forced to change trade policies as a result of complaints made by non-state actors. The credence of such an argument would be even more important in developing countries with cultural sensitivity to the influence of multinational corporations and post-colonial legacies.[111]

Non-state actors may have a difficult time responding to negative public opinion and attacks from governments in various WTO member states. However, the rationale for allowing non-state actors to adjudicate complaints is based on the ability to maximize the benefits of formalized dispute settlement. Concerns about the broader influence of powerful multinational firms and private interests may be diminished if private actors in developing countries experience the greatest benefits of challenging trade law violations. Additionally, significant political influence is already exercised by non-state actors in the United States and European Union. The proposed reform would do little to expand the powers that non-state actors based in developed countries already possess. However, the proposal would make it possible for non-state actors in the developing world to compete in global markets without allocating considerable resources toward improving public-private networks or leveraging their own political influence.

4. Government Accountability in Developing Countries

The proposal may seem to place a disproportionate amount of responsibility on the shoulders of non-state actors. This perception is supported by the argument that governing authorities in developing countries are the most appropriate recipients of aid and capacity-building programs with regard to managing dispute settlement.[112] The argument that governments in developing countries should be encouraged and supported in their activities in the WTO is compelling. This proposal does not directly conflict with the argument because both methods emphasize the need to improve the WTO dispute settlement system for developing countries. Even if extremely rapid reform were achieved by governments in

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110. *See* Nichols, *supra* note 58, at 310-12.

111. *See* Maki Tanaka, *Bridging the Gap Between Northern NGOs and Southern Sovereigns in the Trade-Environment Debate: The Pursuit of Democratic Dispute Settlements in the WTO under the Rio Principles*, 30 ECOLOGY L. Q. 113, 115-16, 128 (2003) (arguing that friction between developing states and NGOs over environmental issues is intensified by historical legacies of colonial rule and decolonization).

112. *Cf.* Shaffer, *supra* note 57, at 40-44 (discussing ways to improve the capabilities of developing country governments in the WTO dispute settlement process); Shaffer, *supra* note 56, at 649-51; Bown & Hoekman, *supra* note 57, at 873, 875-77, 886, 888-89.

developing countries as a result of aid and capacity-building measures, it is uncertain whether governments in developing countries would directly meet the needs of non-state actors in those countries. Enabling non-state actors to challenge violations may counteract unaccountable policy-making in the area of global trade by governments in developing countries. As a result, the proposal may help trade authorities in developing countries become more responsive to the needs of private actors. Governments would have an incentive to remain relevant by providing significant amounts of assistance and by using their own resources to create public-private networks to reduce the need for arbitration to be initiated by non-state actors. The concept applies to new WTO member states like Vietnam, where authorities at the national level have traditionally exercised unilateral control over policy and have only begun to seek input from private actors. By improving their competence and relevance following the advent of private rights of action, governments in developing countries may ultimately benefit from this proposal by proving that, in the end, non-state actors have more to gain by utilizing public-private collaboration than by challenging violations independently.

VI. CONCLUSION

Although the WTO dispute settlement process created new opportunities for developing countries to compete in global trade, non-state actors in developing countries and especially new WTO member states are placed at a disadvantage when defending their interests and exercising influence in the formal dispute settlement process. Governments and non-state actors in developed countries are already adept at using formal and informal methods to prevail in trade disputes. In developing countries, such methods are underdeveloped or unavailable, and may be unlikely to improve in time to help non-state actors fully preserve their interests.

Non-state actors in developing countries may be provided an opportunity to initiate dispute settlement without having to spend the time and energy necessary to build public-private networks that would otherwise increase the likelihood of favorable outcomes in WTO dispute settlement. Empowering non-state actors to independently raise trade dispute claims against WTO member states would require modifications to the current WTO dispute settlement system but would ultimately create benefits. As one of the newest states to join the WTO, Vietnam is no exception to the disadvantages facing developing countries with respect to dispute settlement. Vietnam faces additional challenges due to its unique political development and rapid introduction to global trade since the mid-1980s. However, as discussed earlier in this article, firms and affiliated groups in Vietnam's garment export industry would benefit from modifications enabling them to assert influence by challenging violations by WTO member states. In the event that a discriminatory trade policy diminished the value of an important market for Vietnamese garment exporters, exporting firms and industry groups would have the opportunity to raise claims under the DSU, avoiding the time and effort required to facilitate cooperation with government authorities that would otherwise be necessary to effectively challenge the problematic trade measure.

As more developing countries seek to join the WTO, reforming the dispute settlement process would provide a practical way to ensure that the WTO system stays relevant for all member states. By freeing non-state actors to complain about

violations of international trade law with the prospect of receiving timely resolution, reformation of the DSU may achieve those goals and ultimately reinforce the salience of the post-Bretton Woods international trading regime.