



Tangible and concrete proposals for improving small State participation the context of the reform of the WTO's Dispute Settlement System and Investor-State Dispute Settlement

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About the University of the West Indies TradeLab Clinic

Dr. Jan Yves Remy and Dr. Ronnie Yearwood supervise one of TradeLab's newest clinics which is being offered as a collaborative effort between two departments of the University of the West Indies Cave Hill Campus: the Shridath Ramphal Centre for International Trade Law, Policy & Services (SRC) and the Faculty of Law (Cave Hill).

The SRC is the leading centre devoted to assisting the Caribbean region with issues of international economic law, regionally and on the global front, and is home to the Masters in International Trade Policy (MITP). The Faculty of Law at the Cave Hill Campus (in Barbados) is the oldest law faculty of the University of West Indies's three campuses, with the other two campuses located in Trinidad (St. Augustine) and Jamaica (Mona). The TradeLab pilot clinic is being offered as an elective to third-year students from the Faculty of Law.

Dr. Remy is the Deputy Director of the SRC and teaches on the MITP course; and Dr. Yearwood is a Lecturer in Law in the Faculty of Law, at The University of West Indies, Cave Hill Campus (UWI).

As the Academic Supervisors, Dr. Remy, and Dr. Yearwood, signed up students to work in teams of three or four. They worked with mentors of the TradeLab network as well as Research Fellows from the TradeLab alumni who assisted the students with research tasks.

This memorandum was completed by one of three student teams working for beneficiaries from the Caribbean region.

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Table of Abbreviations

ACIL	Advisory Centre on International Investment Law
ACWL	Advisory Centre on WTO law
AB	Appellate Body
ADR	Alternative Dispute Resolution
BIT	Bilateral Investment Treaty
CARICOM	Caribbean Community
CS	Commonwealth Secretariat
DSB	Dispute Settlement Body
DSP	Dispute Settlement Process
DSS	Dispute Settlement System
DSU	Dispute Settlement Understanding
EC	European Commission
ECCU	Eastern Caribbean Currency Union
FDI	Foreign Direct Investment
GATT	General Agreement on Tariffs and Trade
GATS	General Agreement on Trade in Services
ICJ	International Court of Justice
ICSID	International Centre for Settlement of Investment Disputes
IIA	International Investment Agreement
IO	International Organization
ISDS	Investor-State Dispute Settlement
LDC	Least Developed Countries
MFN	Most Favoured Nation
NT	National Treatment



Table of Abbreviations (cont'd)

OECS	Organization of Eastern Caribbean States
SRC	Shridath Ramphal Centre for International Trade Law, Policy and Services
TIP	Treaty with Investment Provision
UNCITRAL	United Nations Commission on International Trade Law
WTO	World Trade Organization



Executive Summary

International dispute settlement outlines the scope of a litigating party's rights and obligations in line with the object and purpose of the agreement at hand, in a given context. Dispute settlement also allows States to enforce rights and seek remedies when they are breached. For small States, this twin purpose of dispute settlement – clarifying the scope of rights and obligations as well as providing recourse against breaches of rules – assumes paramount importance.

The purpose of this memorandum is to provide small States involved in dispute settlement at the World Trade Organization (WTO) and in Investor State Dispute Settlement (ISDS) with concrete and tangible proposals to improve their effective participation in these systems. To this end, the memorandum will analytically review these two sets of dispute settlement mechanisms with a view to appraising the existing reform proposals submitted by various States, investors, and academic scholars, and ultimately proposing new ones aimed at assisting small States to overcome major constraints and promote their unique interests.

The first chapter defines a small State and sets the scope of the memorandum by grouping the most common characteristics used by international organisations to categorize them. To provide clarity and consistency in this memorandum, the WTO and ISDS systems are thereafter discussed in separate chapters (Chapters 2 and 3 respectively). However, they are organized similarly, each covering the background and characteristics of small State participation in the specific regime, existing reform proposals and recommended reforms. The final chapter (Chapter 4) concludes with the authors' findings and recommendations.

For the purposes of this memorandum, the four main characteristics used to identify small States are: population (that is 1.5 million or less); limited resources; Gross Domestic Product (GDP) volatility; and vulnerability to natural and manmade disasters. All of these characteristics are linked to the physical/geographical small size of the States and place them in a uniquely disadvantaged position in the WTO dispute settlement and ISDS systems.

The memorandum also explores the main features of each of the dispute settlement system. The WTO dispute settlement mechanism comprises a multi-stage, rules-based system created to secure the



predictability and the balance of rights and obligations in the multilateral trading system. In theory, the system was set up to preserve the rights of all WTO members, providing equal benefits and standing before the Dispute Settlement Body. In practice however, as per this memorandum, due to lacklustre remedies, uneven trade flows and larger more developed States having more economic clout, the participation of smaller States in WTO DS is generally limited. For ISDS, the rationale behind it is two pronged: it protects investors on one hand and promotes investment in the host State on the other. This memorandum demonstrates that the benefits of ISDS to the host State are largely theoretical, and that ISDS has manifested itself as an investor-centred regime whose effects on small States are exacerbated because of their characteristics.

Trends and statistics of small State participation in both WTO dispute settlement and ISDS is comparatively low with small States usually appearing as the respondent, or third-party. Barriers to small State participation in WTO dispute settlement are largely due to capacity and power constraints, which limits its value to them. While deficiencies in the ISDS system such as its one sided and automatic nature, high costs, and overall investor centric focus, as well as the characterisation of small States, impair their ability to adequately participate in the disputes and improve their investment climate.

The Sections on existing reform proposals outline and assess reforms which address specific areas of dispute settlement under each regime. The proposals discussed in this memorandum include the following:

For WTO:

1. Longstanding (“legacy”) proposals aiming to reform the WTO’s DSM which cover issues such as:
 - Limited access, third party rights, diversity in DSB personnel, compliance, cross retaliation, and time frame procedures.
2. Recent proposals aimed at mitigating the current Appellate Body (AB) Crisis
3. Academic proposals to increase small States participation



For ISDS:

1. Proposals requiring multilateral collaboration
2. Proposals relating to treaty interpretation and reducing investor centredness
3. Proposals dealing with arbitrator appointment, pool and independence
4. Proposals aiming to reduce cost and improve time management
5. Proposals related to dispute prevention

After a review of these proposals, the memorandum presents concrete and tangible proposals to enhance small States' participation in international disputes. While drawing from relevant aspects of existing proposals, ours go further and proceed from an appreciation of the special characteristics of small States and the unique challenges that impair their participation in disputes.

Specifically, as it relates to WTO dispute settlement, we recommend:

- ***Training international trade experts.*** Acknowledging the complexity of the WTO rules-based dispute settlement system, this proposal advocates for the development of small States' human capital.
- ***Improving government-industry/private sector coordination.*** This involves developing statutory and institutional mechanisms to improve communication as well as other mechanisms to improve private sector awareness in areas of international trade.
- ***Collective specialized general dispute settlement unit for small States.*** This proposal advocates for small States' integration and collaboration in dealing with international trade issues to combat small States individual limited resources.
- ***A shared representative office at the WTO for small States groupings.*** This reform can improve representation at the international level as well as the bargaining power of small States.
- ***Reassessing the ACWL categorisation criteria for accession.*** This proposal calls for flexibility in the criteria used to determine accession fees for small developing countries and graduating LDCs to allow for more affordable access to the ACWL's services.
- ***Provision for direct communication channels for private entities seeking raise foreign market access complaints by the ACWL.*** This proposal aims to develop private sector capacity to identify trade barriers and undertake the necessary research to identify the economic benefits or legal merits of the complaint and bring it to the attention of the government officials.



- ***Regional proposals at the WTO for the inclusion of monetary damages in lieu of trade sanctions as a DSM remedy.*** This proposal aims to remedy the constraints faced by small States when seeking to enforce favourable outcomes when rulings are made in their favour under the DSM.

With respect to enhancing small States' participation in ISDS, this memorandum discusses two main proposals: proposals to altering features of the existing system or to depart and replace it completely.

In terms of altering the existing system, the proposals suggested are:

- ***A centralised system for the international investment regime.*** This will make the system more cohesive and provide guidelines on rules, procedures, and a code of conduct for arbitrators. This could also be actualized through a standing investment court.
- ***Review and restructuring of existing International Investment Agreements.*** This can clarify the rights and obligations of both the host State and the investor, with specific focus on narrowing currently broad clauses and inserting ones that expressly empower States to regulate.
- ***The development of model International Investment Agreements.*** This will provide for innovative and more effective language and taking in to account the unique characteristics of small States.
- ***Capacity building initiatives.*** This can develop human resources capacity of small States and strengthen their ability to intervene in disputes.

With regard departing and replacing the system, to the proposals are:

- ***Investment facilitation provisions.*** This will remove ISDS as a driver for investment facilitation and replace it with other regional or domestic investment facilitation mechanisms.
- ***State-to-State dispute settlement.*** This would entail States bringing international investment disputes against other States on behalf of investors and would thus bring ISDS within the political international arena.
- ***Settlement of disputes through domestic courts.*** This would be most cost effective and practical, requiring that States strengthen existing institutions and ensure investors' confidence in the impartiality and independence of the domestic system.



Finally, the memorandum concludes by making a number of recommendations to improve the participation of small States in WTO dispute settlement and ISDS. Whether the systems change or remain the same, small States need to equip themselves with the requisite skills and expertise to handle the international trade and investment regimes. Additionally, any type of reform will likely incur some costs and resources to comply with the new norms. As states with limited resources, the authors highlight the importance of regionalism as a counterbalance for the challenges that might render reform efforts difficult. Lastly, one of the most important takeaways is that small States need to take advantage of the unique opportunity at present in the WTO and under ICSID and UNCITRAL to participate in discussions on reform. To maximise the chances of their issues being heard and addressed by the international community at large, advocacy on behalf of small States should be done with a collective and unified voice.



Chapter One: Introduction

1.1 Introduction

This memorandum examines the unique position of small States in international dispute settlement by assessing their participation in both the World Trade Organization (WTO) and Investor State Dispute Settlement (ISDS) frameworks. The ultimate aim is to offer tangible and concrete proposals to improve their participation in both systems and empower small States to reap the full benefits of global trade and investment rules.

First, this memorandum acknowledges that inherent vulnerabilities and economic constraints limit small States' capacity to avail themselves of the protection, rights, and opportunities generated by multilateral systems. Second, this memorandum also recognizes the benefits promised by dispute settlement mechanisms including promoting the stability and predictability of international rules and ensuring the enforceability of commitments and remedies. Third, this memorandum appreciates that both the ISDS and WTO system have attracted significant criticism from their stakeholders and that various aspects have been identified for urgent reform.¹ Against this backdrop, the need for small States to evaluate their position in the existing systems, identify and communicate their interests and work expeditiously to increase their presence in various dispute settlement processes (DSP) is evident.

This memorandum is composed of three chapters. Chapter 1 attempts to define a “small State” for purposes of this memorandum. This will be achieved by describing specific characteristics which are inherent to small States and which affect their ability to participate effectively in disputes.

Chapters 2 and 3 then each proceed with a separate analysis of small States in WTO dispute settlement and ISDS respectively. The sections in both chapters correspond but reflect slight variances which accommodate the differences in the rationale, scope, process, and nature of the two systems. The material in each section is subcategorised as follows: Section 1 provides a brief background of the existing dispute settlement systems as well as the dispute settlement processes and features. Section 2 provides a review of the nature of small States participation in the system to date. This includes statistics on small

¹ Since December 2019 the WTO's Appellate Body's functioning has been rendered inoperable since there are not enough AB Members to satisfy the 3-Member quorum required to review appeals. Also, UNCTAD's 2012 World Investment Report revealed that there are numerous questions about the usefulness and legitimacy of ISDS. See https://unctad.org/en/PublicationsLibrary/diaepcb2017d8_en.pdf.



States participation, trends, and an assessment of common constraints on participation. Section 3 provides an overview of past and ongoing dispute settlement reform proposals that are most relevant in relation to small States' challenges. States. Section 4 presents our own recommendations for improving small States participation in response to the constraints highlighted in the previous sections.

The concluding chapter then provides a summary of the main differences, similarities, and overlap between the dispute settlement mechanisms at the WTO and in ISDS, drawing together some recommendations for small States to improve their participation in both.

1.2 Definition and Scope Issues

There is no unanimity in the international community regarding the definition of small States which makes the task of picking one for present purposes elusive. For the purposes of this memorandum, we will identify and define a small State by reference to common characteristics used by prominent international organizations (IOs) like the World Bank (WB), the Commonwealth Secretariat (CS) and the International Monetary Fund (IMF). Broadly speaking, these characteristics are:

1. A population of 1.5 million or less
2. Limited resources
3. GDP volatility
4. Vulnerability to natural and manmade disasters

For purposes of this memorandum, we highlight how the particular characteristic chosen might serve as a constraint on participation in dispute settlement processes.

- **Population Size**

The IMF², the CS³ and the WB⁴ define small States as sovereigns with a population size of 1.5 million people or less.⁵ The Commonwealth definition, while utilizing 1.5 million or fewer persons as an identifier,

²“Macroeconomic Developments and Selected Issues in Small Developing States.” 2015. *Policy Papers* 2015 (46). <https://doi.org/10.5089/9781498344852.007>.

³ See, e.g. Commonwealth Secretariat/World Bank Joint Task Force on Small States, *Small States: Meeting Challenges in the Global Economy* (2000) 3 at 1 October 2005.

⁴ Road Map towards the Implementation of the United Nations Millennium Declaration: Report of the Secretary-General, UN GAOR, 56th sess, agenda item 40, UN Doc A/56/326 (6 September 2001) ('Road Map')

⁵ This includes all the Member s of the Caribbean Community (CARICOM); Antigua & Barbuda, Barbados, Belize, Dominica, Grenada, Haiti, Jamaica, St. Lucia, St. Kitts & Nevis, St. Vincent & the Grenadines, Suriname and Trinidad & Tobago. The Bahamas is the only independent CARICOM Member State which is not a WTO-Member and is currently in the accession process.



highlights that, despite their larger size, States, such as Jamaica, can be designated as small States because of other shared characteristics,⁶ such as land area and total GDP.⁷

A small population size acts as a constraint on a State's ability to effectively participate and enforce compliance in dispute settlement by limiting both the size, specialization, and skill set of a States' human capital.⁸ A small workforce also means that institutional and domestic legal capacity is often indivisible and may overstretch the States' capacity to defend and invoke WTO and investment claims.

- **Limited Human, Economic and Natural Resources**

Participating in both WTO and ISDS litigation requires human, natural and economic resources. In terms of human resources, knowledge of international trade and investment law is necessary for the identification of legal claims and defences, as well as proper drafting of agreements and arguments. Small States lack the domestic personnel for such tasks. Besides human resources, small States also lack the finances to hire experts outside government legal departments.

Additionally, small States are limited geographically. CARICOM States, in particular, have very limited land space. This geographical constraint adds a unique dimension to small States, distinct from a population size that further disadvantages small States in the international dispute settlement system. This physical limitation restricts the amount of available natural resources for small States to exploit, creating significant resource capacity constraints. The combination of limited human and geographical resources leads to the next sub-factor of this characteristic, a lack of financial resources.

The geographical size of small States limits their domestic natural resources⁹ and their capacity to enjoy economies of scale.¹⁰ This in turn, as the CS highlights, narrows small States' capabilities for

⁶ Review, Economic, and Basic Statistics. 2020. *Small States: Economic Review and Basic Statistics*. Vol. 18. Commonwealth Secretariat, London.

⁷ Commonwealth Secretariat/World Bank Report, above n 2, 3. The UN list of SIDS includes, for example, Papua New Guinea, with a population of 5.4 million, and the Dominican Republic, with 8.8 million, The Commonwealth designates countries such as Lesotho, Namibia and Papua New Guinea, Bangladesh amongst others as small islands.

⁸ Corbett, J., & Connell, J. (2015). All the world is a stage: global governance, human resources, and the 'problem' of smallness. *Pacific Review*, 28(3), 435-459.

⁹ Review, Economic, and Basic Statistics. 2020. *Small States: Economic Review and Basic Statistics*. Vol. 18. Commonwealth Secretariat, London.

¹⁰ "Macroeconomic Issues in Small States and Implications for Fund Engagement." 2013. *Policy Papers* 2013 (8). <https://doi.org/10.5089/9781498342315.007>.



economic production. In fact, the WB indicates that the Caribbean Community (CARICOM) States¹¹ rely on very few products and services, such as tourism and agriculture, for their economic inflows. Consequently, they remain highly dependent on their major trading partners for critical resources. The limited domestic capacity of small States prevents them from having the same levels of economic diversity enjoyed by larger countries. Additionally, small States, while having a high degree of trade openness importing heavily and exporting only a narrow array and volume of exports to a limited number of markets. This means that they individually account for minute shares of global trade.¹² The way in which small States interact with the international trade and investment regime is governed by the openness of their economies. It creates a situation where small States are inherently dependent on the international market and its systems, which in turn has implications for dependence on the dispute settlement systems attached. The cumulative effect of these factors is a limit on the accruable economic resources of small States. In sum, for small States, being under-resourced means lacking both the “in-house human capacity required to deal with the entire range of issues related to investment disputes” and the financial resources required to hire international law firms to help in their defence.¹³

Limited human and economic resources ultimately impact the capacity of small States to participate in both WTO and ISDS litigation, given the high costs associated with both procedures. For instance, the average legal and arbitration costs for ISDS cases are over USD 8 million with some exceeding USD 30 million.¹⁴ Furthermore, the awards granted by ISDS tribunals can be exponentially more; CARICOM States like Belize for example have been ordered to pay compensation through a USD 96 million award.¹⁵ For the WTO DS system, while monetary awards are not yet part of the WTO framework, limited resources still impair small States’ ability to bring claims and adequately participate in the system. Small States, with small world trade shares, usually have very limited capital to afford the sizeable legal costs associated with fielding a team of legal experts to adequately participate in WTO dispute settlement.

¹¹ They specifically identify, Antigua and Barbuda, Dominica, Grenada, Saint Kitts and Nevis, Saint Lucia, and Saint Vincent and the Grenadines.

¹² Soobramanien, Teddy, and Leah Worrall. 2017. "Emerging Trade Issues for Small Developing Countries; Scrutinizing the Horizon." <https://unctad.org/meetings/en/Contribution/ditc-ted-oceans-commonwealth-9781848599642-en.pdf>.

¹³ Sauvart, Karl P. 2019. “An Advisory Centre on International Investment Law: Key Features Academic Forum on ISDS,” no. September. www.jus.uio.no/pluricourts/english/projects/leginvest/academic-forum/

¹⁴ Gaukrodger, David, and Kathryn Gordon. 2012. "Investor-State Dispute Settlement: A Scoping Paper For The Investment Policy Community". *SSRN Electronic Journal*, 10. doi:10.2139/ssrn.2207366.

¹⁵ *Dunkeld International Investment Ltd. v. The Government of Belize (Number 1)*, PCA Case No. 2010-13, UNCITRAL; *Dunkeld International Investment Limited v. The Government of Belize (II)* (PCA Case No. 2010-21).



- **GDP Volatility**

While many small States have high GDP, they struggle to participate in disputes. Because small States have a very high degree of trade openness, they tend to be highly dependent on foreign investment and capital flows, to support their domestic demand, and have a small number of highly concentrated exports in a few sectors. All this results in small States having higher GDP per capita growth *volatility*¹⁶, which leaves them exposed to fluctuations in world markets and susceptible to

Gross Domestic Product (GDP) and GDP Volatility:

While GDP (the total market value of goods and services within a country at a given time) is universally accepted indicator of economic health, GDP *volatility* refers to the ability of a State's GDP growth patterns to change rapidly and unpredictably, especially for the worst.

natural disasters. Also, because of this volatility, private investors tend to see small States as being riskier to invest in than larger States, and this ultimately affects private investment negatively.¹⁷ The cumulative effect of this is that small States do not have consistent access to the necessary funds required to participate in the ISDS and WTO DSS. The world trading and investment regime is constantly changing and high volatility in national incomes also makes the transition difficult. Due to this volatility, small States lack the reliable resources that is necessary to actively participate in dispute settlement.

- **Vulnerability to natural or manmade disasters**

Many small States – often islands – are geographically located in places that are isolated from world economic activities and in regions prone to natural disasters and susceptible to the effects of climate change. Although natural disasters affect all States, the impact of natural disasters with regards to per unit of area damage as well as per capita costs are more severe for smaller States. These disasters have the potential to wipe out the already limited human, natural, and financial resources of small States and further fetters their capacity to participate adequately in dispute settlement. While all small States are vulnerable in this way, archipelagic and islands States such as those of the Eastern Caribbean, including Anguilla, Antigua and Barbuda, Dominica, Grenada, Monserrat, St. Kitts and Nevis, St. Vincent and the Grenadines, are among the ten most disaster-prone States in the world.¹⁸

¹⁶ For a survey of literature, see, eg, Small Economies: A Literature Review, WTO Doc WT/COMTD/SE/W/4 (2002) (Note by the Secretariat).

¹⁷ Ibid.

¹⁸ Robinson, David, Paul Cashin, and Ratna Sahay. 2006. "7 Natural Disasters and Their Macroeconomic Implications". *IMF Elibrary*. <https://www.elibrary.imf.org/view/IMF071/06826-9781589065147/06826-9781589065147/ch07.xml?redirect=true#Rch07fn02>.



Based on the definition and characteristics above, a number of small States can be identified and grouped according to their geographical locations.¹⁹ For purposes of this memorandum, we focus predominantly on the profile and experience of small States of the Commonwealth Caribbean group, and in particular those small States that have had experience in WTO and investor-state dispute settlement regimes.

Latin America and Caribbean	East Asia & Pacific	African	Other
Antigua and Barbuda	Brunei	Botswana	Bahrain
Bahamas	Cook Islands	Cape Verde	Bhutan
Barbados	Fiji	Comoros	Cyprus
Belize	Kiribati	Lesotho	Estonia
Dominica	Marshall Islands	Namibia	Maldives
Grenada	Micronesia, Fed.	Djibouti	Malta
St. Kitts and Nevis	Nauru	Equatorial Guinea	Qatar
St. Lucia	Niue	Gabon	
St. Vincent and the Grenadines	Palau	Gambia	
Suriname	Samoa	Mauritius	
Trinidad and Tobago	Solomon Islands	São Tomé and Príncipe	
Haiti	Tonga	Seychelles	
Guyana	Vanuatu	Swaziland	
Jamaica	Tuvalu	Guinea-Bissau	
	Papua New Guinea	eSwatini	

Table 1: Small States by geographical region.

¹⁹ This list is by no means intended to be exhaustive and has been compiled on the basis of fulfilment of the majority of above listed characteristics.



Chapter Two: Dispute Settlement at the WTO

This Chapter is organized into three Sections. The first section sets out the background of the WTO's DSS. The second section then seeks to identify the trends in small States participation in the DSS by conducting a case study analysis of the CARICOM grouping for the periods 1995-2020. This case study will evaluate the incidence CARICOM participation as complainant, respondent, third parties, and adjudicators (panelists and Appellate Body (AB) Members) to highlight the trends in participation. To complement this analysis, where appropriate, another group of small States, Pacific Island States will be used as a comparator given their similar profiles. Acknowledging that statistical analysis may not depict a comprehensive picture of the barriers that small States face when attempting to participate in the DSS, the third section examines the barriers to small States participation.

2.1 Background of the WTO dispute settlement system

2.1.1 Foundations of the WTO dispute settlement system

The WTO's DSS is considered to be one of the "most noteworthy achievements" established under the Uruguay Round of negotiations in 1995.²⁰ It evolved from the 1947 General Agreement on Tariffs and Trade (GATT) dispute settlement system. The main objectives of the DSS are to provide "security and predictability to the multilateral trading system, to preserve the rights and obligations of its Members and to clarify the existing provisions in accordance with customary rules of interpretation of public international law".²¹ Many of the principles and practices from the GATT dispute settlement system under Articles XXII and XXIII were codified over the years into the WTO system in the Understanding on the Rules and Procedures Governing the Settlement of Disputes or the Dispute Settlement Understanding (DSU). This legal text has been described as "containing innovations which resulted in a paradigm shift from the GATT, which was based on economic power and politics, to a WTO system which was based on the rule of law."²² This new DSU introduced what has been described as a "significantly strengthened dispute system".²³ It provides for detailed procedures for the different stages of the dispute process. It also provides for

²⁰ Nottage, Hunter. 2015 "Commonwealth Small States and Leastdeveloped Countries in World Trade Organization Dispute Settlement." *Commonwealth.org*. <https://sscoe.thecommonwealth.org/wp-content/uploads/2018/11/SmallStatesintheMultilateralTradingSystem.pdf>.

²¹ Article 3.2 of the Dispute Settlement Understanding (DSU).

²² Nottage supra see note 20

²³ WTO. "'Handbook on the WTO Dispute Settlement System" First Edition." *wto.org*. 2004. https://www.wto.org/english/tratop_e/dispu_e/disp_settlement_cbt_e/c2s2p1_e.htm (accessed April 1, 2010).



timeframes to ensure that settlement of disputes between Members concerning the redress of a violation of obligations²⁴ or other nullification or impairment of benefits²⁵ under the covered agreements their rights are settled promptly.

The introduction of these binding WTO dispute settlement procedures was expected to benefit developing countries. The idea was that developing countries would benefit mainly through its “reputational effects” as larger trading powers would not be able to deviate from dispute settlement ruling without risking harm to the institution.²⁶ Conventional wisdom also suggested that the presence of a rule-oriented system by its nature would benefit and safeguard the interests of small Member States with little bargaining leverage and provide “unprecedented security and predictability in their trading relations.”²⁷ This is as small States with weaker economic power would in theory be able to have equal access to the benefits of the judicial law enforcement system. This would allow them to defend and impose their interests as compared to larger States which would have other means to defend their interests.²⁸

²⁴See Article XXII in the General Agreement for Trade and Tariffs (GATT)

²⁵ Article XXIII:1 GATT

²⁶Smith, J. 2004. Inequality in International Trade? Developing Countries and Institutional Change in WTO Dispute Settlement. *Review of International Political Economy*, 11(3), 542-573. Retrieved February 18, 2020, from www.jstor.org/stable/4177510

²⁷ Supra WTO see note 26

²⁸Ibid.

2.1.2 The Current WTO dispute settlement system

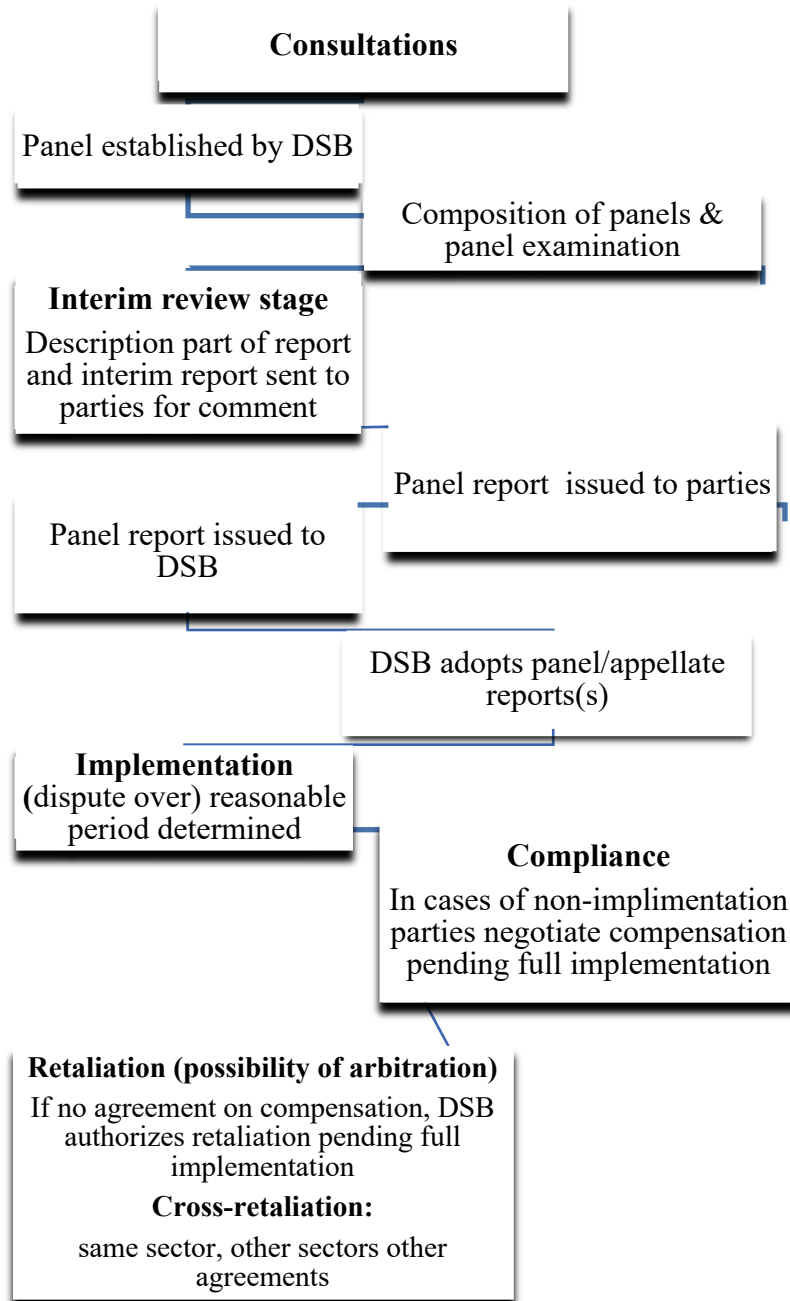


Figure 1 Graph showing the Dispute Settlement Process (DSP). Source: (WTO) WTO "Understanding the WTO: Settling Dispute; The panel process." https://www.wto.org/english/thewto_e/whatis_e/tif_e/disp2_e.htm (accessed 2020).



As depicted in figure 1 above, there are several stages in the dispute settlement mechanism (DSM). Under the DSS measures challenged by WTO Members may be subject to consultations, reviews by a panel, an AB, an arbitrator determining the reasonable period of time to comply, further reviews to determine compliance, as well as arbitration on the level of suspension of concessions.

The Dispute Settlement Body (DSB) follows the negative consensus rule. The negative consensus rule means that DSB decisions are adopted unless every WTO Member including the complainant agrees to overturn a decision.²⁹ This means that the establishment of panels, the adoption of panel and AB reports and the authorization of countermeasures against a party which fails to implement a ruling are thus now considered to be virtually automatic.³⁰ Consequently, the right that an individual party had under the GATT 1947 to block the establishment of a panel or the adoption of a report was eliminated.³¹

Under the GATT, panelists were selected by the disputing States and consisted of three-five panelists who drew up reports in which they made decisions about State violations, this had implications on the political independence of the panelists.³² Under the WTO's DSS, panelists are selected by the WTO Secretariat or the Director-General from an "indicative list" or "roster" of governmental and non-governmental individuals nominated by WTO Members as well as from the Secretariat's own list. AB Members are nominated by WTO Members by consensus and must be broadly representative of the Membership of the WTO, while being unaffiliated to any government. The WTO's AB is the only major international court where the election of a judge is dependent on a consensus voting rule.³³ This has had repercussions on the fluidity of the selection process for AB judges at the WTO. There was also the establishment of a formal surveillance of implementation following the adoption of panel (and AB) reports under the WTO's DSS.³⁴

²⁹ WTO. (n.d.). Retrieved from The process — Stages in a typical WTO dispute: https://www.wto.org/english/tratop_e/dispu_e/disp_settlement_cbt_e/c6s3p1_e.htm

³⁰ Ibid.

³¹ Since December 2019, the Appellate Body's functioning has been rendered inoperable since there are not enough AB Members to meet the 3-Member quorum required to review appeals.

³² Jackson, John H., 1997. *The World Trading System: Law and Policy of International Economic Relations*, (second edition), Cambridge, MA: MIT Press.

³³ Dobre, Alexandra, and Steve Charnovitz. n.d. *The Uniqueness of WTO Court Elections as Compared to other Multilateral Courts*, *International Economic Law and Policy* blig. Accessed 2020. <https://ielp.worldtradelaw.net/2020/01/the-uniqueness-of-wto-court-elections-as-compared-to-other-multilateral-courts.html>.

³⁴Supra WTO see note 26



2.2 Characteristics of small States Participation in WTO

2.2.1 Trends and Statistics

The number of disputes being brought to the WTO's DSS has been described as being "unprecedented for an inter-governmental dispute system".³⁵ Currently, the WTO has 164 Members accounting for 98% of world trade.³⁶ Since the establishment of the dispute system in 1995, 595 disputes have been brought to the WTO and over 350 rulings have been issued.³⁷ Overall, a total of 109 Members from 1995-2018 have been active in dispute settlement, as a party or a third party.³⁸

While these general statistics provide an impressive representation of WTO's dispute settlement participation, it does not paint the picture from a small-State perspective. To evaluate the participation of small States in the DSS, a case study will be conducted using a sample size of (13) CARICOM small States for the period 1995-2020. All CARICOM Member States are developing and LDCs³⁹ under the WTO consisting of both high income and upper middle-income countries.⁴⁰ Statistics of CARICOM small State participation will also be compared to a grouping of (6) Pacific Island small States⁴¹, which comprise LDCs and developing countries.⁴² States' participation as complainants, respondents, third parties and as panellists will be analysed separately and the patterns or trends which become evident will be discussed.

³⁵ Nottage Supra see note 20

³⁶ WTO. *WTO in brief*. https://www.wto.org/english/thewto_e/whatis_e/inbrief_e/inbr_e.htm (accessed February 2020).

³⁷ WTO. *Dispute settlement*. https://www.wto.org/english/tratop_e/dispu_e/dispu_e.htm (accessed February 2020).

³⁸ WTO. *Dispute settlement activity — some figures 1995-2018*.

https://www.wto.org/english/tratop_e/dispu_e/dispustats_e.htm (accessed February 2020).

³⁹ All CARICOM Member States are developing countries with Haiti the only Least Developing Country (LDC)

⁴⁰ World Bank. 2020. *World Bank Country and Lending Groups, Country Classification*. Accessed 2020. <https://datahelpdesk.worldbank.org/knowledgebase/articles/906519>.

⁴¹ The small states of the Pacific Islands are Fiji, Kiribati, Marshall Islands, Micronesia, Fed.Sts., Nauru, Palau, Samoa, Solomon Islands, Tonga, Tuvalu, Vanuatu. Source: "Pacific Island Small States | Data". 2020. *Data.Worldbank.Org*. <https://data.worldbank.org/region/pacific-island-small-states>.

⁴² *ibid*.

CARICOM	Comp.	Resp.	3rd party	Pacific islands	Comp.	Resp.	3rd party
Antigua and Barbuda	1	0	0	Papua New Guinea	0	0	0
Grenada	0	0	1	Solomon Islands	0	0	0
Trinidad & Tobago	0	2	4	Fiji	0	0	3
Barbados	0	0	4	Tonga	0	0	0
Guyana	0	0	3	Samoa	0	0	0
Jamaica	0	0	8	Vanuatu	0	0	0
Dominica	0	0	3				
Saint Kitts and Nevis	0	0	3				
Saint Lucia	0	0	3				
Saint Vincent	0	0	1				
Haiti	0	0	0				
Suriname	0	0	1				
Belize	0	0	4				
Total	1	2	35	Total	0	0	3

Table 2 Dispute Settlement Participation by CARICOM and Pacific Island States. Source WTO Statistics.



2.2.1.1 Participation as complainants

Both the CARICOM and Pacific Islands groups have the lowest levels of participation as complainants. Between the years 1995-2020, no Pacific island State has initiated a case in the DSS. Amongst the CARICOM group, Antigua & Barbuda (hereinafter called Antigua) has been the only Member to initiate a dispute at the WTO. In fact, Antigua is the first nation with fewer than 100,000 people to bring dispute to the WTO.⁴³ This low level of participation amongst both groups may reflect the reluctance of small States, to participate in costly disputes unless it is due to large controversial as opposed to everyday matters, as a last resort and in cases in which the likelihood of a win is high.

The *US – Gambling*⁴⁴ case initiated by Antigua plays a key role in examining the trends in CARICOM participation in the DSS in the capacity of a complainant. The subject matter of Antigua’s claim, the cross-border supply of gambling and betting services, was of monumental importance to Antigua’s economy therefore the stakes of the case for Antigua were very high. The Panel, AB and the compliance panel ruled in favor of Antigua. (see box 1) To date, the US has not complied with the WTO’S ruling despite several attempts by Antigua to negotiate a mutually acceptable solution and threats to enforce the compliance panel’s authorization to cross-retaliate.

While Antigua has had the support of the WTO’s DSB, the outcome was not one which as a small State it could actualize. The miniscule size of Antigua’s economy meant that the option to cross-retaliate has been more of a risk than a remedy. A risk meaning that the economic impact that cross retaliation could have on Antigua’s economy outweighed its benefits. Antigua has had very little leverage against a bigger world power like the US, as such it has not achieved a tangible result to date, in spite of the fact that it won on the legal merits. The fact that small States which seek recourse through the DSU to confront larger economies may be deterred from adopting retaliatory measures sanctioned by an arbitrator and the DSB, is a constraint and deterrent to small States participation.

⁴³ Background Note: Antigua and Barbuda, July 2002, Bureau of Western Hemisphere Affairs, State Dep’t, at <http://www.State.gov/r/pa/ei/bgn/2336pf>

⁴⁴ Appellate Body, United States — Measures Affecting the Cross-Border Supply of Gambling and Betting Services, WT/DS285/AB/R, adopted 20 April 2005.



Box 1 showing the different stages of the US-Gambling case

US-Gambling case⁴⁵

Box 1 showing the different stages of the US-Gambling case

Panel proceedings

In 2003, Antigua requested consultations and the establishment of a panel at the WTO with the US regarding US measures applied by local authorities in the US. In 2004, a DSB established a panel and found in favour with Antigua that the US's measures were contrary to its specific market access commitments under the General Agreement on Trade in Services (GATS) for gambling and betting services for cross – border supply.

AB proceedings

In 2005, the US appealed the case however, the AB upheld the panel's finding and a reasonable period for implementation was decided.

Compliance proceedings

The US failed to comply to the ruling and in 2006 Antigua requested consultations for compliance proceedings. In 2007, the Panel concluded that the United States had failed to comply with the recommendations and rulings of the DSB and the Arbitrator determined that the annual level of nullification or impairments of benefits accruing to Antigua was determined as US\$21 million annually and that Antigua may request authorization from the DSB to suspend obligations under the TRIPS.

In 2012, the US was still not in compliance with the ruling and Antigua formally notified the US of its desire to settle by recourse to the good offices of the Director-General in finding a mediated solution to the dispute. This was unsuccessful.

In 2013, due to persistent non-compliance of the US, the DSB agreed to grant authorization to suspend the application to the United States of concessions or other obligations consistent with the Decision by the Arbitrator to this dispute.

To date, the US has still not complied with the ruling and Antigua has not gained a favourable outcome.

2.2.1.2 Participation as a respondent

Trinidad and Tobago has been the only CARICOM State to participate as a respondent in the WTO's DSS in two cases. The cases brought against Trinidad reflect the concerns of Latin American States with regards to anti-dumping measures by importers of Latin American goods⁴⁶ (see box 2). With respect to the Pacific Island Members no State has participated as a respondent.

⁴⁵ Appellate Body, United States — Measures Affecting the Cross-Border Supply of Gambling and Betting Services, WT/DS285/AB/R, adopted 20 April 2005.

⁴⁶ ICTSD; (2012); Asian Participation in the WTO Dispute Settlement System; International Centre for Trade and Sustainable Development, Geneva, Switzerland, www.ictsd.org



Whereas it has been acknowledged that there are certain constraints in participation when initiating a dispute, the dimension of States participation as respondents in the system is often ignored.⁴⁷ Factors which have been posited to explain the low levels in this area are: limited market access commitments, invocation of special and differential treatment provisions and limited gains for foreign exporters when litigating claims with “poor countries” for WTO violations.⁴⁸ It remains unclear however the extent to which these factors explain the low level of cases brought against the CARICOM and Pacific Island States groupings.

Box 2a showing CARICOM cases as respondents

Trinidad and Tobago- Pasta case⁴⁹

In 1999, Costa Rica requested consultations with Trinidad and Tobago with respect to anti-dumping investigations being carried out on them against imports of pasta from a Costa Rican company. Costa Rica claimed that the 1996 Antidumping and Countervailing Duties Regulation of Tobago and Trinidad were inconsistent with the Anti-Dumping Agreement.

Box 2b showing CARICOM cases as respondents

Trinidad & Tobago - Macaroni and Spaghetti case⁵⁰

In 2000, Costa Rica also requested consultations with Trinidad & Tobago claiming that certain measures undertaken by Trinidad’s Ministry of trade by which provisional anti-dumping duties were imposed on the imposition of macaroni and spaghetti from Costa Rica was inconsistent with the Anti-Dumping Agreement.

⁴⁷ Laker, Apecu Joan. 2013. African Participation at the World Trade Organization: Legal and Institutional Aspects, 1995-2010. Martinus Nijhoff Publishers.

⁴⁸ Ibid.

⁴⁹ Trinidad, and Tobago - Anti-Dumping Measures on Pasta from Costa Rica, WT/DS185/1, consultations requested 23 November 1999

⁵⁰ Trinidad and Tobago - Provisional Anti-Dumping Measure on Macaroni and Spaghetti from Costa Rica, WT/DS187/1, consultations requested 20 January 2000.



2.2.1.3 Participation as third parties

Data shows that CARICOM states have participated in (35) as third parties while only Fiji in the South Pacific Islands grouping has been a third-party participant in (3) disputes. The largest levels of Member participation in both groups has been as third parties. This may be due to the fact that third party's interventions require substantially less engagement in terms of investment of resources. (see box 3a)

Statistics on third part participation (see Table 2) show that Jamaica has invested the most in third party participation. It was through its experience as a third party that it was able to contribute to proposals in the Doha Mandated Review of the DSU on the grant of enhanced third-party status.⁵¹

Box 3a: Nature of 3rd party participation

States have access to the WTO's DSM by virtue of participation as a third party at various stages of the process where it has a substantial, systemic or commercial interest.⁵² At the early stages Members can join consultation as third parties only in the case where the respondent accepts his request to join any bilateral discussions.

At the panel level third parties can make oral presentations and written submissions at the start of the process.⁵³ However, access for them at this stage is quite restricted under the DSU.

At the appellate level, the role of the third party is broader and more open as they can take part in the appeal. Third party participants have complete access to all oral hearings and written submissions before the Appellate Body, as well as to any questions or communications from its Member. They also have the opportunity to persuade and rebut, both orally and in writing, throughout the appellate process.⁵⁴

In certain instances, third parties can also be granted "enhanced third party rights" on a case by case basis. Panels enjoy discretion to grant such rights as long as such "enhanced" rights are consistent with the provisions of the DSU and the principles of due process.⁵⁵ This is done on a case by case basis. This allows States to participate in a capacity exceeding that which is outlined in the DSU.

⁵¹ TN/DS/W/21 Contribution by Jamaica to the Doha Mandated Review of the Dispute Settlement Understanding 10 October 2002.

⁵² Article 10.2 17.4 of the DSU.

⁵³ Article 10 and DSU Appendix 3, paragraph 6, in WTO, 1995.

⁵⁴ WTO (1997a) 'Working Procedures for Appellate Review'. WTO Document WT/AB/WP/3 (2-28-97).

⁵⁵ United States — Tax Treatment for "Foreign Sales Corporations" (Article 21.5 – EC).



While participation as a third party appears high for CARICOM States this participation has been “highly concentrated” in a small number of disputes.⁵⁶ In the past, (7) CARICOM States have participated in the *Banana case*⁵⁷ and (7) in the *Sugar case*.⁵⁸ (see boxes 3b and 3c) Similarly, for Pacific Islands States participation has been concentrated in the *Sugar* disputes.

The *sugar* and *banana* cases amongst other cases participated in as third parties highlight, firstly that dispute settlement cases can have major ramifications for small States irrespective of whether they are afforded the chance to be directly involved in the proceedings or not. These cases also show that small States often have to depend on other States to defend their interests even in matters which are important to its economies and that they lack the levels of inhouse expertise necessary to participate. In these cases, small States were not the object of the disputes but rather suffered collateral damage in disputes between larger WTO Members.⁵⁹

Similarly, the *US-FSC*⁶⁰ case highlights the fact that small states are significantly impacted by the decisions of the cases in which they participate as a third parties. In this case Barbados appeared as third parties on the side of the EC. The rulings in this dispute had several revenue implications for CARICOM State’s government and financial centres. Following the WTO’s panel and AB rulings on the FSC, the number of new FSC’s declined to 118 in 2000 as compared to the 384 licensed in 1997.⁶¹

⁵⁶ Supra Nottage see note 20.

⁵⁷ Panel Report, European Communities — Regime for the Importation, Sale and Distribution of Bananas, WT/DS27/R, adopted 25 September 1997.

⁵⁸ Appellate Body Report, European Communities – Export Subsidies on Sugar, WT/DS265/AB/R, WT/DS266/AB/R, WT/DS283/AB/R, adopted 19 May 2005.

⁵⁹ Roman Grynberg “WTO at the Margins: Small States and the Multilateral Trading System”, (Cambridge University Press 2006) 4-6.

⁶⁰ United States — Tax Treatment for “Foreign Sales Corporations”- (WT/DS108/R. WT/DS108/AB/R)

⁶¹ Grynberg, Roman, and Elroy Turner. 2003. *Multilateral and Regional Trade Issues for Developing Countries*. Commonwealth Secretariat, 2003.



Box 3b: Showing CARICOM cases as third parties

Banana case⁶³

The initiators of the banana case were Colombia, Costa Rica, Guatemala, Nicaragua and Venezuela with the support of the US which only later became the principal plaintiff. They were banana exporting countries which claimed to be adversely affected by the EU’s trade regime which they deemed to be “protectionist, discriminatory and restrictive”.⁶⁴ The complaint targeted more specifically, the preferential treatment given to banana imports from the EU’s traditional sources, the ACP (Africa, Caribbean and Pacific) States which included several CARICOM Member States.

The US, which was not directly involved in direct trade of bananas to the EU, maintained the position of leading plaintiff in the dispute. Its justification was that the EU banana trade policy was causing injury to US firms such as Chiquita. The US was awarded \$191.84 million as compensation for the nullification and impairment of its benefits. On the other hand, the ACP States, with very significant interests in the outcome of the case, took on the role of third parties which only allowed them the chance to make submissions with regards to their interests which were affected by the dispute. The smallest islands (CARICOM islands) were represented within the larger ACP grouping. To allow smaller States to participate fully in the proceedings, at the AB level St. Lucia was allowed private representation.⁶⁵ Liberalization of the EU market had the potential to severely harm their banana exports which were “an essential aspect of their livelihoods,”⁶⁶ however, CARICOM States were marginalized in this dispute and their ability to substantially influence the outcome of the case was insignificant.

Box 3c: showing CARICOM cases as third parties contd.

Sugar case⁶²

The initiators of the sugar case, concerning the EU sugar regime, are Brazil, Thailand and Australia. They challenged two types of EU exports, “C-sugar and ACP/India exports” as being subsidized contrary to the WTO provisions on agricultural export subsidies. Regarding the issue of ACP/India re-exports, under the Sugar Protocol of the Cotonou Agreement, the EU grants preferential access to 1.3 million tons of sugar from African, Caribbean, and Pacific (ACP) countries and has a similar sugar arrangement with India. The Panel and AB reports found that the EU subsidies on sugar exports for both C sugar exports and ACP/India re-exports and were beyond the level formally notified to the WTO in its commitment schedule and were therefore in violation of the WTO Agreement on Agriculture.

As third parties no less than 15 ACP States (this included CARICOM Member States Barbados, Guyana, Jamaica and St. Kitts and Nevis) were able to join as third parties to protect their preferential access to the EC market. Similar, to the Banana dispute small States were only able to have limited participation in a dispute which would have potential detrimental effects on its economy. It was merely viewed as collateral damage in the matter.

⁶² European Communities –Export Subsidies on Sugar- (WT/DS265, WT/DS266, WT/DS283) 2004-2005

⁶³ European Communities- Regime for importation, sale and distribution of Bananas DS27, 1997-2001

⁶⁴Perdikis, Nicholas, and Read Robert. *The WTO And the Regulation of International Trade: Recent Trade Disputes Between the European Union and The United States.* Edward Elgar Pub.

⁶⁵ Appellate Body Report, EC-Bananas III.

⁶⁶ Perdikis, Nicholas; Robert, Read; 2005. *The WTO And the Regulation of International Trade: Recent Trade Disputes Between the European Union and The United States.* Edward Elgar Pub, 2005.

2.2.1.4 Adjudicators

- **Adjudicators at the Panel Level**

In the indicative list of Governmental and non-governmental panelists published by the WTO, the Pacific Islands grouping has no individuals on the list for June 2019- January 2020.⁶⁸ For the CARICOM group, Jamaica is the only country on the list. However, this list may not be an accurate representation of the panelists as there are many other CARICOM individuals that are currently panelists absent from the list.⁶⁹ For the CARICOM grouping, participation as panelists has improved immensely over the years and CARICOM Member delegations have taken the opportunity to nominate competent individuals for the roster at the WTO. In the past, various Jamaican legal experts have been invited to serve on WTO dispute settlement panels adjudicating trade remedy cases.⁷⁰ Additionally, the *Australia-Tobacco Plain Packaging*⁷¹ dispute involved a number of CARICOM actors. For example, a CARICOM Member served as one of the three panelists in the dispute at the panel level and Dr. Jan Yves Remy, a CARICOM citizen was part of the legal team representing a

Box 4: The selection process for panelists

At the WTO there is no permanent panel roster. A different panel is composed for each dispute. At the panel level panels are composed of three to five panelists. The WTO Secretariat proposes nominations for the panel and these candidates must meet certain requirements in terms of expertise and independence.

These candidates are selected from an “indicative list” or “roster” of governmental and non-governmental individuals nominated by WTO Members as well as the Secretariat’s own list. Traditionally however, many panelists include trade delegates, former Secretariat officials, retired government official and academics. Citizens of a party and third parties to a dispute are not allowed to serve as panelists without the agreement of the parties. The Secretariat has the legal right to propose panelists whether on the roster or not subject to the absence of opposition of a Member with compelling reasons.

If there is no agreement between the parties on the composition of the panel within 20 days after the date of its establishment by the DSB, either party may request the Director General of the WTO to determine the composition of the panel. Within ten days after sending this request to the chairperson of the DSB, the Director General appoints the panel Members in consultation with the chairperson of the DSB and the chairperson of the relevant Council or Committee, after consulting with the parties.

Source: WTO⁶⁷

⁶⁷ Perdikis, Nicholas, and Read Robert. *The WTO And the Regulation of International Trade: Recent Trade Disputes Between the European Union and The United States*. Edward Elgar Pub, 2005.

⁶⁸ The list is based on the previous Indicative List issued on 25 June 2019 (WT/DSB/44/Rev.47). It includes additional names approved by the DSB at its meeting on 18 December 2019 and reflects one deletion from the previous list, as requested by the Member concerned. WTO. 2020. "Indicative list of governmental and non-governmental panelists; WT/DSB/44/Rev.48." WTO. January 13. Accessed May 1, 2020. [https://docs.wto.org/dol2fe/Pages/FE_Search/FE_S_S006.aspx?Query=\(\(%40Symbol%3dWT%2fDSB%2f*+NOT+%40Symbol%3dWT%2fDSB%2fW%2f*\)\)+AND+\(%40Title%3d%22indicative+list%22+NOT+%40Title%3dpropose\)\)&Language=ENGLISH&Context=QuerySearch&btsType=&SourcePage=FE_B_007](https://docs.wto.org/dol2fe/Pages/FE_Search/FE_S_S006.aspx?Query=((%40Symbol%3dWT%2fDSB%2f*+NOT+%40Symbol%3dWT%2fDSB%2fW%2f*))+AND+(%40Title%3d%22indicative+list%22+NOT+%40Title%3dpropose))&Language=ENGLISH&Context=QuerySearch&btsType=&SourcePage=FE_B_007).

⁶⁹ For instance, Dr. Chantal Ononaiwu (Jamaica), Dr. Jan Yves Remy (St. Lucia), Ms. Andrea Brown (Jamaica), Dr. Kathy-Ann Brown (Jamaica), to name a few.

⁷⁰ Morgan, Elizabeth. 2020. *Jamaica: 25 years at WTO [Part I], CARICOM TODAY*. March 11. Accessed 2020. <https://today.caricom.org/2020/03/10/jamaica-25-years-at-wto-part-i/>.

⁷¹ Appellate Body Report, *Australia — Certain Measures Concerning Trademarks, Geographical Indications and Other Plain Packaging Requirements Applicable to Tobacco Products and Packaging*, (DS435, 441, 458, 467



complainant.⁷² In this area therefore, CARICOM Member States have surpassed their otherwise low participation in other areas of dispute settlement.

Taking note of this, overall, participation in the area has still been relatively low, especially amongst the South Pacific grouping. The question arises therefore as to what factors explain the low levels of nominations on the roster. One factor may be the absence of large delegations which can claim expertise in the field as well as under-utilisation of the experts in the field. (see box 4) Secondly, Government officials' capacity is usually indivisible and as such it becomes difficult for small States to allocate time to serve in the DSB.⁷³ Small States also have less incentive to work as panelists. Although it has been made clear that panelists are not expected to donate their services, the pay for serving on a WTO panel has been described as modest when compared to tribunals in the private sector.⁷⁴

⁷² Remy, Jan Yves. (2020, June 12). Lessons from the Appellate Body's Parting Shot in the WTO Tobacco Plain Packaging Dispute. Retrieved 2020, from Shridath Ramphal Centre: <https://shridathramphalcentre.com/lessons-from-the-appellate-bodys-parting-shot-in-the-wto-tobacco-plain-packaging-dispute/>

⁷³ Johanesson, Louise, and Petros C Mavroidis. "Black Cat, White Cat: The Identity of the WTO." *Econstor*. 2015. <https://www.econstor.eu/bitstream/10419/109131/1/82178353X.pdf> (accessed 2020).

⁷⁴ Lowenfield, Andreas F. 2003. *International Economic Law*. Oxford University Press.



- **Adjudicators at the AB level**

Regarding participation as AB Members, the trend is also that of very limited involvement especially amongst the smaller States. Since 1995, no CARICOM country nor Pacific island State has been a Member of the AB.⁷⁶ AB Members must be broadly representative of the Membership in the WTO and unaffiliated with any government.⁷⁷ The levels of participation for small States however has been weak.⁷⁸ This may be due to the nature of the selection process for AB Members (see Box 3).

While all Members can submit their candidate's profile for nomination, the process of campaigning is resource intensive and political. Following the nomination, Members campaign by visiting delegations in Geneva and capitals of major WTO players to

rally support (or non-objection) for the AB voting process.⁷⁹ Small States are under-resourced and may not have the persuasive power, capacity or the resources to run such large campaigns even where persons qualify for nomination.

In summary, participation amongst CARICOM small States and that of Pacific Island small States compare favourably in that, levels of participation in all capacities have been low amongst both groups.

Box 5: The selection process for AB Members

The AB is composed of seven Members who are appointed by the DSB for a four-year term, renewable once. Three rotating Members are required to hear each appeal. The criteria for AB Members are that they must be persons of recognized authority, with demonstrated expertise in law international trade and the subject matter of the covered agreements generally.

The appointment process for an AB Member commences 7-8 months prior to the expiry of the term of office of an outgoing AB member. The DSB Chair shoulders this responsibility and announces the need to select new Members. The chair holds consultations on the process details about the launch of the selection process in which Members could raise problems. A nomination is made when a Member submits its candidate's curriculum vitae (CV) to the WTO. The selection committee interviews each candidate and informs the DSB of its recommendations. The AB members are then appointed by consensus of all WTO Members through the DSB.

The conduct of Members of the AB and of the AB Secretariat is regulated by the Rules of Conduct for the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU). These Rules emphasize that AB Members shall be independent, impartial, avoid conflicts of interest.

Source: WTO⁷⁵

⁷⁵ WTO. n.d. Dispute settlement training module: Chapter 6; The process – stages in a typical WTO dispute settlement case. Accessed 2020. https://www.wto.org/english/tratop_e/dispu_e/disp_settlement_cbt_e/c6s3p2_e.htm.

⁷⁶ Article 17.3 of the DSU.

⁷⁷ Article 17.3 of the DSU.

⁷⁸ Mauritius is one of the only small States which has served as an AB Member.

⁷⁹ Lo, Chang-fa Lo, Junji Nakagawa, and Tsai-fand Chen Chen. 2019. *The Appellate Body of the WTO and Its Reform*. Springer Nature.



CARICOM has been the only group to initiate a case under the DSM, to participate as a respondent and as adjudicators at the panel level. On the other hand, Participation has been almost absent amongst the Pacific Island group.

2.2.2 Barriers to small-States participation in WTO Dispute Settlement

Whereas certain trends and revelations become evident from the data, a more critical assessment is required as these numbers do not depict a comprehensive picture. Important questions such as “what constrains small States participation in the system” are raised. In academic literature, two main categories of constraints have been identified: (i) **power constraints** and (i) **capacity constraints**.⁸⁰ Power constraints concern fears of political and economic retaliation and enforcement constraints. Capacity constraints on the other hand include human resources constraints, cost constraints and private sector constraints. The role of the Advisory Centre on WTO Law (ACWL), the first legal aid centre established in international law,⁸¹ in redressing capacity constraints for small States will also be examined.

2.2.2.1 Power constraints

- **Fear of political and economic retaliation**

An observation has been put forward that small States may be reluctant to initiate DSP’s against larger developed States because of a fear of the negative consequences that may result to their economies and reputation.⁸² This is especially as a result the vulnerable position of small States resulting from their dependence on international developmental assistance and preferential market access.⁸³ For example, the larger the exporter’s reliance on the respondent for bilateral aid, the less likely it is to intervene as a Complainant.⁸⁴ This fear has been referred as “unquantifiable” as it is difficult to objectively determine whether retaliation would be applied where small States initiate disputes.⁸⁵ This is especially since so few small States have initiated dispute settlement proceedings. Despite this, the idea is that small States do at

⁸⁰ Guzman, Andrew T., and Beth A. Simmons. (2005) Power plays and capacity constraints: the selection of defendants in world trade organization disputes. *Journal of Legal Studies* 34, no. 2: 557-598. WAGE Conference, “Power plays and capacity constraints”, article by A Guzman & B Simmons presented in May 2005.

⁸¹ Sharpe, Jeremy. "An International Investment Advisory Center: Beyond the WTO Model." *EJIL:Talk!* 2019. <https://www.ejiltalk.org/an-international-investment-advisory-center-beyond-the-wto-model/> (accessed 2020).

⁸²Supra Nottage see note 20.

⁸³ *ibid.*

⁸⁴ Bown, Chad P. (2005) "Participation in WTO Dispute Settlement: Complainants, Interested Parties, and Free Riders." *The World Bank Economic Review* 19, no. 2: 287-310. Accessed March 7, 2020. www.jstor.org/stable/402822.

⁸⁵ Supra Nottage see note 20.



least anticipate retaliation on some level which would hurt their economies. Additionally, in a 2011 study, interviews undertaken on trade negotiators from a sample group of 30 small States confirmed that many of the officials believed that they were “operating under a high level of threat from large States which severely constrained their determination to persist” with “offensive requests on trade matters”.⁸⁶

- **Enforcement constraints**

Small States are also constrained when attempting to enforce compliance of rulings in their favour under the WTO’s DSM. The WTO’s judicial system has been continuously criticized for its weak remedies and enforcement mechanism.⁸⁷ The opinion is that whereas there was a move from a power- based system for a rule-based one the area of remedies was neglected, and so economic and political power are still factoring which come into play in achieving compliance.⁸⁸ Despite the equality of Members as a matter of law, the nature of the system of enforcement is such that it exacerbates the political and economic inequalities between small and large States.⁸⁹ The nature of the system of enforcement is such that it is self-enforcing. Self-enforcing, in the sense that rulings of the DSB are enforced only by the parties to it and no external party can enforce it. The WTO therefore merely provides a “neutral” forum for the arbitration of trade disputes among its Members. It is then the responsibility of the successful party on the Member countries to have the retaliatory capacity to impose economic costs or threaten respondents which do not comply with DSB rulings in their favor. Unlike larger more developed Members which have the economic or political influence to induce compliance, small States may find that this is very difficult to achieve, given the presence of power politics at play in the process. This has direct implications on small States as they have weak leverage to enforce rulings against the WTO’s larger powers.

The *US – Gambling* case highlights the limitation of small States’ ability to effectively enforce favourable rulings situations where cost and capacity constraints to initiating a case are surpassed. It also highlights the economic and political power factors which come into play in achieving compliance. The *US*

⁸⁶ Jones, E, C Deere-Birkbeck and N Woods (2010), *Manoeuvring at the Margins: Constraints Faced by Small States in International Trade Negotiations*, Commonwealth Secretariat, London.

⁸⁷ See Horn Henrik, institute for International Economic Studies, Stocholme Univeristy’ Centre for Economic Policy Research, Bown, Chad P. “Trade Remedies and World Trade Organization Dispute Settlement: Why Are So Few Challenged?” *The Journal of Legal Studies* 34, no. 2 (2005): 515–55. <https://doi.org/10.1086/429849>. Dencho Georgiev, Kim van der Borgh Cameron, “Reform and Development of the WTO Dispute Settlement System” Cameron May (2006) .

⁸⁸ Pauwelyn, Joost. "Enforcement and Countermeasures in the WTO: Rules Are Rules-Toward a More Collective Approach." *The American Journal of International Law* 94, no. 2 (2000): 335-47. Accessed April 18, 2020. doi:10.2307/2555296.

⁸⁹ibid.



– *Gambling* case has been described as a “David and Goliath”⁹⁰ dispute due to the fact that one the WTO’s smallest and “weakest” Members, Antigua was able to single – handily utilize the dispute settlement mechanism to bring a strong legal case against the “powerful” US. However, the description of this case as a “David and Goliath” dispute is somewhat simplistic in that, it gives the perception that it is the process and not the outcome which matters to smaller States. Whereas the panel and the AB ruled in favour of Antigua and granted it the ability to retaliate against the US to enforce compliance, to date, Antigua has been unable to gain a tangible outcome through the remedies offered under the DSM.

Firstly, Antigua expressed concern that retaliating through import restrictions would have a “disproportionately adverse impact on its economy by making products and services materially more expensive to the citizens of the country”.⁹¹ As a small State Antigua’s economy is heavily dependent on imports especially from the US. Retaliatory restriction on goods or services therefore would have a greater impact on its economy as compared to the US.⁹² Additionally, the potential to cross-retaliate through the suspension of intellectual property rights is a means of increasing the bargaining leverage of small States, the implementation is complex, costly and the harm which may occur to Antigua’s reputation may outweigh and outlast its economic benefits.⁹³ Antigua, the proverbial David, therefore despite its best efforts still loses to Goliath.

⁹⁰Ibid.

⁹¹ Bown, Chad P, and Joost Pauwelyn. *The Law, Economics and Politics of Retaliation in WTO Dispute Settlement*. Cambridge University Press, 2010. , Recourse by Antigua and Barbuda to Article 22.2 of the DSU, US_Gambling, 2-3.

⁹² Supra Nottage see note 20.

⁹³ Supra Bown see note 91.



2.2.2.2 Capacity constraints

The WTO system is one of self-representation, this means that States are required to have the human resources or the domestic capacity to make optimal use of the DSP.⁹⁴ Access to optimal use of the DSM requires not only legal and financial resources for WTO litigation but the domestic capacity to identify, monitor and communicate illegal trade barriers to legal experts.⁹⁵ Small States are however disadvantaged by the lack domestic and private sector capacity to do so. They also lack permanent representation in Geneva who can keep track and influence the “increasingly complex and expanding jurisprudence of the dispute settlement system as well as the resources to develop internal WTO legal expertise.”⁹⁶ Some specific capacity constraints will be discussed below.

- **Cost constraints**

The costs constraints of litigation are strongly tied to the lack of internal legal expertise of small States governments who engage in a dispute. The absence of internal legal and technical experts means that governments must source them externally.⁹⁷ In the *US – Gambling* case for example a legal team was outsourced from firms in El Paso, Texas and Brussels, Belgium.⁹⁸ Governments of small States tend to have small global trade shares and even smaller government budgets which means that they are not usually able to allocate funds to cover litigation costs to enforce or defend their rights. This means that the decision to invest in a WTO case is a political one. The reality is that small States are less likely to invest in a complex and costly process with an uncertain costs and outcome especially where there are more pressing government priorities.⁹⁹

Private law firms do not usually publicly state their client bills and fees may vary depending on how far the case goes to reach settlement as well as the nature and complexity of a case. With the expansion

⁹⁴ Bown, Chad P. "Participation in WTO Dispute Settlement: Complainants, Interested Parties, and Free Riders." *The World Bank Economic Review* 19, no. 2 (2005): 287-310. Accessed March 7, 2020. www.jstor.org/stable/402822.

⁹⁵ *ibid.*

⁹⁶ Smith, James. "Inequality in International Trade? Developing Countries and Institutional Change in WTO Dispute Settlement." *Review of International Political Economy* 11, no. 3 (2004): 542-73. Accessed March 16, 2020. www.jstor.org/stable/4177510.

⁹⁷ Nordstrom, Hakan, and Gregory Shaffer. "Access to Justice in the World Trade Organization: A case for small claims procedure." *ResearchGate*. 2008.

⁹⁸ Shaw, Timothy M, Laura C Mahrenbach, Renu Modi, and Xu Yi-chong. 2018. *The Palgrave Handbook of Contemporary International Political Economy*. Springer.

⁹⁹ Nordstrom, Hakan, and Gregory Shaffer. "Access to Justice in the World Trade Organization: A case for small claims procedure." *ResearchGate*. 2008.



of the scope of issues under the 1995 WTO agreements, new legal standards were created which turns on detailed scientific or economic determinations.¹⁰⁰ The technical nature of submissions therefore also further increases the costs of dispute settlement. A ballpark calculation in 2008 estimates that, a case of average complexity ending after the initial consultations because the parties have settled, or the complaint is otherwise withdrawn would cost USD \$100,000. If the case advances to the panel stage, it would cost another USD \$320,000. Lastly, if the panel decision is appealed, the bill would rise by another USD \$135,000. The total cost would then top half a million dollars. The costs would be reduced to the extent that a party uses the ACWL however it can still be considerable. While this estimation is dated¹⁰¹, it highlights the fact that in deciding of whether initiate a dispute settlement dispute to small States must consider the costs of outsourcing legal resources.

- **Private sector constraints**

The absence of engaged stakeholders and a strong private sector network is also tied to small States capacity constraints. This has the effect of placing countries which lack the finances to assist themselves and which lack support from such industries at a disadvantage. Most litigation costs are often funded by private industries with high per capita stakes international trade.¹⁰² Large States like the EU and US especially are supported by large multinational firms which actively monitor WTO matters, and which dedicate the resources to the public authorities to engage in WTO litigation.¹⁰³

In the *US – Gambling* case, the cost for Antigua simply to bring the trade dispute to the attention of the DSB and to seek reform in conformity with the established rules in the WTO exceeded more than USD \$2 million dollars.¹⁰⁴ Given the enormous cost and technical preparation needed to pursue the case at the WTO, Antigua's participation was made possible only through the financial support and resources from the offshore gaming and betting industry.¹⁰⁵ This highlights the importance of the private sector to DSS participation especially for small States with limited government resources.

¹⁰⁰ These Agreement include: Technical Barriers to Trade Agreement, the Agreement on Subsidies and Countervailing Measures and the Agreement on Agriculture.

¹⁰¹ This was estimated in 2008 by Nordstrom & Shaffer see note 91.

¹⁰² Ibid.

¹⁰³ Ibid.

¹⁰⁴ New, William. "US Misrepresentations Called Out By Antigua In Online Gambling Case At WTO." *Intellectual Property Watch*. 2017. <https://www.ip-watch.org/2017/09/29/us-misrepresentations-called-antigua-online-gambling-case/> (accessed 2020).

¹⁰⁵ Campbell, Patricia. 2007. *Antigua Reviews Controls for Gaming Sector*. February 28. Accessed 2020.



- **Capacity constraints and the role of the ACWL**

The ACWL is important to the discussion of capacity constraints faced by small States. The establishment of this centre was meant to help under resourced developing countries in international disputes by providing them with legal capacity and by helping them to fully understand their rights and obligations under WTO law (see Box 4). It was established in 2001 and is based in Geneva, near to the headquarters of the WTO.¹⁰⁶ The ACWL is an intergovernmental organization (IGO) independent from the WTO with its General Assembly consisting of developing, developed and LDC countries. The General Assembly oversees the functioning of the centre, adopts the annual budget and monitors its finances.¹⁰⁷

The ACWL’s annual budget is funded by the revenues from the Centre’s endowment fund, the fees for services rendered by the Centre and any voluntary contributions made by governments, international organisations or private sponsors.¹⁰⁹ Contributions to the endowment fund has been mainly funded by developed and high-income donors that do not qualify for the legal services of the Centre.¹¹⁰ These contributions by developed countries constitute a substantial contribution to small developing States by improving access to legal resources needed to participate in the DSU.¹¹¹

Developing country Members or Members with an economy in transition listed under the Agreement are exclusively entitled to the services of the centre. The schedule of fees for services are set out in Annex IV of the Agreement Establishing the ACWL (the Agreement). Fees for different services vary based on the classification of Developing countries, (A, B, C & LDC).

Box 6: Services provided by the ACWL

1. Giving free legal advice to governments on all procedural and substantive issues arising under WTO law.
2. Assisting countries (for modest fees, free-of-charge for LDCs) in all stages of the dispute settlement proceedings as complainants, respondents and third parties in the same manner as private or in-house counsel.
3. Supporting alternative dispute settlement proceedings
4. Holding trainings on WTO law and procedures, as well as arranging annual Secondments Programme for government lawyers at the Centre (capacity building).
5. The ACWL also has a technical expertise trust fund to aid developing countries in obtaining the economic, scientific and domestic law expertise needed to participate in DSP.¹

Source: (ACWL)¹⁰⁸

¹⁰⁶ ACWL, “The services of the ACWL,” available at https://www.acwl.ch/download/ql/Services_of_the_ACWL.pdf, p. 2.

¹⁰⁷ See, ACWL, “Members”, op. cit., and ACWL, “The services of the ACWL”, op. cit., p. 4.

¹⁰⁸ ACWL. n.d. *Quick Guide to the ACWL*. https://www.acwl.ch/download/ql/ACWL_Quick_guide_2014.pdf.

¹⁰⁹ Article 5, Agreement establishing the ACWL

¹¹⁰ Bown, Chad P. 2010. *Self-Enforcing Trade: Developing Countries and WTO Dispute Settlement*. Brookings Institution Press.

¹¹¹ Ibid.



The ACWL services are also provided to developing countries which are not Members of the Centre. For non-Members, the costs of ACWL legal services are set at slightly higher rates provided for under Annex IV.¹¹²

Newly acceding developing countries are required to pay a one-time contribution to the Centre's endowment fund and/or annual contributions during the first five years of operation of the Centre.¹¹³ LDCs¹¹⁴ are entitled to the services without contributing to the ACWL's Endowment Fund and becoming ACWL Member and there is no fixed Membership amount for developed countries.¹¹⁵ These fees are decided in accordance with the scale of contributions set out in Annexes I¹¹⁶ and II¹¹⁷ to the Agreement Establishing the Advisory Centre on WTO Law.¹¹⁸ If a Member considers it necessary, it may make its contribution in equal annual instalments during the four years following the entry into force of the Agreement.

Currently, developing countries' one-time contributions on accession are as follows: Category A: CHF486,000 (USD504,560.34); Category B: CHF162,000 (USD168,186.78); Category C: CHF81,000 (USD168,186.78). Countries are classified into three categories (A, B and C) based on their "share of world trade with an upward correction reflecting their per capita income."¹¹⁹ The share of world trade was determined on the basis of the share of world trade that the WTO used to determine the share of its Members in the expenses of the WTO. The per capita income was based on WB statistics.¹²⁰ The Management Board of ACWL reviews the classification of Members listed in the Annex at least once every five years in order to modify the classification to reflect any changes in the share of world trade and/or per capita income.¹²¹

¹¹² Annex IV, subsection 4.

¹¹³ Article 6, Agreement establishing the ACWL.

¹¹⁴ All the countries designated by the United Nations as least-developed countries are entitled to the services of the Centre even without being Member of the Centre.

¹¹⁵ Sauvart, Karl P. 2019. "An Advisory Centre on International Investment Law: Key Features; Academic Forum on ISDS Concept Paper 2019/14." September 10. Accessed April 29, 2020.

¹¹⁶ Annex 1 of the Agreement.

¹¹⁷ Annex showing the minimum contribution of developing country members and members with an economy in transition.

¹¹⁸ Annex showing the minimum contributions of developed country members.

¹¹⁹ ACWL. 1999. "The Agreement establishing the Advisory Centre on WTO Law." November 30.

¹²⁰ Ibid.

¹²¹ Ibid.



Category	World Trade Share	GNP per capita
A	More than or equal to 1.5%	High Income countries
B	More than or equal to 0.15% and less than 1.5%	Upper Middle-Income countries
C	Less than 0.15%	

Table 3 Showing categorization criteria for ACWL Membership. Source ACWL

- **Barriers to ACWL benefits**

Despite this opportunity for subsidized legal aid, many small States have not made use of the ACWL’s support nor have become Members. This may be due firstly to the costs of accession and methods of categorization. Despite the small populations of many small States, their relatively high per capita incomes would place them in the upper middle income, Category B accession fees alongside countries such as Thailand and Brazil or Category C. One factor postulated to explain the absence of accession to the ACWL by small States has been the possible reluctance on behalf of governments to justify the accession cost in their government budget, “in absence of an imminent WTO dispute.”¹²² This one off fee has been often quoted as an obstacle to joining the ACWL at round table talks on the issue of developing country participation in WTO litigation.¹²³

Secondly, several procedural barriers are faced by firms and industries requiring ACWL legal assistance. Contact with the ACWL is limited to developing Member and LDC governments rather than private entities or non-governmental entities within a developing country grouping of developing countries.¹²⁴ Therefore, for an exporting firm to raise questions of WTO enforcement with the experts at the ACWL it would have to petition the government to endorse the request and contact the Centre directly. In small States especially, small exporting firms or trade industry associations may be unable to acquire the legal, economic or political information needed to convince the government of the importance of a foreign market access complaint.¹²⁵

¹²² Supra Nottage see note 20.

¹²³ Bohanes, Jan, and Fernanda Garza. 2012. "Going Beyond Stereotypes: Participation of Developing Countries in WTO Dispute Settlement." *Trade, Law and Development*. <http://www.tradelawdevelopment.com/index.php/tld/article/viewFile/4%281%29%20TL%26D%2045%20%282012%29/118>.

¹²⁴ Supra Nottage see note 20.

¹²⁵ Bown, Chad P. (2002). “The Economics of Trade Disputes, The GATT’s Article XXIII, and the WTO’s Dispute Settlement Understanding.” in *Economics and Politics*, 13(3). p.283-323.



Having discussed these constraints and barriers the need for reform is apparent. As such, the existing reform proposals will next be considered.

2.3 Overview of Existing WTO Reform Proposals

WTO reform has been in discussion for many years, resulting in a complex web of negotiations and submissions relating to different areas and themes. Cognisant of this, the Section of the memorandum will furnish an overview of the existing WTO reform proposals, by discussing the existing literature under three categories; Legacy reform proposals, reform proposals related to the AB crisis and finally academic proposals targeted to increase small States participation. Focus will be placed on the legacy and academic proposals which address concerns of small States and on the general reform proposals addressing the AB crisis.

2.3.1 Legacy reform proposals

In 1994, before the establishment of the DSU, a “Ministerial Decision on the Application and Review of the Understanding on Rules and Procedures Governing the Settlement of Disputes” called upon ministers to complete a full DSU review.¹²⁶ This review was not completed and was only reintroduced on the agenda at the Doha Ministerial. Since then, negotiations to review and reform the DSU have taken place intermittently, most of which have not produced any success.¹²⁷ Several proposals in different areas of the DSS have been born out of these negotiations with the aim of contributing to clarifying and improving the DSP.¹²⁸

These longstanding proposals can be termed “legacy” proposals since they have been recurrently addressed in the past negotiations. Many of these legacy proposals require further work to address the concerns of different proponents as well as to address how the proposed mechanisms would work in practice. The current assessment of the legacy reform proposals in the DSS is not intended to reflect every detail of discussions to date. Instead this Section will focus on the areas which have particular relevance

¹²⁶ Zimmermann, Thomas A. 2006. "Negotiating the review of the WTO Dispute Settlement Understanding." https://www.alexandria.unisg.ch/39370/1/zimmermann_2006_book_dsu_alexandria.pdf.

¹²⁷ Ibid.

¹²⁸ Waincymer, J. M. Evaluating options for dispute settlement reform. In D. Georgiev, & K. Van der Borgh (Eds.), *Reform and Development of the WTO Dispute Settlement System* (1st ed., pp. 405 - 422). London UK: Cameron May 2006.



for small States under the following four categories: Access Reform, Representation Reform, Effective Compliance and Timeframes and Procedures. Examining legacy reforms in these categories and its considerations will aid in the assessment of the value of feasible initiatives moving forward.

<u>I. Access Reform</u>	<ul style="list-style-type: none">• Strengthening of third-party rights• Consultation• Panel Proceedings• Appellate Stage
<u>II. Representation Reform</u>	<ul style="list-style-type: none">• More inclusive and diverse panel composition
<u>III. Effective Compliance</u>	<ul style="list-style-type: none">• Collective or group retaliation• Calculation of the level of nullification or impairment• Cross-retaliation• Administrative sanctions
<u>IV. Timeframes and Procedures</u>	<ul style="list-style-type: none">• Shortening time frames

I. Access Reform

<u>Legacy Proposal</u>	<u>Proponents</u>	<u>Reform Elements</u>	<u>Issues raised by proponents</u>
<p>Strengthening of third-party rights¹²⁹</p> <p>Specific Challenges</p> <p>Limited access to dispute settlement proceedings at each level for third parties who have a substantial interest in the outcome.</p>	<p>“Friends of Third Parties”¹³⁰</p> <p>Chinese Taipei Colombia Guatemala Hongkong China Switzerland Turkey</p> <p>(JOB/DS/21/Rev.1)</p>	<p>Consultations</p> <ul style="list-style-type: none"> Responses to third party requests to participate in consultations should be notified to the applicant Member and to the DSB in writing and within a specific deadline. 	<p>Consultations</p> <ul style="list-style-type: none"> What exactly would this timeline be, taking into account the overall timeline for consultations? There is no consensus among members regarding the timeline for this venture. Members have expressed the need to preserve the current flexibility and control for the parties at the consultations phase.
		<p>Panel stage</p> <ul style="list-style-type: none"> Third party rights at the panel stage should be enhanced similarly to the extended and enhanced third party rights which has been granted on a case-by-case basis to date. 	<p>Panel stage</p> <ul style="list-style-type: none"> Should this be granted subject to an agreement of the parties or is it best left to the discretion of the panel after consultation with the parties? Members have expressed a preference for conserving the current flexibilities so that panels can decide whether additional rights should be granted based on the circumstances of the case.
		<p>Appellate stage</p> <ul style="list-style-type: none"> Members should become third parties for the first time at the appellate stage of the dispute The language for defining the rights of third participants should be clarified. 	<p>Appellate stage</p> <ul style="list-style-type: none"> Will this create excessive additional burdens for appellate proceedings and AB hearings?

¹²⁹ Recent discussions on third-party rights have been based on various legal drafting proposals, addressing third party rights in consultations (JOB(05)/19/Rev.1 , JOB(06)/89 , JOB(06)/175 and JOB(06)/224/Rev.1), in panel proceedings and at the appellate stage (JOB(05)/19/Rev.1 and TN/DS/W/92).

¹³⁰ JOB/DS/21/Rev.1, https://docs.wto.org/dol2fe/Pages/FE_Search/FE_S_S006-1.aspx?Id=236070&IsNotification=False.



II. Representation

<u>Legacy Proposal</u>	<u>Proponents</u>	<u>Reform Elements</u>	<u>Issues raised by proponents</u>
<p>More inclusive and diverse Panel Composition¹³¹</p> <p>Specific Challenges</p> <p>Under representation of Panelists from Developing and Small States</p>	<p>European Communities (JOB (05)/144/Rev.1)</p> <p>Chile and the United States (TN/DS/W/89)</p> <p>African Group (JOB (08)/81)</p>	<ul style="list-style-type: none"> • A panel roster should be created. • There should be better representation on panels of developing countries and LDCs in panels that deal with cases involving them.¹³² • There should be an improved procedure and current practices for panel compositions under Article 8 of the DSU. 	<ul style="list-style-type: none"> • Members have expressed a concern that the establishment of a panel roster would create significant procedural burdens. • Members also consider that a certain level of flexibility is needed to select appropriate panellists for each dispute in line with the “Member-driven approach at the WTO”. • The African group suggests that whereas the current Article 8.10 of the DSU provides for the presence of a panelist from a developing country on a panel only upon the request from the developing country, this should be reversed. • Panels should include a panelist from a developing country or LDC unless the developing Member or LDC decides otherwise. • There should be a procedure which explicitly defines the expertise expected of panelists. • Members agree that the relevant expertise is already, in practice considered as pertinent in panelist selection and that flexibility should remain in the selection of the panelists.

¹³¹Two proposals have been under discussion that relate to panel composition: JOB(05)/144/Rev.1 , https://docs.wto.org/dol2fe/Pages/FE_Search/FE_S_S006-1.aspx?Id=62248&IsNotification=False.

suggesting the creation of a panel roster and an improved procedure for panel composition, and TN/DS/W/89 , that would explicitly define the expertise expected of panelists.

¹³² The '*Balas text*' annexed to document TN/DS/9.



III. Effective Compliance

<u>Legacy Proposal</u>	<u>Proponents</u>	<u>Reform Elements</u>	<u>Issues raised by proponents</u>
<p>Collective or group retaliation</p> <p>Specific Challenges</p> <p>Proposals in this area seek to promote effect and prompt compliance by strengthening the remedies which are available under Article 22 of the DSU. Compliance is a systemic issue that is of general interest to all Members.</p>	<p>African Group (TN/DS/25)</p>	<ul style="list-style-type: none"> • Collective enforcement of recommendations in cases involving developing country respondents should be introduced. • This will allow other Members to retaliate “on behalf” of a successful developing country complainant who is not in a position to apply a suspension of concessions without causing harm to its own economy. 	<ul style="list-style-type: none"> • Several Members believe that all Member risk causing themselves economic harm in applying retaliatory measures and so this is not sufficient to distinguish situations that justify recourse to collective retaliation. • The concern is that Members will have limited incentive to join in a group when they are not a part of the dispute and where they would also suffer from the imposition of retaliatory measures. • There are still questions as to how the proposed mechanism would work in practice.



III. Effective Compliance

<u>Legacy Proposal</u>	<u>Proponents</u>	<u>Reform Elements</u>	<u>Issues raised by proponents</u>
<p>Calculation of the level of nullification or impairment</p> <p>Specific Challenges</p> <p>Proposals in this area seek to promote effect and prompt compliance by strengthening the remedies which are available under Article 22 of the DSU.</p> <p>Compliance is a systemic issue that is of general interest to all Members</p>	<p>Korea Ecuador (TN/DS/25)</p>	<ul style="list-style-type: none"> • Compensation and suspension of concessions or other obligations should cover nullification or impairment of benefits suffered during the reasonable period of time (RPT) of implementation. • Article 22.4 should be amended to take into account the impact of inconsistent measures on domestic economies 	<ul style="list-style-type: none"> • Members expressed concern that this proposal will change the nature and role of the RPT which is understood to be a period in which no remedy can be sought. • Members also are concerned about the possible difficulties in assessing the level of nullification or impairment in a period which is subject to changes where the Member explores different means to come into compliance. • Member also have concerns about the impact of measures on the economy and how this would work in practice.



III. Effective Compliance

<u>Legacy Proposal</u>	<u>Proponents</u>	<u>Reform Elements</u>	<u>Issues raised by proponents</u>
<p>Cross-retaliation ¹³³</p> <p>Specific Challenges Promotion of effect and prompt compliance by strengthening the remedies which are available under Article 22 of the DSU. Compliance is a systemic issue that is of general interest to all Members</p>	<p>Korea Mexico Developing Countries (TN/DS/25)</p>	<ul style="list-style-type: none"> • Cross-retaliation should be made available to developing country respondents against only developed countries without requiring specific justification. 	<ul style="list-style-type: none"> • Several Members recognize the possible challenges which exist for smaller economies in retaliating effectively against larger trading partners. • It will also consider the appropriateness of the measure for developing countries of different trading volumes and economic profiles. • It has also been asked whether the right should only be available against developed country defendants, and not developing country defendants as well. • Further work would focus on clarifying the situations in which cross retaliation would be facilitated.

¹³³ WTO Dispute Settlement Body, Informal Meeting of the DSB Special Session, 8 June 2012– Chairman’s Remarks: Summary of Recent Work (Week of 4 June 2012), JOB/DS/10, 15 June 2012, para 69. 45 WTO Dispute Settlement Body, Informal Meeting of the DSB Special Session, 30 September 2011–Chairman’s Remarks: Summary of Recent Work (Week of 26 September 2011), JOB/DS/4, 26 October 2011, para 38. 46 & WTO Dispute Settlement Body, TN/DS/25, 21 April 2011, above at n 12, B-24.



III. Effective Compliance

<u>Legacy Proposal</u>	<u>Proponents</u>	<u>Reform Elements</u>	<u>Issues raised by proponents</u>
<p>Administrative sanctions¹³⁴</p> <p>Specific Challenges Promotion of effect and prompt compliance by strengthening the remedies which are available under Article 22 of the DSU. Compliance is a systemic issue that is of general interest to all Members</p>	<p>DS Chairman Special Session</p>	<ul style="list-style-type: none"> • Administrative sanctions should be granted for situations of non-compliance once all other options have been exhausted. • Members have suggested that these sanctions could include the non-posting of documentation to the Member’s delegation in Geneva and disqualification of their representatives from being nominated to preside over WTO bodies. • If a Member is in arrears for more than 1 years’ worth of dues, it is disqualified from participating in the WTO Committee on Budget, Finance and Administration. • Members who are in arrears for more than 3 years’ worth of dues are to be designated as “Inactive Members” and denied access to training or technical assistance other than those necessary to meet their obligations under Art. XIV:2 of the WTO Agreement. • There should be a waiver for least-developed country WTO Members. 	<ul style="list-style-type: none"> • The “administrative sanctions” themselves have not yet been defined. • There is merit in this proposal as sanctions could possibly include suspension of voting rights for certain infractions. • There are still questions as to how this proposal will be implemented and how the DSB would be able to make a decision to impose administrative sanctions where it could only be done by consensus.

¹³⁴ WTO Dispute Settlement Body, JOB/DS/10, 15 June 2012, above at n 39, para 64.



IV. Timeframes & Procedure

<u>Legacy Proposal</u>	<u>Proponents</u>	<u>Reform Elements</u>	<u>Issues raised by proponents</u>
<p>The possibility of shortening timeframes</p> <p>Specific Challenges Length of time</p>	<p>DS Chairman Special Session</p>	<ul style="list-style-type: none"> The minimum consultation period before a panel can be requested should be shortened to 30 days. The flexibilities relating to developing country Member should be retained for the current timeframes to be maintained. 	<ul style="list-style-type: none"> Members have reservations to the idea that the extension should only apply where the complaining party is a developing Member. Members also questioned whether the additional 30 days would be an appropriate extension. It is important to take into consideration the fact that the shortening of the minimum duration for consultations may have a significant impact the overall timeframe for request and responses.



2.3.2 Assessment of proposals to mitigate the current AB crisis

Currently, the WTO is facing what is referred to as “its deepest existential crisis yet ahead of its silver jubilee”.¹³⁵ The crown jewel of the WTO is now being described as having transformed into a “problem child who is in urgent need of reform”.¹³⁶ The functioning of the WTO’s AB has been stalemated as a result of the US’s blockage of the selection process to fill the vacancies in the AB which has stunted its ability to entertain appeals. There is thus currently one member on the AB which means that it cannot meet its required 3-member quorum to review appeals. These unilateral moves undertaken by the US has implications for the continued effectiveness and stability of the DSS as a whole and WTO Members are now faced with critical choices with regards to the future of the system.

Several joint proposals for reformation of the current AB rules and to bypass the current stalemate have been put forth by several WTO Members principally including Member States of the European Union, China, to name a few as well as Ambassador Walker’s proposed General Council Decision of 15 October 2019.¹³⁷ More recently, on March 27th, 2020 announced the proposal of a multi-party interim appeal arbitration arrangement (MPIA) pursuant to Article 25 of the DSU as a temporary arrangement which will allow Member to bring appeals.¹³⁸

The table below provides a summary of the issues discussed amongst WTO Members in the last two years, in their efforts to address the US’ concerns regarding the AB. Small States should consider which proposals are in accordance with their interests and strategically position themselves to engage constructively on the proposals to ensure that their interest and rights guaranteed by the rules-based system are not undermined.

¹³⁵Pattanayak, Banikinkar. "WTO faces deepest existential crisis ahead of its silver jubilee." *Financial Express*. December 2019. <https://www.financialexpress.com/economy/wto-faces-deepest-existential-crisis-ahead-of-its-silver-jubilee/1788127/>.

¹³⁶Ambassador Ujal Bhatia. 2018 ‘Address by ambassador "launch of the wto appellate body's annual report for 2019, Delivered at Room CR, Centre William Rappard .' https://www.wti.org/media/filer_public/e2/a9/e2a991d6-85cd-47c1-8d36-2ef0ec11605b/bhatia_speech_-_ab_annual_report_2018_and_peter_van_den_bossche_farewell_on_28_may_2019.pdf.

¹³⁷ Sacerdoti, Giorgio. 2019. "The stalemate concerning the Appellate Body of the WTO: Any way out?" Jan 20. Accessed 2020. http://www.qil-qdi.org/the-stalemate-concerning-the-appellate-body-of-the-wto-what-way-out/#_ftnref42.

¹³⁸ European Commission. 2020. "Interim appeal arrangement for WTO disputes becomes effective." April 30. Accessed 2020. <https://trade.ec.europa.eu/doclib/press/index.cfm?id=2143>.



I. Proposals relating to the conduct of appeals ¹³⁹

<u>Existing Proposals</u>	<u>Reform Elements</u>	<u>Assessment</u>
Completion of appeals by outgoing AB Members	<ul style="list-style-type: none"> The DSU should be amended to provide for a transitional rule that an outgoing AB Member shall complete the disposition of a pending appeal in which a hearing has taken place during that Member's term. 	<ul style="list-style-type: none"> It can serve to decrease the backlog of cases in the DSS thereby increasing efficiency. It can create a level of predictability in the process for the completion of appeals by AB Members
90-day deadline for completion of appeals	<ul style="list-style-type: none"> Article 17.5 of the DSU should be amended to provide for the possibility for the parties to agree to the exceeding of the 90-day timeframe. If there is no agreement between the parties to the exceed the timeframe, the procedure or working arrangements for the specific appeal could be adapted to ensure that the 90-day timeframe is met. 	<ul style="list-style-type: none"> Allows for increased flexibility in the process especially considering the complexities and the myriad of stages of WTO disputes. Improves the quality of AB reports. Longer timeframes will ensure that quality is not compromised while attempting to meet the deadline.
Meaning of municipal law as an issue of fact	<ul style="list-style-type: none"> Article 17.6 of the DSU should be amended. This will provide greater certainty on issues of law covered in the panel report and ensure that legal interpretations developed by the panel do not include the panel's findings with regard to the meaning of the municipal measures of a Member. 	<ul style="list-style-type: none"> This aims to address the issues of judicial overreach of AB Member which is a concern to certain members in the WTO. It also aims to clarify the role of the AB in reviewing Members' domestic laws

¹³⁹ EU et al (W/752), Chinese Taipei (W/763), Brazil, Paraguay and Uruguay (W/767), Thailand (W/769), African Group (W/776), Japan, Australia and Chile (W/768).



I. Proposals relating to the conduct of appeals ¹⁴⁰

<u>Existing Proposals</u>	<u>Reform Elements</u>	<u>Assessment</u>
Findings unnecessary for resolution of dispute	<ul style="list-style-type: none"> Article 17.12 of the DSU should be amended to provide that the AB shall address each of the issues raised on appeal by the parties to the dispute to the extent that it is necessary for the resolution of the dispute. The AB should explicitly indicate in its reports why it considered issuing certain findings requested by the parties was either necessary or unnecessary to the resolution of the dispute 	<ul style="list-style-type: none"> This addresses the issues of judicial overreach of AB Member which is a concern to certain members in the WTO. It also aims to prevent situations where rights and obligations are being added to or diminished by AB Members
Precedential value of previous AB reports	<ul style="list-style-type: none"> The guidelines on the future functioning of the AB should clarify that panel and AB reports do not have binding precedential values. However, reports from prior panel and AB reasoning or interpretation should be able to be considered by panellists in addressing appropriate issues. 	<ul style="list-style-type: none"> This can increase clarity with regards to the precise role of AB reports as precedent for panels and its consistency with WTO rules. Consistency and predictability in the interpretation of the rights and obligations under the covered agreements is of significant value to members.
Interaction between the AB and WTO Members	<ul style="list-style-type: none"> Article 17 of the DSU should be amended to provide for the holding of annual meetings between the AB and WTO Members (in the DSB) where Members could express their views in a manner unrelated to the adoption of particular reports 	<ul style="list-style-type: none"> This can allow for increased opportunities for regular discussions of developments in the AB's jurisprudence thereby promoting transparency and accountability in the DSS.

¹⁴⁰ EU et al (W/752), Chinese Taipei (W/763), Brazil, Paraguay and Uruguay (W/767), Thailand (W/769), African Group (W/776), Japan, Australia and Chile (W/768).



II. Proposals relating to the independence of and selection process for the AB ¹⁴¹

<u>Existing Proposals</u>	<u>Reform Elements</u>	<u>Assessment</u>
Term of AB Members	<ul style="list-style-type: none"> In order to enhance the independence of the AB and its Members, Article 17 of the DSU should be amended to provide for one single but longer (6-8 years) term for AB Members. 	<ul style="list-style-type: none"> This aims to reinforce the AB's independence and impartiality and to improve its efficiency.
Number of AB Members	<ul style="list-style-type: none"> Article 17 of the DSU should be amended to increase the number of AB Members from 7 to 9; and provide that Membership of the AB is a full-time occupation 	<ul style="list-style-type: none"> This aims to reinforce the AB's independence and impartiality and to improve its efficiency.
Transitional rules for outgoing AB Members	<ul style="list-style-type: none"> Article 17 of the DSU should be amended to provide that outgoing AB Members should continue discharging their duties until their places have been filled but not longer than for a period of two years following the expiry of the term of office. 	<ul style="list-style-type: none"> This can account for a smoother transition between incoming and outgoing AB Members and address the backlog of cases in the DSS thereby increasing efficiency.
Launch of selection process	<ul style="list-style-type: none"> Article 17 of the DSU should be amended to clarify that the selection process to replace outgoing AB Members shall be automatically launched no later than a specified number of months (e.g. six months) before the expiry of their term of office 	<ul style="list-style-type: none"> This attempts to address the current impasse and weakness of the selection process.

¹⁴¹ EU et al (W/753), African Group (W/776), Brazil, Paraguay and Uruguay (W/767); Communication to the General Council, WT/GC/W/753 of 26 November 2018.



III. Proposal for Article 25 Arbitration as an interim solution¹⁴²

<u>Existing Proposals</u>	<u>Reform Elements</u>	<u>Assessment</u>
Provisions	<ul style="list-style-type: none"> The proposal provides that the appeal arbitration procedure will be replicated as closely as possible with regards to all substantive and procedural aspects as well as the practice of Appellate Review pursuant to Article 17 of the DSU. This includes the provision of appropriate administrative and legal support to the arbitrators by the AB Secretariat. 	<ul style="list-style-type: none"> There are technical issues which arise due to the contextual differences of the AB Working Procedures and the proposed appeal arbitration procedure. For clarity purposes all applicable provisions should be listed.¹⁴³
Panel composition	<ul style="list-style-type: none"> The arbitrators shall be three persons selected by the Director-General within 10 days from the filing of the Notice of Appeal from the pool of available former Members of the AB, based on the same principles and methods that apply to constitute a division of the AB under Article 17.1 of the DSU and Rule 6(2) of the Working Procedures for Appellate Review. 	<ul style="list-style-type: none"> Requiring that the arbitrators be selected from the pool of available former Members of the AB may prove to be problematic. This may not be very feasible since this pool is limited¹⁴⁴
Faster Timelines	<ul style="list-style-type: none"> Paragraph 7 of the Annex to the Proposal provides the arbitrators shall be selected by the Director-General within 10 days from the filing of the Notice of Appeal from the pool of available former Members of the AB. 	<ul style="list-style-type: none"> It should be discussed whether this time period is enough or not.
Inclusion of Third parties	<ul style="list-style-type: none"> Paragraph 11 of the Annex proposes that only parties to the dispute, not third parties, may initiate the arbitration. Third parties which have notified the DSB of a substantial interest in the matter before the panel pursuant to Article 10.2 of the DSU may make written submissions to and shall be given an opportunity to be heard by, the arbitrator. 	<ul style="list-style-type: none"> For small States especially, this proposal would increase participation in the new phase of the WTO DSM.

¹⁴²Text of the EU- Norway interim arbitration, Interim Appeal Arbitration pursuant to Article 25 of the DSU https://trade.ec.europa.eu/doclib/docs/2019/october/tradoc_158394.pdf.

¹⁴³ James J Nedumpara, *Does Article 25 Arbitration Need Serious Consideration?*

¹⁴⁴ Ibid.



IV. Multi Party Interim Appeal –Arbitration Arrangement (MPIA) pursuant to Article 25 of the DSU

<u>Existing Proposals</u>	<u>Reform Elements</u>	<u>Considerations</u>
The overarching institutional arrangement	<ul style="list-style-type: none"> Any Member of the MPIA can join in by indicating their intent to do so if the AB continues to be dysfunctional. Member will not pursue appeals under Articles 16.4 and 17 of the DSU. The procedure of this new mechanism aims to utilize the arbitration process under Article 25 of the DSU. The MPIA applies to any future dispute between two or more participating Members, including the compliance stage of such disputes, as well as to any such dispute pending on the date of the communication, except if the interim panel report, in the relevant stage of that dispute, has already been issued on that date. 	<ul style="list-style-type: none"> Small States need to consider whether the MPIA is a replica of the previous system rigged with inefficiencies or whether it is an improvement. The MPIA for the most part mimics the original AB system. There are however adjustments that were made.
Procedures for the conduct of MPIA appeals	<ul style="list-style-type: none"> The appeal arbitration procedure will be based on substantive and procedural aspect of the Appellate Review pursuant to Article 17 of the DSU. Features such as independence and impartiality thus would be maintained. 	
Timeframes	<ul style="list-style-type: none"> Members must notify an agreement to arbitrate under the MPIA 60 days after panels are established The arbitration shall be initiated by filing a Notice of Appeal with the WTO Secretariat no later than 20 days after the suspension of the panel proceedings. The parties request the arbitrators to issue the award within 90 days following the filing of the Notice of Appeal. If it is necessary to issue the award within the 90-day time-period, the arbitrators may also propose substantive measures to the parties. For example, an exclusion of claims based on the alleged lack of an objective assessment of the facts pursuant to Article 11 of the DSU. On a proposal from the arbitrators, the parties may agree to extend the 90-day time-period for the issuance of the award 	



IV. Multi Party Interim Appeal –Arbitration Arrangement (MIPA) pursuant to Article 25 of the DSU

<u>Existing Proposals</u>	<u>Reform Elements</u>	<u>Considerations</u>
System for selecting a “pool” of arbitrators	<ul style="list-style-type: none"> • Under the appeal arbitration procedure appeals would be heard by three appeal arbitrators selected from a pool of 10 standing arbitrators. • Each participating Member would nominate one candidate to a pre-selection committee comprising the WTO Director General and other Chairs of relevant WTO committees who would screen the nominees. • The participating Members will compose the final pool of 10 pre-selected and screened arbitrators by consensus. Current and former AB Members thus are automatically qualified for selection. • The arbitrators are to be chosen based on “an appropriate overall balance”. 	<ul style="list-style-type: none"> • Despite minor changes the selection process substantively remains the same. • Small States should consider whether the MPIA system encourages certain biases which were perpetuated in the previous system. • Consider that the past AB Members on the roster automatically qualify and that the initial arbitrators most likely will be chosen by the current 16 Members subject to re-composition only two years after the MIPA comes into effect.
Secretary style Assistance	<ul style="list-style-type: none"> • Appeal arbitrators will be provided with appropriate administrative and legal support separate from the WTO Secretariat staff and its divisions. • This support structure will be entirely separate from the WTO Secretariat staff and its divisions supporting the panels and be answerable, regarding the substance of their work, only to appeal arbitrators 	<ul style="list-style-type: none"> • It is unclear what “entirely separate from the WTO Secretariat and staff and its divisions supporting panels” means.



2.3.3 Academic Proposals to Increase Small States Participation

V. Academic Proposals to Increase small States Participation		
<u>Proposal</u>	<u>Reform Elements</u>	<u>Considerations for small States</u>
<p>Proposal for a small Claims Procedure for developing states at the WTO</p>	<p>A small claims procedure would have the effect of reducing the procedural demands placed on small developing states.¹⁴⁵</p> <ol style="list-style-type: none"> 1. The first criterion for consideration under this procedure would be the monetary value of the claim: <ul style="list-style-type: none"> • The author suggests that the small claims procedure would be limited to claims up to a defined amount negotiated by WTO Members. The means to assess the complaint's value would be to "accept the value of the complaint at face value in order to determine the procedure's availability" and if the value was "less than or equal to the defined threshold, the small claim procedure would be used." 2. In terms of compliance: <ul style="list-style-type: none"> • In the event of a respondent's non-compliance with a ruling in a small claims' procedure, the remedy of retaliation through the withdrawal of equivalent concessions or payment of monetary damages should be capped at a threshold amount. The authors believe that this will prevent abuse of the system for high value claims. 	<ul style="list-style-type: none"> • The idea of a small claim's procedure is innovative and ambitious. However, the practicality of the proposal must be considered. • History shows that formal changes to WTO principles are rare and that recommendations usually should not "reinvent" the process but build on what is currently in place. Take for example the MIPA which aims to build on the existing AB procedures.

¹⁴⁵ Nordstrom, Hakan, and Gregory Shaffer. "Access to Justice in the World Trade Organization: A case for small claims procedure." *ResearchGate*. 2008.



V. Academic Proposals to Increase small States Participation

<u>Proposal</u>	<u>Reform Elements</u>	<u>Considerations for small States</u>
<p>Proposal for a small Claims Procedure for developing states at the WTO</p>	<p>3. Precedential value of small claims procedures:</p> <ul style="list-style-type: none"> • The author suggests that there be “sufficiently well-established precedent” applied to the issues in question as determined by the panel. • Small claims procedures should not be applied to novel issues but routine issues where clear precedent had already been established. Panels will thus rule firstly on the claim’s admissibility. • The panel system would merely clarify the existing provisions of WTO agreements in accordance with Article 3.2 of the DSU. (Whereas this may reduce the scope of admissible cases, coverage will increase as WTO jurisprudence develops over time) <p>4. Provision of a limited form of appellate review</p> <ul style="list-style-type: none"> • There should be provision of a limited form of appellate review of small claim panel decisions based on a petition. • This would be a permanent body of standing panellists to hear these claims. 	<ul style="list-style-type: none"> • Small States would have to invest considerable resources to establish the parameters of this court as well as to review the feasibility, practicality and cost-effectiveness.



There is a plethora of existing proposals, as demonstrated above, for small States to navigate through. It may difficult for small States to identify which proposals to support or whether the iteration of the proposals tabled above are best for their situation. The author acknowledges that there is merit in all proposals tabled in the Section under legacy reforms, academic proposals and reforms for the AB crisis. Small States however should allocate resources to research in detail the proposals already on the table which they can and should promote. Under legacy proposals, small States should pay special attention to the proposals aimed at improving the compliance mechanisms under the WTO's DSS. The proposal with the most promise may be collective or group retaliation. However, while this can benefit small States, the practicality of such a mechanism being supported by all Members of the WTO should be carefully examined. Additionally, as a means of increasing representation in the WTO's DSS small states should also support legacy proposals for a more inclusive and diverse panel composition. Lastly, acknowledging the importance of an AB system in the WTO small States should consider whether signing on to the MPIA would be in their interest given the absence of a functioning AB system at present.



2.4 Recommended reforms to enhance small States participation in the WTO

Small States need to begin to think strategically on how they could transform the nature and incidence of their participation, which is that of low and ineffective participation to active and effective participation. This Section as such seeks to provide tangible and concrete proposals for improving small State participation in the WTO'S DSS. We note that a successful outcome for these proposals will depend on their ability to address and overcome the specific barriers and limitations identified for small States and ultimately benefit them.

In examining the barriers that small States face at the WTO's DSS, we recall that small States lack the human and institutional capacity necessary for effective participation. Many of the challenges to participation are deeply entrenched in the domestic context. As a result of the geographic size of small States, the natural and financial and skilled human resources within their land base space are lacking. The development of the domestic capacity of small States thus is central to increasing participation and should be given priority. This is especially as ACWL subsidized legal assistance becomes futile unless potential WTO inconsistent trade barriers can be efficiently and effectively identified, monitored at minimum. Secondly, while the ACWL's role in enhancing developing countries' access to the DSU is acknowledged and commended, small States have not acceded to and made use of its services. This may be due to cost constraints with regards to accession fees as well as private sector constraints. Thirdly, small States are constrained in its ability to enforce compliance of rulings in their favor under the WTO's DSM. This is tied to its fear of initiating cases for fear of political and economic retaliation.

In the table below, we offer proposals aimed at enhancing small State participation in the WTO's DSS that are designed to overcome constraints identified above.



Addressing capacity constraints

Proposal	Considerations
<p>1. Seasoning/Training International Trade experts</p>	<ul style="list-style-type: none"> • The rules-based WTO system represents a complex niche area which requires specific training. It is therefore important for States to develop their human capital to ensure that they have professionals versed in the various aspects of international trade and in the 21st century trading environment. This includes not only international trade lawyers but public sector workers, economists and trade policy experts skilled and knowledgeable of the WTO system and the operation of the DSS. This is key to improved participation in the process at the national, regional and international levels. • To ensure that States are primed with the necessary human resource to participate in the system successfully, small States should ensure that “international trade law” is offered as an option in the undergraduate law programs¹⁴⁶ of local universities. In tandem with the “trade law” course, the curriculum should include modules on the DSS of the WTO as well as mock panel and AB simulations. • This programme should offer as part of the package internships with international law firms or even with its permanent missions in countries such as Geneva where the WTO headquarters is located. This will allow persons to familiarise themselves with the practical application of the WTO theories they have learned in the classroom. Moreover, this will help these individuals visualise a tangible career in WTO trade law, providing an incentive to them while simultaneously aiding in the development of the country’s human resources. Furthermore, students should be encouraged to participate in the John Jackson Moot Court Competition as it can provide them with the opportunity to interact with WTO luminaries as well as expose them to the procedural and substantive elements of bringing a dispute through the WTO’s DSS.

¹⁴⁶ Within the context of the CARICOM nations, it might be prudent for this reform option to take place at a regional level with the implementation of the course in the three UWI campuses.



Addressing capacity constraints

Proposal	Considerations
<p>1. Seasoning/Training International Trade experts (cont'd)</p>	<ul style="list-style-type: none"> • Funding for programs such as the “OECS Masters in Trade Programme (MITP)” at the SRC of the Faculty of Social Sciences, Cave Hill Campus, UWI, Barbados should be encouraged and continued. This programme is an adaptation of the MITP flagship programme tailored to the needs of OECS nationals. The students are beneficiaries of a fully-funded scholarship made possible by the European Union (EU) through its Trade Com II Project – Building ACP Trade Capacity. The Objectives of the MITP programmes are firstly to “create a cadre of professionals specially trained to assist in the specific areas of vulnerability unique to the region and developing countries as a whole’ and “ the creation of institutional capacity to address the ongoing human capacity needs of the OECS and wider CARICOM in the area of international trade policy.”¹⁴⁷ Seeking funding for similar programmes should be made a priority and scholarships should especially target public sector workers in government ministries such as the Ministry of Foreign affairs. It is important that public sector workers have the mandate and competence to handle matters which may be brought to their attention concerning the identification of international trade barriers. • Additionally, small States should make use of ACWL opportunities for training for governmental officials from developing countries. The ACWL offers annual training courses in WTO law and jurisprudence starting on a three-year cycle. The first course covers the basic principles of WTO law, the second the WTO agreements relating to trade remedies, trade in services and trade-related intellectual property rights, and the third the WTO dispute settlement procedures.¹⁴⁸

¹⁴⁷ UWI. n.d. "Shridath Ramphal Centre for International Trade, Law, Policy and Services; MSc. International Trade Policy 2017-2018." <https://www.cavehill.uwi.edu/gradstudies/resources/brochures/international-trade-policy.aspx>.

¹⁴⁸ ACWL, “The services of the ACWL,” available at https://www.acwl.ch/download/ql/Services_of_the_ACWL.pdf.



Addressing capacity constraints

Proposal	Considerations
2. Improving Government–industry/private sector coordination	<ul style="list-style-type: none"> The DS mechanism at the WTO provides only for State-to-State interaction as such access to the DSP operates to the exclusion of private parties. However, the “real beneficiaries and victims of the international trade regulations and multilateral dispute settlement are the exporters and importers.”¹⁴⁹ The majority of WTO disputes are triggered by private industries with concerns about foreign government measures. The norm is that the aggrieved company approaches its sector-specific Ministry (whether it be the Ministry of Foreign Affairs or Trade) to communicate a trade barrier. Thus, when there is a perceived potential market access concern the burden usually lies on the stakeholder of industries affected to undertake the necessary research to identify the economic benefits or legal merits of the complaint and bring it to the attention of the government officials.¹⁵⁰ For this process to materialize, procedural barriers which prevent the flow of information from the private and public sector should be identified and addressed.

¹⁴⁹ Bown , Chad P, and Bernard M Hoekman. 2005. "WTO Dispute Settlement and the Missing Developing Country Cases: Engaging the Private Sector." May. Accessed May 2020. https://www.researchgate.net/publication/5213803_WTO_Dispute_Settlement_and_the_Missing_Developing_Country_Cases_Engaging_the_Private_Sector.

¹⁵⁰ Ibid.



Addressing capacity constraints

Proposal	Considerations
<p>2. Improving Government–industry/private sector coordination (cont’d)</p>	<ul style="list-style-type: none"> • The first issue which should be addressed is the lack of statutory and institutional mechanisms in place at the domestic level through which private entities can file well-documented applications requesting government authorities to investigate or undertake complaints about unfair foreign trade practices. Given the vital role played by the private sector in the identification of trade barriers and the initiation of trade disputes, there at least needs to be a clear formal complaint mechanism that stakeholders can utilize. This in turn will bolster the demand for small States to engage more with the DSB. • In many developed and developing States, the private sector is empowered to engage the domestic government under relevant domestic regulations and statutory provisions. The Trade Barrier Regulation (TBR) in the EU for example creates a formal mechanism through which domestic industries and enterprises are conferred a right to petition the EC to complain about obstacles to trade in third countries or injurious foreign trade practices.¹⁵¹ The regulation was designed as “an interface between the EU industry and enterprises and the international dispute settlement processes.”¹⁵² The Section 301 process under US law also creates a system whereby stakeholders can request that U.S. Trade Representative (USTR) initiate an investigation.¹⁵³ <p>A formal complaint mechanism can have the following benefits:</p> <ul style="list-style-type: none"> • Conferring rights on private parties as well as protection for small States institutions • Encouraging the private sector to notify governmental authorities of foreign trade barriers • Spurring small States government to become more assertive in addressing these concerns • Facilitating the monitoring of trade barriers • Ensure transparency and accountability by the Government

¹⁵¹ Maclean, Robert Macdonald. 2006. *EU Trade Barrier Regulation: Tackling Unfair Foreign Trade Practices*. Sweet & Maxwell, 2006.

¹⁵² Ibid.

¹⁵³ Congressional Research Service . 2020. "Section 301 of the Trade Act of 1974." *Congressional Research Service; Informing the legislative debate since 1914*. April 20. Accessed 2020. <https://crsreports.congress.gov/product/pdf/IF/IF1134>.



Addressing capacity constraints

Proposal	Considerations
<p>2. Improving Government–industry/private sector coordination (cont’d)</p>	<ul style="list-style-type: none"> • Also, increasing private sector awareness on WTO rules and mechanisms for resolving trade disputes goes hand in hand with creating transparent institutional mechanisms by which interested parties may persuade government authorities to pursue trade remedies at the WTO. For industries to communicate trade barriers, they must be able to identify them. Engaging and educating the relevant actors in the industry on international trade rules and rights under the WTO is thus important. <p>Increasing private sector awareness and engagement can be encouraged through:</p> <ul style="list-style-type: none"> • National Trade Estimate Report on Foreign Trade Barriers (Annual compilations of concerns raised by their national firms on foreign trade barriers) • Periodic round table discussions • Town hall meetings • Training courses & webinars • Internship programs • The provisions of a public “Help Desk” for trade related inquiries • Use of ACWL opportunities



Addressing capacity constraints

Proposal	Considerations
<p>3. Collective Specialized General Dispute Settlement Unit' for small States</p>	<ul style="list-style-type: none"> In Brazil, the strategy to increase DSS participation has been to create an inter-ministerial body to investigate, prepare and approve the filing of WTO disputes. This includes a specialised WTO dispute settlement unit known as the “General Coordination of Disputes”(CGC) based in Brazil’s capital falling within the Ministry of Economics and Foreign trade in the Ministry of Foreign Affairs. This unit coordinates with the private sector and works with other sectoral Ministries. It provides a central contact point for affected entities regarding trade concerns. It contains a group of professionals responsible for analysing the grounds for a WTO complaint and the viability of pursuing a case, defining strategies, representing Brazil in hearings etc.¹⁵⁴ Most small States do not have the same level of government and private sector resources available to them as States such as Brazil. However, the idea is that small States could collectively adopt a similar framework which could be made possible through enhanced regional cooperation and pooling of resources. Instead of establishing a dispute settlement unit within a Ministry of one State, small State groupings (such as CARICOM) can collectively establish a dispute settlement unit based in one State which would serve as a central contact point for governments to regulate WTO related matters. This undertaking would evidently require specialized personnel for international trade dispute settlement representative of all Members of the small States grouping.

¹⁵⁴ Shaffer, Gregory, Michelle Raton Sanchez, and Barbara Resenburg. 2006. "Brazil’s Response to the Judicialized WTO Regime:." *ICTSD*. Accessed 2020. <https://www.ictsd.org/sites/default/files/downloads/2008/05/brazils-response-to-the-judicialized-wto-regime-strengthening-the-State-through-diffusing-expertise.pdf>.



Addressing capacity constraints

Proposal	Considerations
<p>3. Collective Specialized General Dispute Settlement Unit' for small States (cont'd)</p>	<ul style="list-style-type: none"> • This unit should be responsible for monitoring and registering trade barriers, analysing the merits of petitions filed within different State Ministries co-ordinating with governments to discuss strategies for dealing with select cases or the course of action if formal dispute settlement was to be invoked. This unit would need to be complimented by personnel in Geneva dedicated to the area of dispute settlement. • This system should effectively utilize ICT to facilitate communication between the unit and different member States to reduce the costs of transportation where possible and to store information in a safe and sustainable manner. <p>The potential benefits of this mechanism include:</p> <ul style="list-style-type: none"> • This mechanism can improve the ability of small states groupings to develop its domestic capacity to identify, monitor and communicate to the WTO inconsistent measures affecting its economies in a more cost-effective manner than a unilateral undertaking. • It would allow governments to respond more effectively to events in the trading system which effects its economies. Various Ministries will now have a central point to bring matters with regards to trade concerns. When small States governments can identify barriers, it should be more equipped to defend its interests at the multilateral level. • It can also improve private sector capacity to make and bring cases to the attention of the government and the unit by providing them with the aid in the form research to identify the economic benefits or legal merits of a complaint in order to bring it to the attention of the government officials. It also aids in developing governmental capacity to analyse the legal and factual grounds for a complaint and adapt the appropriate strategies to obtain redress. • This unit can also serve as a mechanism to make better use of the trade experts available to small States as well create a place for upcoming trade experts. This unit could also increase participation in matters in which small States groupings have a substantial or economic interest in the capacity of third parties.



Addressing capacity constraints

Proposal	Considerations
<p>4. A shared representative office at the WTO for Small States groupings</p>	<ul style="list-style-type: none"> • Small States have had difficulties maintaining permanent European representation at the WTO. Small States groupings should consider requesting a shared representative office at the WTO. A shared representative office has been established for Pacific Islands group. This office is based in Geneva and represents the Member nations of the Pacific Islands as well as the Organization of East Caribbean States (OECS). The Pacific Island Forum Representative Office in Geneva is sponsored by groups of developed nations inclusive of the EC. <p>The potential benefits of a shared representative office include:</p> <ul style="list-style-type: none"> • A shared representative office has the potential to “set powerful precedent regarding regional co-operation” of small States and may improve bargaining power when engaging in the DSS reform negotiations. • It also allows for greater communication between matters occurring at the international level and the domestic level.
<p>5. Pooling resources to bring cases with several parties</p>	<ul style="list-style-type: none"> • Small States should improve communication as a region on commonly identified trade barriers and pool resources to initiate or defend disputes jointly. Article 9.1 of the DSU states that "where more than one Member requests the establishment of a panel related to the same matter, a single panel may be established to examine these complaints taking into account the rights of all Members concerned”. <p>The potential benefit of bringing joint cases includes:</p> <ul style="list-style-type: none"> • reducing costs and resources for small States • increasing bargaining power by presenting on unified front on matter important to and affecting small states economies



Addressing cost constraints

Proposal	Considerations
<p>1. Reassessing ACWL categorization criteria for accession</p>	<p>Main concerns with the current criteria:</p> <ul style="list-style-type: none"> • While the ACWL’S role in enhancing developing countries’ access to the DSU is acknowledged and commended, one opinion highlights that the accession fees required by ACWL do not adequately take into consideration the economic diversity of developing States and the resources available to small developing countries to meet this financial commitment.¹⁵⁵ • While small States commonly have very tiny shares of global trade, many of them also have relatively high per capital incomes and vice versa for States with large shares in global trade. Many small States therefore face fees of CHF162,000 due to their classification as upper middle-income countries under the WB and CHF81,000.¹⁵⁶ While share of world trade has been identified as a definitive indicator of the likelihood of a State to bring a case as a complainant or respondent, the opinion is that the income per capita classification under the World Bank does not represent accurately small States’ capacity to pay this one-off fee especially given the frequency with which these States are likely to draw on the services offered through the fund.¹⁵⁷ • Organizations such as the Commonwealth for example take into special consideration the unique developmental challenges that small States face. The contributions required by the Member are primarily based on their “ability to pay” which takes into consideration special circumstances affecting that country so there appears to be a level of flexibility. Where a country fails to pay due to special circumstances, it is classified as a "member in arrears" and has limited access to the institutions of the Commonwealth until it can repay its debt.¹⁵⁸

¹⁵⁵ Fournet, Caroline. 2006. *International Crimes: Theories, Practice and Evolution*. Cameron May.

¹⁵⁶ ACWL. 1999. "The Agreement establishing the Advisory Centre on WTO Law." November 30.

¹⁵⁷ Supra Fournet.

¹⁵⁸ CPU Media Trust. n.d. "About The Commonwealth." <http://cpu.org.uk/about-the-commonwealth/>.



Addressing Cost Constraints	
Proposal	Considerations
1. Reassessing ACWL categorization criteria for accession (cont'd)	<p>Recommendations:</p> <ol style="list-style-type: none"> 1. The ACWL should introduce more flexibility in determining the accession fees for small developing States whether on a preferential basis or across the board. Special factors or circumstances affecting the State should be considered as opposed to the one-size-fits all formula being adopted when using income-based criteria such as income per capita. Other criteria such as the economic vulnerability index indicators such as population size, remoteness, merchandise export concentration, instability of exports of goods and services, victims of natural disasters, instability of agricultural production can be considered.¹⁵⁹ 2. Also, the University of the West Indies' Shridath Ramphal Centre (SRC) in Barbados has developed a "Trade Vulnerability Index (TVI)" that aims to "detect, measure and ultimately quantify the degree of trade vulnerability of countries."¹⁶⁰ It was first proposed as an objective basis for guiding country eligibility for preferential treatment at the WTO. The framework steers focus away from income-based criteria for assessing development like GDP or GNI per capita – toward structural characteristics of an economy.¹⁶¹ This should be proposed to the ACWL for review by its Management Board. 3. The Management Board reviews the classification of Members listed in this Annex at least once every five years and, if necessary, modifies the classification to reflect any changes in the share of world trade and/or per capita income of such Members. The recommendation is that this review should be undertaken more frequently in order for categorization criteria to be adapted on an ad hoc basis to take into small States' capacity to pay accession fees. Small States' should also be afforded an opportunity to provide input on the matter.

¹⁵⁹ Guillaumont, Patrick. 2008. "An Economic Vulnerability Index: Its Design and Use for International Development Policy " *United Nations University*. Accessed May 2020. <https://www.wider.unu.edu/sites/default/files/rp2008-99.pdf>.

¹⁶⁰ CARICOM TODAY. 2020. "UWI SRC Trading Thoughts By Jan Yves Remy, J. Jason Cotton and Alicia Nicholls." May. Accessed May 2020. UWI SRC Trading Thoughts By Jan Yves Remy, J. Jason Cotton and Alicia Nicholls.

¹⁶¹ See Cotton, Jason, Alicia Nicholls, and Jan Yves Remy. 2019. "Using a Trade Vulnerability Index to determine eligibility for Developing -Country Status at the WTO: A Conceptual Response to the Ongoing Debate." Accessed 2020. https://shridathramphalcentre.com/wp-content/uploads/2019/10/Using-Trade-Vulnerability-Index-for-Determining-WTO-Developing-Country-States_WorkingPaper_Sept_2019-3.pdf.



Addressing Cost Constraints

Proposal	Considerations
<p>1. Reassessing ACWL categorization criteria for accession (cont'd)</p>	<p>4. Another option to addressing the accession costs for Membership at the ACWL would be to propose that the ACWL offers a subsidized regional accession package for small States groupings. This may encourage small States to pool resources together to meet the costs of accession.</p> <p>The potential benefits of increased flexibility in the categorisation bands for ACWL Membership include:</p> <ul style="list-style-type: none"> • Increased access for small States to ACWL services and as such increased participation in the WTO's DSS.
<p>2. Provision for direct communication channels for private entities seeking raise foreign market access complaints by the ACWL</p>	<ul style="list-style-type: none"> • Private entities or non-governmental entities within a developing country grouping of developing countries are prevented from initiating contact with the ACWL as the ACWL's mandate is restricted to ACWL member governments. Small States can thus propose that mechanisms be put in place to allow for a firm in a developing country to raise questions of WTO enforcement with the experts at the ACWL. <p>The potential benefits of the provision of direct communication channels include:</p> <ul style="list-style-type: none"> • This would afford exporting firms and other stakeholders the legal, political and economic information need to convince the government that a complaint is worth pursuing. Thereby allowing them to effectively identify and present a case with strong legal or economic merit to governments.



Addressing Enforcement Constraints

Proposal	Considerations
<p>Support proposals at the WTO for the inclusion of monetary damages in lieu of trade sanctions as a DSM remedy.</p>	<p>Current criteria: Where the winning party to a WTO dispute does not get full compliance by the end of reasonable period of time for implementation of the panel/AB’s ruling, it has the option of entering into negotiations with the complaining party for mutually acceptable compensation.¹⁶² Compensation under the DSU suggests that the respondent is supposed to offer a benefit, (i.e. Tariff reduction) which is equivalent to the benefit which the respondent has nullified or impaired by applying its measure.¹⁶³ This compensation, however, does not normally include monetary payment, and must consistent with the covered agreements.¹⁶⁴ If parties cannot agree on satisfactory compensation, the complainant may request permission from the DSB to retaliate by suspending concessions or other obligations under the covered agreements.¹⁶⁵</p> <p>Main concerns with the current criteria</p> <ul style="list-style-type: none"> • The existing remedies available under the WTO’ DSM are inefficient The remedy of retaliation, has the effect of “requiring the complaining Members to shoot themselves in the foot”.¹⁶⁶ This means that retaliating by suspending concessions or other obligations under the covered agreements usually hurts its industries and private sectors more than the respondent State. • For small States especially, the non-effectiveness of the remedy of retaliation is magnified as small States economies are too small make an impact on or pressure larger infringing countries to comply. Often injury suffered by the complainant’s industry as well as industries which are not directly involved are not actually compensated and retaliatory measures taken may not be sufficient to account for the nullification or impairment suffered by that State. This has been highlighted in the <i>US-Gambling</i> in which Antigua was unable to gain compliance in the form of compensation nor retaliation for these reasons. <p>Continued on next page</p>

¹⁶² Article 22.2 of the DSU.

¹⁶³ Article 22.2 of the DSU.

¹⁶⁴ Article 22.1 of the DSU.

¹⁶⁵ Ibid.

¹⁶⁶ Bronckers, Marco, and Naboth van den Broek. 2005. "Financial Compensation in the WTO: Improving the Remedies of WTO Dispute Settlement." *Journal of International Economic Law* Volume 8, Issue 1 101-126.



Addressing Enforcement Constraints

Proposal	Considerations
<p>Support or put forth proposals at the WTO for the inclusion of monetary damages in lieu of trade sanctions as a DSM remedy.</p>	<p>Recommendations: A reasonable solution to the problem of non-compliance or ineffective remedies may be to allow small States the option to seek monetary damages/compensation in lieu of trade sanctions. This has been proposed in the past in the GATT, the WTO, by various academic and has been a traditional means for reparation by governments for injury in public international law.¹⁶⁷ In order to make such a proposal therefore the practicalities of monetary damages as an enforceable remedy will have to be further examined. Concerns such as methods for the calculation of injury, the compliance of or cooperation on the non-complying country amongst others will have to be addressed. Small States should collaborate with other “like minded” groups and make a case for this reform at the WTO.</p> <p>The potential benefits of allowing for the remedy of monetary compensation include:</p> <ul style="list-style-type: none"> • The availability of financial compensation for injury suffered by the complaining party as a result of the respondent’s country’s trade restrictive measures. • In cases where the legal costs of bringing a dispute under the WTO’s DSM has been funded by private sector stakeholders, as with <i>US-Gambling</i>, any such funds could be used to reimburse stakeholders for the legal fees and resources contributed. In order for this to be effective governments must decide how these funds would be re-distributed to private parties. Among other factors, this might make such stakeholders more willing to finance WTO cases brought by small States.

¹⁶⁷ Ibid.



Chapter Three: Dispute Settlement under International Investment Agreements

The first section of this chapter will provide an overview of the rationale and current mechanism for ISDS. The second section will discuss the trends and statistics relating to small State participation in ISDS to illustrate how small States participate in the system. The third section provides a tabular overview of the existing reform proposals. Finally, the fourth section highlights the authors tangible and concrete proposals for reform.

3.1 Background of the ISDS System

This Section seeks to provide a background to the ISDS system by discussing its basic tenets. This will be achieved by providing insight into its foundation, by examining the rationale for its creation, and then providing an overview of the current system.

3.1.1 Rationale

The modern international investment regime was founded in the aftermath of World War II.¹⁶⁸ Certain legal challenges, such as expropriation, denunciation of contracts and the legal incapacity of newly independent States, in the post-colonial era, prompted the creation of International Investment Agreements (IIAs).¹⁶⁹ The system was set up primarily to constrain the policy space of newly independent governments and ensure the protection of foreign investors “from capital-exporting countries against arbitrary and discriminatory interventions from host-State governments.”¹⁷⁰

An IIA can either take the form of a BIT or as a treaty with investment provisions (TIP).¹⁷¹ BITs are the most common form of IIAs: they are treaties concluded for the reciprocal promotion and protection of investment between two countries. UNCTAD highlights that “the distinguishing feature of a modern BIT is that it deals exclusively with issues concerning the admission, treatment, and protection of foreign investment”.¹⁷² TIPs, on the other hand, encompass a variety of issues, such as protection of intellectual

¹⁶⁸ Berger, Axel. 2015. "Developing Countries and The Future of The International Investment Regime", 6.

¹⁶⁹ Ibid.

¹⁷⁰ Berger, "Developing Countries and The Future of The International Investment Regime".

¹⁷¹ "International Investment Agreements Navigator | UNCTAD Investment Policy Hub". 2020. *Investmentpolicy.Unctad.Org*. <https://investmentpolicy.unctad.org/international-investment-agreements>.

¹⁷² *Key Terms And Concepts In IIAs: A Glossary*. 2004. Geneva Switzerland: United Nations Conference on Trade and Development, 13.



property rights or trade in goods. They can be divided into three main categories;

1. Broad economic treaties that include obligations commonly found in BITs;
2. Treaties with a few investment-related provisions; and
3. Treaties that only contain “framework” clauses.¹⁷³

Many IIAs contain ISDS provisions¹⁷⁴, this is treaty based ISDS.¹⁷⁵ ISDS was first conceptualised in the 1959 ABS-Shawcross Convention¹⁷⁶, and the first Bilateral Investment Treaty (BIT) to contain an ISDS clause emerged in 1969 between Chad and Italy.¹⁷⁷ ISDS is a mechanism through which investment disputes between a host State and a foreign investor can be resolved without the involvement of the investor’s home State. The purported benefits of IIAs containing ISDS clauses are two-fold: providing investment protection, on one hand, and investment promotion in the host State, on the other.¹⁷⁸ Investor protection and investor promotion, are linked: since ISDS is supposed to function as an enforcement mechanism to promote compliance and compensate foreign investors for breaches of obligations by host States,¹⁷⁹ it ultimately can reinforce the credibility of States’ commitments in their IIAs.¹⁸⁰

The efficacy of ISDS, and IIAs in general, in achieving these objectives has been debated. Some surveys find that the correlation between IIAs and increased FDI is minor.¹⁸¹ Thus this section of the memorandum primarily presents an overview of the commonly held perspective of ISDS when it was first conceptualised. The following Sections shed more light on the modern debate and perspective, while acknowledging the potential weaknesses of the system.

¹⁷³"International Investment Agreements Navigator | UNCTAD Investment Policy Hub". 2020. *Investmentpolicy.Unctad.Org*. <https://investmentpolicy.unctad.org/international-investment-agreements>.

¹⁷⁴ Increasingly, ISDS provisions are being terminated and excluded from IIAs in favor of different dispute settlement mechanisms. UNCTAD publications also highlight that many States/regional trade areas, (EU, Indonesia and the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP)) are terminating BITS altogether. Reducing access to ISDS and replacing the system with other regional dispute settlement provisions. Other States, in lieu of termination, engaging reform of ISDS provisions to make exhaustion of local remedies, and alternate dispute mechanisms mandatory.

¹⁷⁵ ISDS can also be contract-based where a contract between an investor and a host State includes a clause on ISDS.

¹⁷⁶ Tienhaara, Kyla. "Investor–State Dispute Settlement." In *Regulatory Theory: Foundations and Applications*, edited by DRAHOS PETER, 675-92. Acton ACT, Australia: ANU Press, 2017. Accessed May 6, 2020. www.jstor.org/stable/j.ctt1q1crtm.51.

¹⁷⁷ Ibid.

¹⁷⁸ Tienhaara, "Investor–State Dispute Settlement", 675-92.

¹⁷⁹ Ibid.

¹⁸⁰ Gaukrodger, David. and K. Gordon (2012), "Investor-State Dispute Settlement: A Scoping Paper for the Investment Policy Community", *OECD Working Papers on International Investment*, 2012/03, OECD Publishing. <http://dx.doi.org/10.1787/5k46b1r85j6f-en>, 10.

¹⁸¹ Berger, "Developing Countries and The Future of The International Investment Regime".



I. Investor Protection

IAs guarantee certain minimum standards of treatment that a host State must afford to a foreign investor operating within its territory. The main rationale behind ISDS is protection of the investor¹⁸² and its investments by providing legal assurance and protection for the obligations contained in an IIA. The ISDS system confers a unique legal privilege to foreign investors: the right to sue host governments for failing to meet the standards of treatment in an IIA.¹⁸³ This right is usually only accorded to other States in other international dispute settlement mechanisms such as the WTO or the ICJ. Prior to the existence of the ISDS system, private parties could only be represented by their home State through diplomatic protection.¹⁸⁴

II. Investment Promotion

Some authorities highlight that including an ISDS clause in their agreements can be beneficial to small States because, by providing an international forum for dispute settlement, it can boost its investment climate and encourage further FDI inflows.¹⁸⁵ ISDS is supposed to demonstrate to potential investors that States are committed to protecting investors rights. ISDS provides a depoliticized method for settling potential disputes that can be activated by the investor themselves. For this reason, the inclusion of ISDS assured investors that they would have a secure method to vindicate the rights and be compensated for any wrongful acts on the part of the host State. ISDS removes dispute resolution from the purview of the host State's domestic courts. Within the historical context of colonialism and the relationship between capital importing and capital exporting countries, this provides further assurances to investors that any breaches will be adjudicated outside of what may be a "poorly functioning or biased domestic dispute resolution and policy-making processes".¹⁸⁶ If a small or developing State wanted to attract investment as an engine to domestic development, adopting a BIT including ISDS was vital. Although it remains unclear whether or

¹⁸² An investor in the context of IIA's normally includes reference to natural persons or legal entities; *Key Terms and Concepts In IIAs: A Glossary*. 2004. Geneva Switzerland: United Nations Conference on Trade and Development, 109.

¹⁸³ Ikenson, Daniel. 2014. "A Compromise To Advance The Trade Agenda: Purge Negotiations Of Investor-State Dispute Settlement". *CATO Institute: Free Trade Bulletin* 57, 1.

¹⁸⁴ Diplomatic protection in is a principle of international law which dictates that a "State is entitled to protect its nationals, when injured by acts contrary to international law committed by another State, from whom they have been unable to obtain satisfaction through the ordinary channels"; *Mavrommatis Palestine Concessions (Greece v. U.K.)*, 1924 P.C.I.J. (ser. B) No. 3 (Aug. 30) [21].

¹⁸⁵ Dolzer, Rudolf, and Christoph Schreuer. 2008. *Principles Of International Investment Law*. Oxford: Oxford University Press, 221.

¹⁸⁶ Gaukrodger and Gordon (2012), "Investor-State Dispute Settlement: A Scoping Paper", 10.

not IIAs and ISDS actually enhance the State’s ability to attract FDI, it still is evident that ISDS directly and primarily benefits investors, since its “ostensible purpose... is to ensure that foreign investors...are protected” from the actions of host States.¹⁸⁷

3.1.2 Current ISDS Mechanism

- **Legal basis of ISDS**

Unlike the centralized dispute settlement system at the WTO “ISDS is complex and varied”¹⁸⁸: there is no central legal framework for international investment rule making or authority for dispute settlement. As a result, this area of law remains fragmented and lacks a dominant model for dispute resolution.¹⁸⁹

- **Process of ISDS**

A lack of a central legal basis means that proceedings can take several forms. ISDS is often conducted through international commercial arbitration, utilising *ad hoc* rules agreed on by the parties or the institutional rules of organisations like the International Centre for Settlement of Investment Disputes (ICSID) and the United Nations Commission on International Trade Law (UNCITRAL).¹⁹⁰ ISDS provisions usually provide that disputes arising out of the agreement can be submitted to an arbitral tribunal. While arbitration is the most used, conciliation, is also an alternative accepted method, although rarely utilised. Some IOs, such as ICSID,

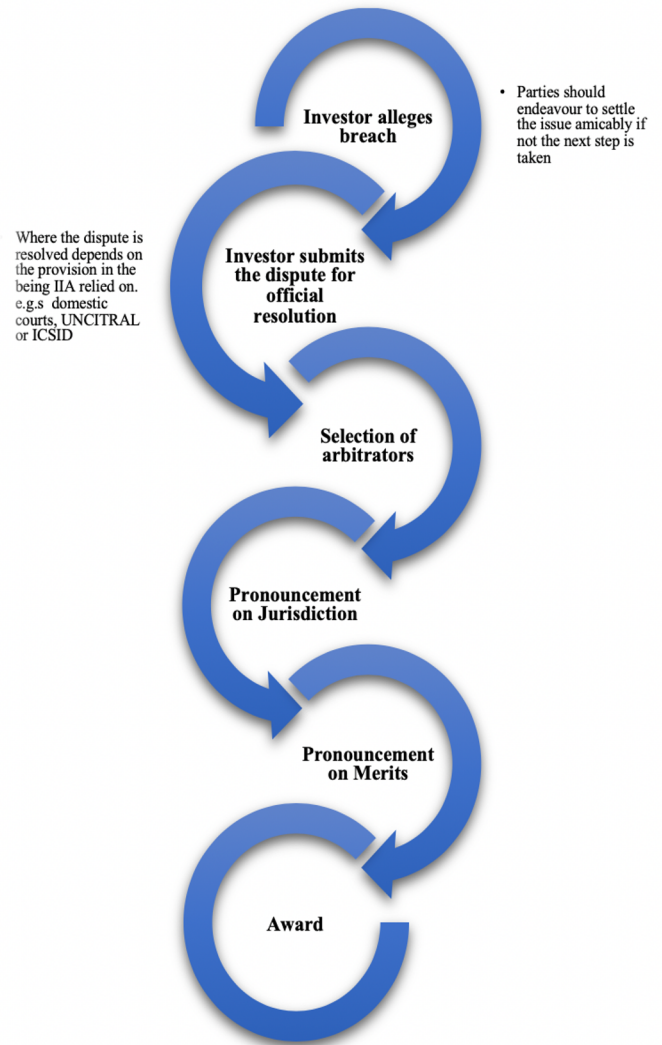


Figure 2 Diagram depicting the typical ISDS process (authors’ creation)

¹⁸⁷Ikenson, "A Compromise to Advance the Trade Agenda", 2.

¹⁸⁸ Gaukrodger and Gordon (2012), "Investor-State Dispute Settlement: A Scoping Paper", 10.

¹⁸⁹ Ibid, 12.

¹⁹⁰ Gaukrodger and Gordon (2012), "Investor-State Dispute Settlement: A Scoping Paper", 10.



treat arbitration and conciliation equally.¹⁹¹ Mediation is a further alternative mechanism of dispute resolution. ICSID supports investor-State mediation by providing its facilities, administrative services, staff to assist the process, and institutional mediation rules.¹⁹²

- **Arbitrator Selection**

In investor-State disputes, arbitrators are appointed on *ad hoc* basis for each individual case.¹⁹³ Arbitrators are selected in accordance with the rules chosen by the parties and they are also compensated by the parties to the dispute.¹⁹⁴ In some instances, appointing authorities are chosen to appoint arbitrators. Most importantly, the chair of a tribunal can be selected by the appointing institution in cases where the parties or co-arbitrators are unable to agree on one.¹⁹⁵ The appointing authority can either be specified by the parties or laid out in selected rules.

- **Parties to the dispute**

As previously stated, this is the only place a private entity has international personality. the ISDS system provides for individual foreign investors the ability to bring claims directly against host States. Again, this a departure from the traditional method of having their home State bring the claim on their behalf in a State to State dispute. All that is required of the home State is an established IIA with ISDS provisions between itself and the host State. Therefore, the parties to a dispute are a claimant foreign investor whose home State has an IIA with ISDS provisions with the respondent host State.

ISDS takes place between a State as the respondent and a private individual, the claimant investor. In most instances with small States, they are the respondent while the investors tend to come from larger more developed nations are claimants. States cannot be claimants in ISDS, their participation is either as the respondent or ancillary as the investor's State of nationality. Thus, other than exceptionally narrow

¹⁹¹ Dolzer and Schreuer "*Principles Of International Investment Law*", 221.

¹⁹² 'Investor-State Mediation' (*Icsid.worldbank.org*, 2020) <<https://icsid.worldbank.org/en/Pages/process/adr-mechanisms--mediation.aspx>> accessed 26 May 2020.

¹⁹³ Gaukrodger, David. 2018. "Appointing Authorities and The Selection Of Arbitrators in Investor-State Dispute Settlement: An Overview", 17. <https://www.oecd.org/investment/investment-policy/ISDs-Appointing-Authorities-Arbitration-March-2018.pdf>.

¹⁹⁴ Gaukrodger and Gordon (2012), "*Investor-State Dispute Settlement: A Scoping Paper*", 11.

¹⁹⁵ Gaukrodger, David. 2018. "Appointing Authorities And The Selection Of Arbitrators In Investor-State Dispute Settlement: An Overview", 7 and 12. <https://www.oecd.org/investment/investment-policy/ISDs-Appointing-Authorities-Arbitration-March-2018.pdf>.



counterclaim provisions¹⁹⁶ and the possibility of recouping costs, the ISDS framework has little to offer regarding compensation to the vindicated State. The ISDS clause is the only evidence of consent needed for a claim to be brought, therefore the obligation to respond and the burdens attached is automatic.

- **Additional elements**

Remedies are usually large monetary damages as compensation.¹⁹⁷ There is generally no provision for appeal. The ISDS system does not utilize precedent to guide tribunal decisions, which can result in contradictory decisions.

- **The Current Perspective on ISDS**

Theoretically, ISDS and FDI were designed to be a mutually beneficial system for both the investor and State. Closer analysis of the IIAs adopted so far and related case-law has revealed that IIAs are generally one-sided. The traditional ISDS clauses¹⁹⁸ agreements are usually “vaguely drafted and open-ended”¹⁹⁹. This has allowed for liberal interpretation in favour of the investor. Additionally, the expansive interpretation of provisions such as the national treatment (NT) and most favoured nation (MFN) standards, allow investors to utilize the most favourable construction of these standards in agreements concluded by the host State with other countries.²⁰⁰ ISDS tribunals decide on executive, legislative, and judicial matters of host countries, which is why it is particularly vulnerable to the critiques,²⁰¹ as further discussed below.

Most Favoured Nation (MFN):
MFN in the ISDS context, is another general requirement which requires host countries to treat foreign investors and their investments no less favourable than the investors and investments of third-party States.

National Treatment (NT):
NT within ISDS mandates that host States must treat foreign investors in the same manner as domestic investors, protecting them from discrimination.

¹⁹⁶ DeLuca, “UNCITRAL Working Group III: Counterclaims in ISDS – Challenges and Prospects in Light of the UNCITRAL Reform Process.”

¹⁹⁷ anrodger and Gordon (2012), “Investor-State Dispute Settlement: A Scoping Paper”, 11.

¹⁹⁸ Traditional agreements were usually led by Europeans. However, note that the European Union (EU) reached an agreement on the 24th of October 2019 plurilateral treaty for the termination of intra-EU BITs. Furthermore the EU has replaced ISDS with a permanent Investment court system and has proposed that the a multilateral investment court completely replaces ISDS.

¹⁹⁹ Berger, “Developing Countries and The Future of The International Investment Regime”, 13

²⁰⁰ Demonstrated in cases such as: Feldman v Mexico, 2002, 18 ICSID Review-FILJ (2003) 448, 171 (NT) and MTD Equity v Chile, 2004, 12 ICSID Reports 6 (MFN).

²⁰¹ Berger, “Developing Countries and The Future of The International Investment Regime”, 17.

With this background as a base, the subsequent Section will demonstrate the trends and statistics that characterise small State participation in ISDS.

3.2 Characteristics of small States Participation in ISDS

3.2.1 Trends and Statistics

Small State participation in ISDS is scant in comparison to the larger developed and developing countries. Larger countries have more investor-State disputes stemming from more BITs among themselves. For example, as illustrated by Figure 4, the combined number of in force BITs of each CARICOM nation (56) is still cumulatively less than Egypt’s number of BITs (72).

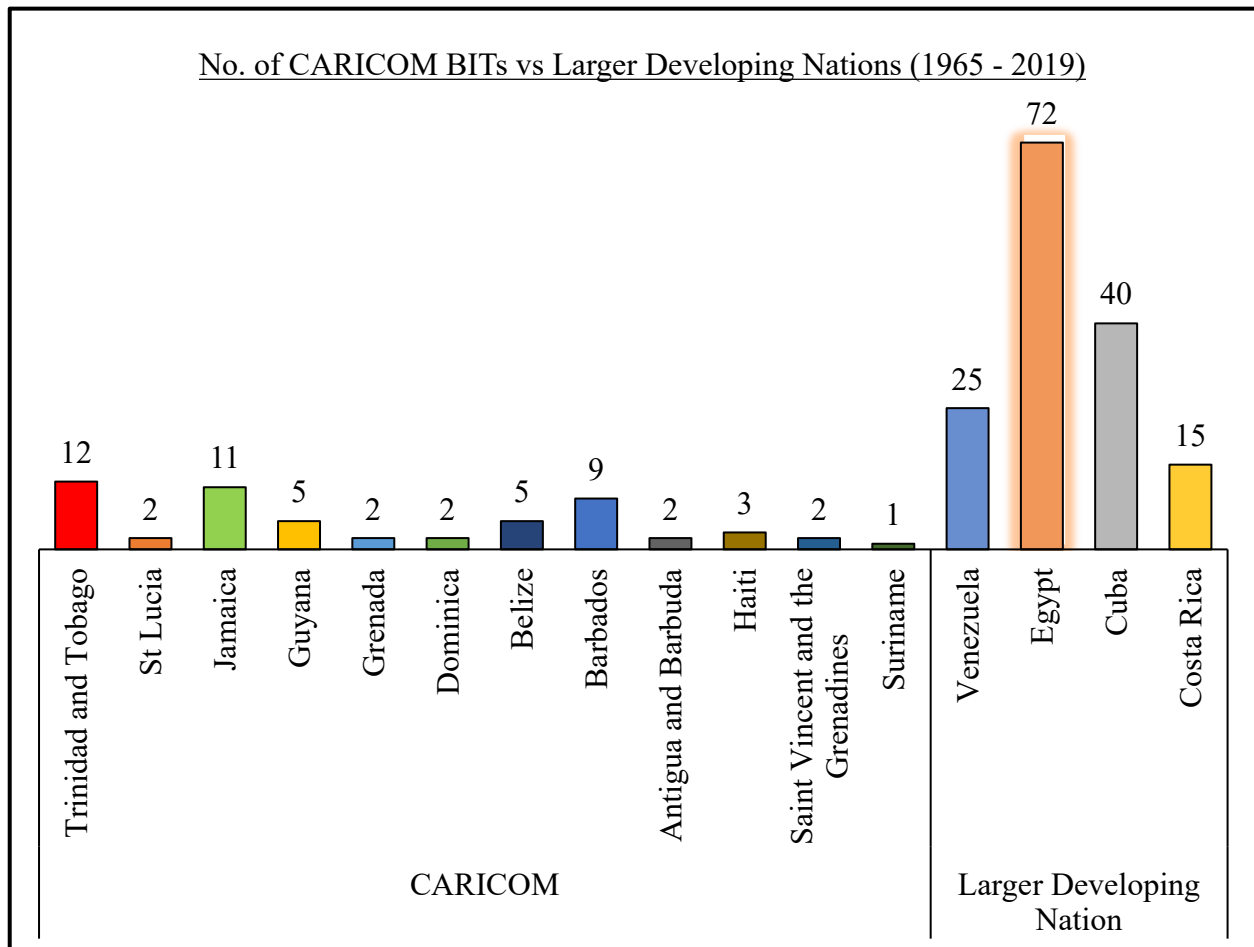


Figure 3 Illustrates the number of individual BITs Small States, particularly Small Caribbean States, have in comparison to larger developing States. Venezuela, Egypt, Cuba and Costa Rica, were chosen as they are more often the respondent in ISDS as opposed to the State of the investor. This is because they are largely capital importing States as opposed to capital exporting. **Source data: UNCTAD Investment Policy Hub.**

Although most CARICOM nations only have on average two individual in force BITs (Barbados, Trinidad and Jamaica excepted), a number of CARICOM’s external trade agreements (including FTAs, partial scope agreements and framework agreements) include investment provisions. FDI therefore, like in many developing and developed countries, has been increasingly addressed at the communal level.²⁰² Of the agreements CARICOM Members have signed onto, **three include ISDS**. These are the CARICOM – Costa Rica FTA (2004), the CARICOM Cuba Cooperation Agreement (2000), and the CARICOM – Dominican Republic FTA (1998). To date there has only been one claim brought under these FTAs.²⁰³

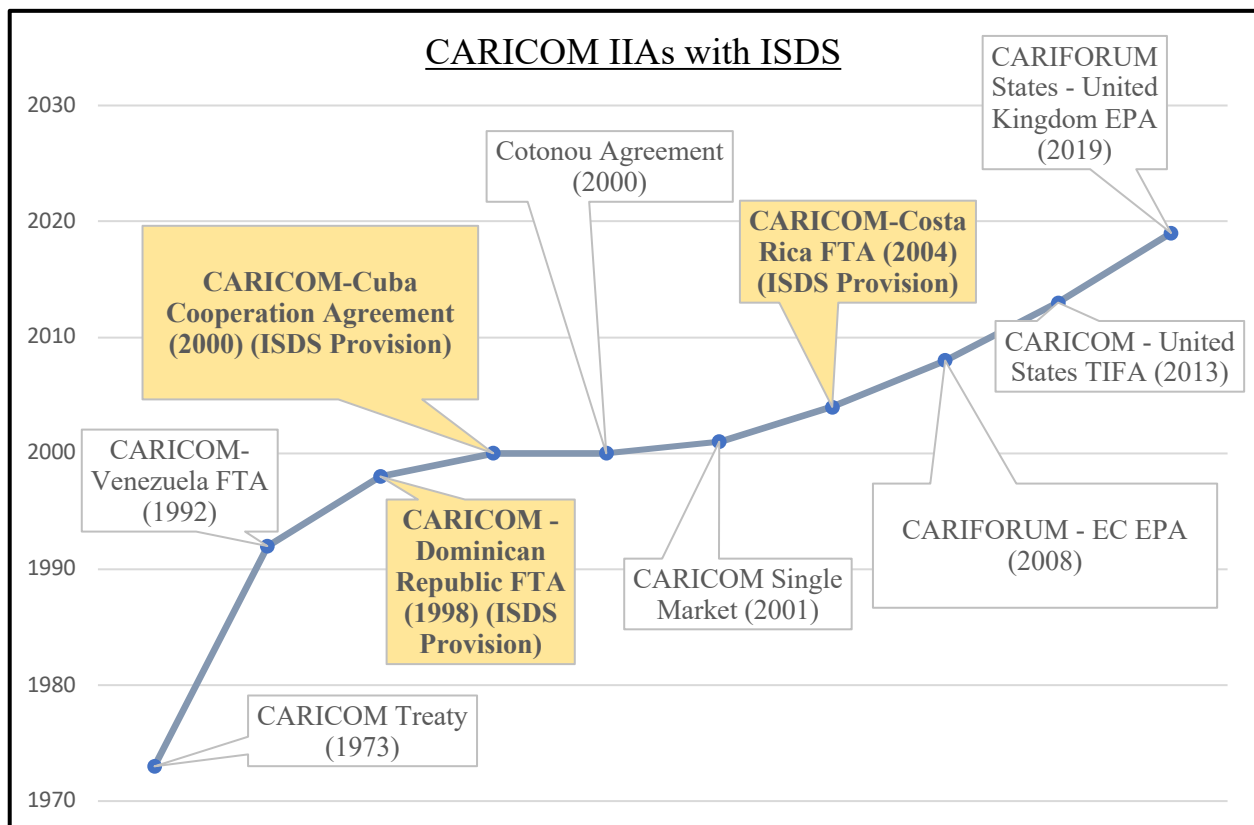


Figure 4 Illustrates the 11 regional agreements CARICOM nations have signed onto. The four highlighted all have ISDS provisions **Source: UNCTAD Investment Policy Hub.**

The ISDS provisions in these FTAs as well as the State to State BITs do not differ from standard ISDS clauses: the parties must try to settle the claim amicably for a determined period of time usually 3 – 6

²⁰² Berger, “Developing Countries and the Future of the International Investment Regime,” 7.

²⁰³ See Table 5: *Michael Lee Chin v Dominican Republic (2018)* (CARICOM-Dominican Republic FTA).

months after the arbitration claim notification.²⁰⁴ If they cannot do that, then they may proceed to arbitration, either usually through the UNCITRAL or ICSID schemes.²⁰⁵

The timing of these CARICOM IIAs with ISDS provisions is also aligned with global trends. As per Figure 5, they fall in line with the influx of BITs that gripped large and small States alike in the mid-1990s until mid-2000s.

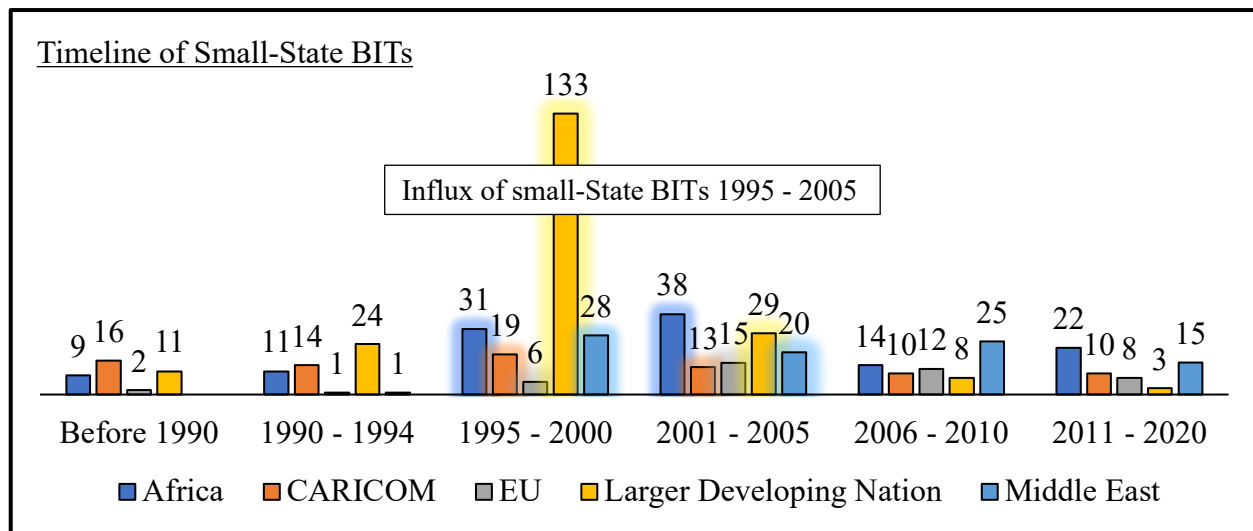


Figure 5 illustrates the timeline of BITs signed by Small-States by region: Africa, EU, CARICOM, as well as the timeline of BITs signed onto by larger developing nations. (Source data: UNCTAD Investment Policy Hub)

What is important to note is that small States have had little involvement in the creation, negotiation and design of the ISDS framework.²⁰⁶ Therefore due to their aforementioned characteristics²⁰⁷, and little say in the process, many small States face the pitfalls of an unbalanced system designed to benefit the foreign investor.

Consequently, while there are less numerous avenues for ISDS against small States, once one is established, the exposure to litigation is quite direct. Small States bound by ISDS provisions via their BITs, FTAs, or individual contracts²⁰⁸, are susceptible to the respondent in claims raised by investor operating in their territories.²⁰⁹

²⁰⁴ For example, in “Trade and Economic Co-operation Agreement Between the Caribbean Community (CARICOM) and the Government of the Republic of Cuba” Article XII, signed July 5th, 2000 between CARICOM and Cuba.

²⁰⁵ Ibid.

²⁰⁶ Berger, “Developing Countries and the Future of the International Investment Regime.”

²⁰⁷ For further details on the unique characteristics of small States, see chapter 1.

²⁰⁸ Refer to note 175.

²⁰⁹ UNCTAD, “Fact Sheet on Investor-State Dispute Settlement Cases in 2018,” 11.

The experience of small States in ISDS proceedings reflects the challenges arising from this imbalance. In relation to CARICOM, eight members have been respondents: Barbados, Guyana, St. Kitts and Nevis, St Lucia, Trinidad and Tobago, Belize, Jamaica and Grenada. The table below lists a majority sample of cases that small States from CARICOM have participated in as the respondent.

Small State (Respondent)	ISDS Case and type ²¹⁰	Ruling in Favour of:
Barbados	<i>Peter Allard v Barbados</i> (2010) (Canada-Barbados BIT)	State
Guyana	<i>Booker plc v Guyana</i> (2001) (Guyana-UK BIT)	[Settled]
Saint Lucia	<i>RSM Corporation v St Lucia</i> (2012) (Contract based ISDS)	[Dismissed]
St Kitts and Nevis	<i>Cable Television of Nevis & Cable Television of Nevis Holdings v Federation of St Kitts & Nevis</i> (1997) (Contract based ISDS)	[Dismissed]
Trinidad and Tobago	<i>Tesoro Petroleum Corporation v Trinidad & Tobago</i> (1985) (Conciliation proceedings) (Contract based ISDS)	[Settled]
	<i>FW Oil Interests v Trinidad & Tobago</i> (Trinidad and Tobago-USA BIT)	State
Belize	<i>British Caribbean Bank Ltd v Belize</i> (2010) (UK - Belize BIT)	Investor
	<i>Dunkeld International Investment Ltd v Belize [I]</i> (2009) (UK - Belize BIT)	Investor
	<i>Dunkeld International Investment Ltd v Belize [II]</i> (2010) (UK - Belize BIT)	Investor
Jamaica	<i>Alcoa Minerals of Jamaica Inc v Jamaica</i> (1975) (Contract based ISDS)	[Settled]
	<i>Kaiser Bauxite Co v Jamaica</i> (1975) (Contract based ISDS)	[Settled]
	<i>Reynolds Jamaica Mines Ltd & Reynolds Metals Co v Jamaica</i> (1975) (Contract based ISDS)	[Settled]
Grenada	<i>WRB Enterprises & Grenada Private Power v Grenada</i> (1997) (Contract based ISDS)	[Settled]
	<i>Grenada Private Power & WRB Enterprises v Grenada</i> (2017) (Contract based ISDS)	[Settled]
	<i>RSM Corporation v Grenada</i> (2009) (Contract based ISDS)	State
	<i>RSM and others v Grenada</i> (2010) (Grenada-USA BIT)	[Dismissed]

Table 4: Source UNCTAD Investment Policy. Hub. For cases listed as settled are where the final rulings were not made public.

²¹⁰ Ononaiwu, “Experience of CARICOM Countries with ISDS,” 4–8.

Necessary to note, is that these cases are those that have been referenced and made public via ICSID and UNCTAD databases. Due to the decentralized and opaque nature of the current ISDS ecosystem a complete list is not available, as disputes can be settled through confidential agreement and go unreported. While some newer model BITs do attempt to address this problem²¹¹, it is not a requirement that the terms of the settlement are disclosed.²¹² Nevertheless, for those that are public, the number of disputes as previously asserted, is far less when compared to other capital importing, developing States like Venezuela (51 disputes as respondent) and Egypt (37 disputes as respondent).²¹³ The disputes are also relatively diverse, dealing with issues such as eco-tourism (**Allard**), Oil and gas exploration and exploitation (**RSM**), Bauxite mining (**Kaiser Bauxite Co.**) Expropriation of telecommunications (**Dunkeld**).

While less common, small States have also been the home State for complaining foreign investors. In CARICOM, only three States to date, Barbados, Bahamas and Jamaica, have been the home State for an investor bringing a claim against another State.

As Home States of Complainant	ISDS Case and type ²¹⁴	Ruling in Favour of:
Barbados	<i>Saint Patrick Properties v Venezuela</i> (2016) (Barbados - Venezuela, BIT)	Pending
	<i>Venezuela US v Venezuela</i> (2013) (Barbados - Venezuela, BIT)	Pending
	<i>Blue Bank Trust v Venezuela</i> (2012) (Barbados - Venezuela, BIT)	State
	<i>Transban v Venezuela</i> (2012) (Barbados - Venezuela, BIT)	State
	<i>Gambrinus v Venezuela</i> (2011) (Barbados - Venezuela, BIT)	State
	<i>Tidewater v Venezuela</i> (2010) (Barbados - Venezuela, BIT)	Investor
Bahamas	<i>Perenco v Ecuador</i> (2008) (Ecuador-France BIT)	Pending
	<i>Mobil v Venezuela</i> (2007) (Netherlands-Venezuela BIT)	Investor
Jamaica	<i>Michael Lee Chin v Dominican Republic</i> (2018) (CARICOM-Dominican Republic FTA)	Pending

Table 5 Cases listed as settled are where the final rulings were not made public. Source UNCTAD Investment Policy Hub.

²¹¹ See for instance US Model BIT 2012 Article 29 (1) whereby inter alia, tribunal awards are to made public.

²¹² Collins, *Introduction to Foreign Direct Investment: History, Trends and Rationales*, 227.

²¹³ As per the UNCTAD Investment Policy Hub, this number of claims for the Caribbean region is on par with the other small State regions listed in table 1. except for Small States in the Pacific region (0 cases), Small African States have cumulatively had 13 ISDS cases, while Small States in the “Other” category have had 15.

²¹⁴ Ononaiwu, “Experience of CARICOM Countries with ISDS,” 16.



As shown in Table 5, these cases so far, have been against similarly situated countries, be it either developing or a small State, and not against the global north.

Using the aforementioned respondent cases in table 4, the following Section will now speak to the identifiable trends in small State participation. This Section will ultimately demonstrate that there are several deficiencies in the ISDS system that are particular to small States, which are only exacerbated by their unique status.

3.2.2 Barriers to small States participation in ISDS

These above statistical trends for small State in ISDS, that is the limited number of BITs and limited number of published cases are suggestive as this memorandum proffers, that there may be inherent shortcomings to the dispute settlement procedure; that not only act as deterrents to including ISDS within IIAs for small States, but also act as barriers to their adequate participation within ISDS. Indeed, as the following will explore, even during the times small States are forced to engage with the system, while many cases have been dismissed, settled in favour of the State, or settled confidentially, the overall sentiment is that the State still suffers. This is due, as will be showcased, to the combined effect of having limited financial, time and human resources. These resource limitations create barriers to adequate participation that are accentuated by the high cost of arbitration, be it the costs of the arbitrators, specialized legal teams, and the real risk of facing disproportionately large and economically crippling awards. Furthermore, the automatic nature of ISDS forces the State as a respondent, without any choice to entertain frivolous and unmeritorious claims, draining the State's monetary and time resources. To illustrate the barriers that small States endure in ISDS, the experience of four States (Belize, Barbados, Grenada and St. Lucia) will be examined below.

3.2.2.1 High costs

The costs of losing an ISDS claim for a respondent State can be severe, especially if the award against them is disproportionate to their economic capacity. Awards generally from Tribunals can be fairly high, Regularly surpassing the US \$ 10 million mark.²¹⁵ While larger States with deeper financial capacity can manage these awards²¹⁶, the task is much more daunting for small States as seen with Belize illustrated in Box 7.

²¹⁵ Collins, *Introduction to Foreign Direct Investment: History, Trends and Rationales*, 187.

²¹⁶ See *Hulley v. Russia*, UNCITRAL, PCA Case No. AA 226 (4 Sept 2014) whereby the investor was awarded US \$ 50 billion compensation against Russia.



Box 7 Showing the High Costs for a State as The Losing Respondent - Belize

Dunkeld International Investment Ltd v Belize I & II

The cases *Dunkeld International Investment Ltd v Belize I & II* relate to Belize's tumultuous encounter with ISDS upon nationalizing two telecommunication companies with the Belize Telecommunications (Amendment) Act of 2009. The ISDS proceedings were brought by two separate entities regarding government expropriation in 2010. The cases resulted in substantial and controversial awards for the investor of \$96 million USD for the first and \$25 million for the second.²¹⁷ For small States like Belize, awards of this size have a more dramatic impact than a country with more economic capacity.²¹⁸ In this instance the net ISDS losses for Belize amounted to nearly a year of government spending in 2010.²¹⁹ The ability to handle such losses is a common thematic challenge for small States, and a prime reason for an aversion to ISDS as well as the call for its reform.

It is also worth noting, that these were not the only instances litigation brought against Belize based on the same subject matter by the *Dunkeld* group. Belize had to defend their actions before their domestic courts, the Caribbean Court of Justice as well as the London Court of International Arbitration, all stresses on limited government resources. Belize's experience, ultimately is a clear warning of how expansive the costs of losing and litigation can be.

Furthermore, even when the small State successfully wins against a foreign investor, the costs of defending the claim can also be disproportionately high as illustrated with Barbados in Box 8.

Box 8 Showing the High Costs for a State as the Winning Respondent - Barbados

Allard v Barbados

The Barbadian case *Allard v Barbados* illustrates that even when Small States are vindicated as respondents, they come at a high cost as it still requires a significant expenditure of monetary, human and time resources to properly defend a claim. In *Allard*, the Barbadian government had properly defended their case against the claimant investor. The arbitration costs had amounted to \$5.2 million over six years. The tribunal capped its recoverable cost at \$2.5million leaving the remainder for Barbados to bear itself.²²⁰ Again as previously asserted, States cannot be claimants in ISDS, their participation is either as the respondent or subsidiary as the investor's State of nationality, i.e. home State. Thus, other than narrow counterclaim provisions²²¹ or recouping all or a portion of legal costs, the current ISDS framework has little compensation for a victorious State.

²¹⁷ *Dunkeld International Investment Ltd. v. The Government of Belize (Number 1)*, PCA Case No. 2010-13, UNCITRAL; *Dunkeld International Investment Limited v. The Government of Belize (II)* (PCA Case No. 2010-21).

²¹⁸ Samples, "Winning and Losing in Investor– State Dispute Settlement."

²¹⁹ Samples, 167.

²²⁰ Peter A. Allard v. The Government of Barbados, PCA Case No. 2012-06 paragraph 313.

²²¹ Counterclaims have their own hurdles to overcome, such as the jurisdictional requirement under the ICSID convention that the counterclaim must arise directly out of the subject-matter of the dispute.



3.2.2.2 Frivolous claims and financial capacity imbalance

The current fractured and automatic nature of the ISDS system creates an environment where small States are vulnerable to predatory claims from savvy investors. As seen with Belize, be it through domestic courts, investor state contracts or various BITs, a well-financed claimant investor can and will use every avenue available to them to bring a claim if need be. These claims can dominate the time, money, and energy of small States, when faced with particularly litigious investors with substantial funds and even third-party backing. This taxing strategy is illustrated in Box 9 with the three RSM cases involving Grenada and St. Lucia.

Box 9 Showing - The Three Sister Cases from Grenada & St Lucia

RSM and others v Grenada (2009), RSM Corporation v Grenada (2010), and RSM Corp. v St Lucia (2012)

In the case of RSM, the company, first brought and lost their arbitration claim against Grenada, in *RSM and others v Grenada (2009)* via the dispute provisions from the parties' oil contract.²²² Dissatisfied with the loss, RSM the in *RSM Corporation v Grenada (2010)* sought the jurisdiction of the US – Grenada BIT to bring the same claim, on the same facts, hoping that a new tribunal would rule in their favour. This new tribunal however, was quick to shut this claim down, as “no more than an attempt to re-litigate and overturn the findings of another ICSID tribunal”.²²³ The Tribunal held that “Claimants’ present case is thus no more than a contractual claim (previously decided by an ICSID tribunal which had the jurisdiction to deal with Treaty and contractual issues), dressed up as a Treaty case”.²²⁴ Thus, the claimant had no legal merit in their treaty claim against Grenada.

Not taking this loss lightly, RSM sought to bring a similar case against St Lucia under a contract with the similar ICSID forum selection provision. In giving RSM their third loss, the tribunal in this instance also took into consideration at the beginning of the proceedings, the claimant’s past history of predatory litigious behaviour in Grenada as well as a pattern of not paying cost awards against them in these previous ICSID proceedings.²²⁵ The tribunal took the rare opportunity to request a security for costs from the claimant in order to protect the respondent State. Essentially, the tribunal found there was a third-party funder which although permissible in ISDS, even if anonymous in this instance created an inequity, in favour of the claimant who had this history of not honouring cost awards. Using a third party funder, RSM benefits from any award in their favour yet avoids responsibility for a contrary award.²²⁶

What these RSM cases illustrate is that while arbitrators may sympathise with the State, the reality is, respondent States are still vulnerable to defending against these claims no matter how frivolous, which may or may not be backed by unknown third parties. These are ultimately a draw on money, time and human resources, which small States generally do not have in abundance.

²²² RSM Production Corporation v. Grenada, ICSID Case No. ARB/05/14.

²²³ RSM Production Corporation and others v. Grenada (ICSID Case No. ARB/10/6) paragraph 7.3.6.

²²⁴ RSM Production Corporation and others v. Grenada (ICSID Case No. ARB/10/6) paragraph 7.3.7.

²²⁵ Joubin-bret, “Spotlight on Third Party Funding in ISDS RSM v St Lucia,” 729.

²²⁶ Joubin-bret, 729.



Based on the discussion above, it is evident that the character of small state participation in ISDs is not currently set up for optimal performance or results. To account for this phenomenon, the following section will detail the acute need for reform and counterbalance by tabulating an overview of the existing ISDS reform proposals.

3.3 Overview of Existing ISDS Reform Proposals

This Section will first highlight the need for reform by delineating the general challenges faced by states in ISDS and then providing an analysis of challenges faced by small States specifically. Secondly, through a tabular format, this Section will outline and assess the various existing proposals for ISDS reform.

3.3.1 The need for reform

The aforementioned experiences of Belize, Barbados, Grenada and St. Lucia, touch upon key challenges both general to all States, and those that are particularly felt by small States that manifest currently with ISDS. Generally, the common themes of lack of transparency, lack of an appeal mechanism and inconsistency of tribunal decisions without any binding precedent, and a homogenous arbitrator pool, are bemoaned by

Fair and Equitable treatment (FET) FET clauses in BITs, establish a guarantee of fairness in dealing with the Host State government. They are worded exceptionally broadly and as such their application requires a fair amount of subjectivity.

UNCITRAL Working Group III: Working groups conduct the preparatory work on UNCITRAL Work program topics of importance. Membership consists of its State signatories. Established in 2017 Working Group III’s mandate specifically, targets ISDS reform. The mandate is purposefully wide, and government led, with a high level of input from all States.

most parties to investor State disputes. The challenges felt more by small States include: the high costs, substantial resources required, and a system that overly favours the investor with Fair and equitable treatment (FET), MFN, NT clauses.²²⁷ These challenges were all ear marked at the 38th session of the United Nations Commission on International Trade Law (UNCITRAL) Working Group III.²²⁸ The following Section will discuss these challenges in greater detail, followed by an analysis on how the current trends in ISDS reforms seek to address these challenges.

²²⁷ Saha, “A Critical Analysis of the Commonly Recommended Reforms of Investor State Dispute Settlement,” 52. ; see also section 2.3.3.4

²²⁸ Secretariat, “Possible Reform of Investor-State Dispute Settlement (ISDS),” 3.



3.3.2 General challenges for all States, regardless of their size

3.3.2.1 Transparency

While improvements have been made to promote transparency by both ICSID and UNCITRAL especially with newer generation IIAs, it remains an issue due to the patchwork ecosystem of ISDS.²²⁹ A majority of existing old generation IIAs do not mandate that proceedings are published to the public, nor are many of these IIAs covered by recent transparency reforms.²³⁰ For instance, the 2013 UNCITRAL Working Group's new rules on transparency only cover disputes under future IIAs and not all future disputes.²³¹ With a majority of IIAs coming between the late 90s early 2000s, the actual impact of these reforms is clearly underwhelming. It is worth noting, that this issue was addressed by the 2014 UN General assembly *Mauritius Convention on Transparency in Treaty-based Investor-State Arbitration*.²³² Parties to the Convention would thereby consent to the transparency rules being applied to their existing IIAs.²³³ With that said however, the *Mauritius Convention* only has 25 signatories, only five of which have followed through and brought the convention into force.²³⁴ Therefore, while transparency does appear to be getting better, there is still an uneven drag in its application.

3.3.2.2 Lack of precedent and Inconsistent Rulings

Coupled with this persistent drag on transparency, as flagged by the Government of Bahrain, without any doctrine of *Stare Decisis*, the current ISDS system is also plagued by inconsistent rulings.²³⁵ Even if the facts are identical, arbitrators are not bound by previous decisions. This was apparent early on in the heyday of ISDS in 2001 with *CME v. Czech Republic* and *Lauder v. Czech Republic* where despite the same facts being used, the tribunals differed in how they viewed the actions of the Czech government.²³⁶ The tribunal

²²⁹ UNCTAD, "Reform of Investor-State Dispute Settlement: In Search of a Roadmap," 3.

²³⁰ Bungenberg and Reinisch, *European Yearbook of International Economic Law Tribunals and Investment Courts to a Multilateral Investment Court*; UNCTAD, "Reform of Investor-State Dispute Settlement: In Search of a Roadmap."

²³¹ UNCTAD, "Reform of Investor-State Dispute Settlement: In Search of a Roadmap," 3.

²³² Nations, United Nations Convention on Transparency in Treaty-based Investor-State Arbitration, para. 1.

²³³ UNCITRAL, "United Nations Convention on Transparency in Treaty-Based Investor-State Arbitration (New York, 2014) (the 'Mauritius Convention on Transparency')."

²³⁴ UNCITRAL.

²³⁵ UNCITRAL Secretariat, 'Possible Reform of Investor-State Dispute Settlement (ISDS) Submission from the Government of Bahrain', *United Nations Commission on International Trade Law Working Group III Thirty Eighth Session* (United Nations 2019) 12 <https://uncitral.un.org/sites/uncitral.un.org/files/wp_180_bcdr_clean.pdf>; Bungenberg and Reinisch (n 82).

²³⁶ Bungenberg and Reinisch, *European Yearbook of International Economic Law Tribunals and Investment Courts to a Multilateral Investment Court*, 18.



in *Lauder* took a narrow approach in how they viewed the rights to property and thus concluded that the government's actions were lawful, not amounting to taking.²³⁷ While in *CME*, the same actions by the government viewed by a different tribunal under a different BIT, were interpreted more broadly, resulting in the government's actions being deemed as unlawful.²³⁸ This is not to propose that systems bound by precedent are not susceptible to conflicting judgements, they indeed are. They, however, also have sound institutional structures that make inconsistent judgements tolerable and correctable, by for instance a higher Court of Appeal. The lack of precedent in the ad hoc ISDS system on the other hand, coupled with the ability of the investor to use multiple avenues to bring claims, only further exacerbates the asymmetry of the system in favour of the investor, giving a wealthy investor many opportunities for a favourable ruling, while the State must by treaty / contractual agreement answer each time, as a respondent.

3.3.2.3 Lack of Appeal Mechanism

Interlinked with a lack of precedent, is the ISDS system lacking an established, uniform and symmetrical appeals process. The absence of such, currently allows inconsistent and incorrect decisions to go largely uncorrected and if so, the challenge as aforementioned is brought by the investor trying to bring the claim via a different BIT or contract provision forcing the State to defend the claim in multiple forums.²³⁹ Furthermore, it has been argued that the finality of ISDS proceedings without an established appeals process brings into question the legitimacy of the system on the whole. Again, the State is fettered in bringing claims / counterclaims therefore the finality of a decision not in their favour can be consequential. The legitimacy of the system is challenged in that the ISDS system by in large, allows investors to bypass local courts with an ad hoc tribunal made up from a small pool of arbitrators, who will be appraising the actions of the State. This is particularly concerning relating to government actions that affect public policy. While BITs do have public policy exceptions clauses, it will be these ad hoc usually foreign arbitrators who appraise their application with finality. Ultimately, without a proper means of correcting erroneous decisions, like a standing appeals process, it remains a concern whether these arbitrators have sufficient legitimacy to assess these typically important and far reaching and State actions.²⁴⁰

²³⁷ Collins, *Introduction to Foreign Direct Investment: History, Trends and Rationales*, 181.

²³⁸ Collins, 180. In addition to this situation pointing to two connected issues with the current ISDS system that will be later discussed, pervasive treaty shopping as well as highly subjective interpretation of broad treaty terms.

²³⁹ Berger, "Developing Countries and the Future of the International Investment Regime," 16.

²⁴⁰ UNCTAD, "Reform of Investor-State Dispute Settlement: In Search of a Roadmap," 3.



3.3.2.4 Arbitrator Pool

The small pool of arbitrators has been a widely discussed issue in the context of ISDS reform. In a 2012 report by the Corporate Europe Observatory and the Transnational Institute the 15 “Elite” arbitrators between the period of 2003 to 2010 presided over 55% of investor-State tribunals.²⁴¹ This rises to 75% in claims of over 4 billion USD.²⁴² As mentioned, this small pool of arbitrators, and the power they wield due to the finality of arbitration, brings into question the legitimacy of the ISDS system. As raised by Catherine Rogers, more vehement critics have hypothesised that these tribunals in actuality operate out of self-interest, favouring their appointing party in order to gain reappointment; while its defenders hold that while they do work out of self-interest, this interest is to develop a reputation of impartiality.²⁴³ While these hypotheses are largely predicated on unarticulated empirical assumptions, and have in large part gone untested²⁴⁴, available public data substantially supports, Bahrain’s submission to UNCITRAL Working Group III which insisted that the small pool of international arbitrators and the rather flexible rules that regulate them, creates a twofold issue: 1) lack of diversity and 2) conflict of interest.

I. Lack of Diversity

Lack of diversity among arbitrators is not a new issue, and has consistently been mentioned as a problem throughout the sessions of Working Group III.²⁴⁵ Not only concerns of a lack of diversity in respect of gender and nationality, but also the homogeneity of the education and location of these arbitrators have been raised as problematic, leading to the perception of inherent biases.²⁴⁶ A 2015 study mapping out the diversity of arbitrators based on language, nationality, legal background, gender and professional experiences, illustrated that the average arbitrator was typically a “fifty-three year-old man who was a national of a developed State and had served as arbitrator in ten arbitration cases”.²⁴⁷ Statistics on the arbitrator make up on ICSID tribunals illustrates this diversity deficiency:

²⁴¹ Eberhardt and Olivet, “Profiting from Injustice,” 3.

²⁴² Eberhardt and Olivet, Annex C.

²⁴³ Donaubauer, Neumayer, and Nunnenkamp, “Winning or Losing in Investor-to-State Dispute Resolution: The Role of Arbitrator Bias and Experience,” 2; Rogers, “The Politics of International Investment Arbitrators,” 226.

²⁴⁴ Rogers, “The Politics of International Investment Arbitrators,” 228.

²⁴⁵ Secretariat, “Possible Reform of Investor-State Dispute Settlement (ISDS) Submission from the Government of Bahrain,” n. 15.

²⁴⁶ Behn et al., “Empirical Perspectives on Investment Arbitration : What Do We Know ? Does It Matter ?,” 37.

²⁴⁷ Franck, “The Diversity Challenge : Exploring the “ Invisible College ” of International Arbitration,” 466.

Arbitrators, conciliators, and ad hoc committee members appointed in cases registered under the ICSID Convention and Additional Facility Rules (2011–2018), by region²⁴⁸								
Geographical Location	2011	2012	2013	2014	2015	2016	2017	2018
Sub-Saharan Africa	3%	1%	1%	1%	1%	3%	5%	1%
Middle East & North Africa	3%	1%	2%	3%	4%	2%	5%	4%
Central America & the Caribbean²⁴⁹	2%	3%	3%	3%	5%	2%	5%	2%
Eastern Europe & Central Asia	2%	2%	1%	5%	3%	1%	3%	6%
South & East Asia & the Pacific	15%	14%	13%	14%	13%	19%	14%	9%
South America	21%	13%	10%	10%	5%	13%	7%	15%
North America	19%	24%	14%	15%	19%	18%	14%	16%
Western Europe	35%	42%	56%	49%	50%	42%	47%	47%

Table 5 as illustrated in the UNCITRAL Working Group III Submission from the Government of Bahrain.

Geographical distribution of cases registered against States under the ICSID Convention and Additional Facility Rules (2011–2018)²⁵⁰								
Geographical Location	2011	2012	2013	2014	2015	2016	2017	2018
Sub-Saharan Africa	11%	14%	15%	21%	15%	6%	15%	11%
Middle East & North Africa	13%	10%	20%	5%	11%	11%	15%	16%
Central America & the Caribbean	0%	4%	7%	8%	2%	6%	4%	4%
Eastern Europe & Central Asia	29%	26%	33%	32%	23%	31%	36%	32%
South & East Asia & the Pacific	13%	10%	5%	5%	4%	8%	4%	5%
South America	34%	24%	5%	11%	4%	17%	13%	23%
North America	0%	6%	2%	0%	4%	6%	4%	0%
Western Europe	0%	6%	13%	18%	37%	15%	9%	9%

Table 6 as illustrated in the UNCITRAL Working Group III Submission from the Government of Bahrain

²⁴⁸ Secretariat, “Possible Reform of Investor-State Dispute Settlement (ISDS) Submission from the Government of Bahrain,” 6.

²⁴⁹ The numbers for Central America and the Caribbean were combined considering how small individually the percentages were. This is in accordance with Bahrain’s Working Group III submission, built from several ICSID World Bank statistics caseload issues between 2011 and 2019.

²⁵⁰ Secretariat, “Possible Reform of Investor-State Dispute Settlement (ISDS) Submission from the Government of Bahrain,” 6.



The juxtaposition of these two tables illustrates, as Bahrain correctly points out, an underrepresentation among arbitrators from certain regions like Africa, Asia and South America (and presumably the Caribbean) coupled with a majority of cases being initiated against countries in those very regions.²⁵¹ While critics like Jan Paulsson, hold that it is an important step in the right direction that arbitrators do not share the nationality of a party to the proceedings to protect impartiality²⁵², others hold that ICSID rules that prohibit the State from appointing their own nationals is a detriment to the system. They hold it precludes the inclusion of arbitrators that would be sympathetic and understand sufficiently the decision making processes of the State.²⁵³ Ultimately, herein lies the difficulty to empirically assess perception of an inherent bias, whereby western States anecdotally are held to not only set the rules of arbitration, but also get a significant stake in the arbitrators that preside these in theory impartial tribunals, because it is from these States a majority of arbitrators are consistently drawn from.

ISDS cases involving small States have also habitually selected arbitrators typically from western States. In *Allard*, the arbitrators were from Canada, the United States and Australia while in *RSM (2009)* they were from the Canada, the United States, and Switzerland. They have also taken from the small pool of the “elite 15” that obtain 55% of the total ISDS cases²⁵⁴, as seen in both *Belize v Dunkeld I and II*.²⁵⁵ The controversially excessive awards were both overseen by renowned Dutch arbitrator Albert Jan Van den Berg.

II. Conflict of Interest

Such a small pool of arbitrators creates a high probability of conflict of interest, which in a decentralized fragmented system such as ISDS is difficult to resolve.²⁵⁶ Arbitrators will “double hat”, presiding over one tribunal while being an expert witness and or counsel in another, with the very same issues.²⁵⁷ A 2017 study found that more than half of presiding arbitrators provided legal advice in other arbitrations to investors.²⁵⁸ While a similar 2018 study of 509 cases found that 47% of them had a presiding arbitrator who was

²⁵¹ Secretariat, 6.

²⁵² Jan Paulsson, *Moral Hazard in International Dispute Resolution*, 25 ICSID REV. 339 (2010) (arguing that rules that preclude appointing of an arbitrator who shares the nationality of one party as “a step in the right direction”).

²⁵³ Rogers, “The Politics of International Investment Arbitrators,” 227.

²⁵⁴ Eberhardt and Olivet, “Profiting from Injustice,” 38–40.

²⁵⁵ *Dunkeld International Investment Limited v. The Government of Belize (I)* (PCA Case No. 2010-13) & *Dunkeld International Investment Limited v. The Government of Belize (II)* (PCA Case No. 2010-21)

²⁵⁶ Sornarajah, *The International Law on Foreign Investment*, 33.

²⁵⁷ Behn et al., “Empirical Perspectives on Investment Arbitration : What Do We Know ? Does It Matter ?,” 46.

²⁵⁸ Waibel and Wu, “Are Arbitrators Political ? Evidence from International Investment Arbitration,” 15.



simultaneously working as a legal counsel in another Investor State dispute.²⁵⁹ Whether this creates actual conflicts of interest or is simply perceived, “double hatting” diminishes confidence in the ISDS system.²⁶⁰ While these are seasoned professionals who would have to become masters of compartmentalization, this system is exceptionally self-serving, to the benefit of a select few arbitrators and ultimately the investor who picks them. Seasoned arbitrators develop a precedent that prospective investor claimants will use to determine their choice of arbitrators.²⁶¹ In a system purposefully designed so that only investors can bring claims against the waiting State, the popular arbitrators appointed, are those that tend to be investor friendly.²⁶²

3.3.3 Challenges that are especially felt by small States

3.3.3.1 Duration and Cost

The high costs related to ISDS can be a heavy burden on government coffers. As per the OECD the average procedural costs are roughly US\$8 million, per case.²⁶³ This means not only is the risk of a disproportionately adverse award high but also the costs of mounting a legal team that is suited to international arbitration which again may also be pulling from this “elite arbitrator pool”.²⁶⁴ This average cost can get even higher when factoring the costs of the arbitrators themselves, interpreters, secretariat, legal and technical experts.²⁶⁵ As previously seen this was an issue in *Allard v Barbados*, where even when the State Barbados won as the respondent, the high costs of the legal team, and experts were not fully recouped by the losing claimant.²⁶⁶ While arbitration is meant to be a quick efficient manner of settling disputes, when it becomes lengthy it will become costly.

²⁵⁹ Behn et al., “Empirical Perspectives on Investment Arbitration : What Do We Know ? Does It Matter ?,” 46.

²⁶⁰ Sardinha, “Towards a New Horizon in Investor-State Dispute Settlement? Reflections on the Investment Tribunal System in the Comprehensive Economic Trade Agreement (CETA),” 349.

²⁶¹ Behn et al., “Empirical Perspectives on Investment Arbitration : What Do We Know ? Does It Matter ?,” 47.

²⁶² Behn et al., 47.

²⁶³ United Nations, “UNCTAD Investor–State Disputes: Prevention and Alternatives to Arbitration,” 17–18.

²⁶⁴ Secretariat, “Possible Reform of Investor-State Dispute Settlement (ISDS) Submission from the Government of Bahrain,” 7.

²⁶⁵ Bungenberg and Reinisch, *European Yearbook of International Economic Law Tribunals and Investment Courts to a Multilateral Investment Court*, 20.

²⁶⁶ *Peter Allard v Govt of Barbados 2016* (n 73) para 313.



3.3.3.2 Regulatory Chill

These inevitably high costs for the State in defending against an ISDS claim, coupled with the relatively low barrier for an investor to bring a claim, especially for small States contribute to what is known as regulatory chill.²⁶⁷ This is where the fear of being sued by a foreign investor, impedes the small State from enacting government policies, even if it were for the good of the country.²⁶⁸ Effectively, the State in wanting to avoid costly ISD litigation will hesitate or not legislate at all in a manner that may contravene with the interests of a foreign investor. This is even in light of many BITs having environmental and health exceptions built into their framework, a rare shield for the host State.²⁶⁹ While environmental and health exceptions have been regularly litigated in ISDS, this has largely only involved developed nations.²⁷⁰ Countries like Germany and Australia have both faced claims relating to government health and environment public policy decisions, but these countries have the resources to defend their actions.²⁷¹ Small States, on the other hand, with limited resources may be hesitant to enact similar policies that may trigger such a claim even if it is in their right to do so. Regulatory chill is therefore, inevitably challenging to quantitatively account for. Nevertheless, it has been held to impact policy making in a manner that is not entirely democratic and as some have argued a form of neo colonialism.²⁷² Herein lies as this memorandum suggests, where small States find their existence with the ISDS system as many of them depend on FDI to bring in much needed capital inflows.²⁷³ That is to suggest, that although not a numerous amount of claims are brought against them, Small States' policy decisions may still be impacted by wanting to avoid any possibility of a dispute arising with their limited, but economically essential FDI partners.

3.3.3.3 Investor Friendly Clauses

Regulatory chill although difficult to quantify, is at the core of the ISDS system and international investment framework. IIAs, and ISDS are all implemented to protect the foreign investor with assurances of consistent

²⁶⁷ Bungenberg and Reinisch, *European Yearbook of International Economic Law Tribunals and Investment Courts to a Multilateral Investment Court*, para. 21; Berger, "Developing Countries and the Future of the International Investment Regime," 17.

²⁶⁸ Berger, "Developing Countries and the Future of the International Investment Regime," 17.

²⁶⁹ Barbados - Canada BIT for example. Noteworthy however, many older BITs do not even have these exceptions as seen in the UK - Barbados BIT as well as the UK - Trinidad and Tobago BIT

²⁷⁰ Collins, *Introduction to Foreign Direct Investment: History, Trends and Rationales*, 263.

²⁷¹ *Vattenfall v. Germany ICSill Case No. ARB/12/12 (2 July 2013)* & *Philip Morris v. Australia UNCITRAL*, 2012 (PCA Case No. 2012- 12); see also, Sergio Puig and Anton Strezhnev, "The David Effect and ISDS," *European Journal of International Law* 28(3), 2017, 733, doi:10.1093/ejil/chx058

²⁷² Samples, "Winning and Losing in Investor- State Dispute Settlement," 157-58.

²⁷³ As per section 1.2.



treatment in a host State, that ultimately protect the investment.²⁷⁴ These assurances are provided by the various provisions in IIAs that once breached by the State, can be relied on by investors to bring claims. As simple as not breaching a treaty provision may seem, a number of provisions in IIAs are rather broad and all encompassing, like provisions that establish the MFN principle, indirect expropriation or those that establish FET.²⁷⁵ These are purposively broad in order to fill gaps left by more specific provisions, thus making them useful vehicles for expansive interpretations by arbitrators and international investment lawyers. While a broad interpretation of these provisions may be welcomed by investors, for States they are a cause for ambiguity and uncertainty in how to comply with their international obligations resulting in the afore-mentioned regulatory chill.²⁷⁶

There are some important considerations for small States regarding this expansive interpretation, whether with existing BITs, or prospective ones. While the system may be decentralized, with each individual BIT only pertaining to the parties outlined in the treaty, this does not mean that other BITs fall outside the scope for consideration during tribunal proceedings.²⁷⁷ MFN and FET, make considering these other treaties and agreements, almost automatic in that treatment of the investor must not be any less than that afforded to other investors from other States. This allows for investors to bring in more favourable provisions or treatment that were not originally set out in their home country's IIAs. In effect, due to MFN, the standard of treatment is not necessarily the one laid out in the BIT but the one provided for in a State's most favourable IIA.²⁷⁸ This is, therefore a complex consideration that small States must account for when signing onto new IIAs, in that they must be cognizant of how these treaties will impact and be impacted by their current roster of investment agreements.

3.3.3.4 Treaty Shopping

The term "investor" like MFN and FET, also importantly has been given an expansive investor friendly approach to interpretation by Tribunals. This term denotes which individuals or entities are covered by the treaty and considered a foreign investor. A liberal approach to its interpretation as seen typically with European Modelled IIAs effectively broadens the scope of who can rely on the agreement to bring a claim. This results in not only national investors relying on IIAs signed between their home State and the host State, but investors from States not party to the treaty, but nevertheless have investments in either treaty

²⁷⁴ Berger, "Developing Countries and the Future of the International Investment Regime."

²⁷⁵ Berger, 13.

²⁷⁶ Berger, 11.

²⁷⁷ Berger, 14.

²⁷⁸ Behn et al., "Empirical Perspectives on Investment Arbitration : What Do We Know ? Does It Matter ?"



State bringing claims as well. Savvy investors especially larger multinationals can therefore “treaty shop”, if they find their home State’s IIAs are either non-existent or inadequate. These investors can creatively structuring their investments to enable them the ability to rely on the IIAs of other States they have investments in, to bring a claim against the targeted host State.²⁷⁹ Indeed tribunals when permissible²⁸⁰ have allowed the use of IIAs of States that host shell companies and subsidiaries, that have very limited genuine links to the home State, to be used by parent investors to bring claims.²⁸¹ There even have been instances of national investors using foreign subsidiaries to gain access to the ISDS system and bring claims against their own State, as seen in *Tokios Tokelés v Ukraine*²⁸², as detailed in Box 10.

Box 10 Treaty Shopping by domestic company - Ukraine

Tokios Tokelés v Ukraine

This dispute was brought under the Lithuania Ukraine BIT by a company which the respondent state contended was 99% run by Ukrainian nationals, headquartered in Ukraine and had little to no business in Lithuania. The company in their view was Ukrainian and should therefore not be covered by the BIT. The tribunal, however, thought differently. They held that the treaty drafters had left the term investor vague, using the phrase “any entity” and the tribunal under the ICSID convention was under no obligation to go beyond the ordinary meaning of the words in the BIT. They simply had to assess whether the claimant fell under this scope as a legally established entity under the laws of Lithuania which they held it did.

Interestingly, small States especially those in the Commonwealth Caribbean have experience with treaty shopping, and not simply as the respondent as seen in the *RSM* trilogy, but also as the home State for strategically minded investors looking to bring claims against their host State. These investors have had varying results in the region, in attempting the legal establishment of their jurisdiction in the targeted home State of a BIT, in order to bring a claim against their host, as shown in the examples provided in Box 11.²⁸³

²⁷⁹ Berger, “Developing Countries and the Future of the International Investment Regime,” 15.

²⁸⁰ Some agreements bar the use of shell companies to bring arbitral claims as seen in the old North Atlantic Free Trade Agreement (NAFTA) art. 1113(2): “Subject to prior notification and consultation in accordance with Articles 1803 (Notification and Provision of Information) and 2006 (Consultations), a Party may deny the benefits of this Chapter to an investor of another Party that is an enterprise of such Party and to investments of such investors if investors of a non-Party own or control the enterprise and the enterprise has no substantial business activities in the territory of the Party under whose law it is constituted or organized.”

²⁸¹ Collins, *Introduction to Foreign Direct Investment: History, Trends and Rationales*, 82.

²⁸² *Tokios Tokelés v. Ukraine* (ICSID Case No. ARB/02/18).

²⁸³ Ononaiwu, “Experience of CARICOM Countries with ISDS,” 17–18; *Perenco Ecuador Ltd. v. Republic of Ecuador and Empresa Estatal Petróleos del Ecuador (Petroecuador)*, ICSID Case No. ARB/08/6; *Mobil Cerro Negro Holding, Ltd., Mobil Cerro Negro, Ltd., Mobil Corporation and others v. Bolivarian Republic of Venezuela* (ICSID Case No. ARB/07/27); *Blue Bank International & Trust (Barbados) Ltd. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB 12/20; *Gambrinus, Corp. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/11/31.



Box 11 Successes and failures by small States in establishing jurisdiction

Perenco v Ecuador, Mobil v Venezuela, Blue Bank v Venezuela and Gambrinus v Venezuela

In both *Perenco v Ecuador* and *Mobil v Venezuela*, the home State of the investors was the Bahamas which did not have IIAs with either host State. The companies therefore treaty shopped to establish a link to bring a claim. In *Perenco*, the company was able to rely on the Ecuador French BIT by establishing a link to France with a majority of its shareholders being French nationals. In *Mobil*, they were able to rely on the BIT between the Netherlands and Venezuela, as Mobil was a subsidiary based in Bahamas, but its parent investor was a Dutch company.

There have been cases in the region however, where tribunals have been less liberal. In *Blue Bank v Venezuela* and *Gambrinus v Venezuela*, the tribunals held that the companies were not investors under the Venezuela Barbados BIT. They felt that the incorporated companies in Barbados did not make the requisite investment in Venezuela to establish jurisdiction.

Having established the need for reform through examination of these challenges, the existing reform proposals will now be examined against this background.

3.3.4 Existing reform proposals

Reform of ISDS can take place at several levels and in many different forms: the system can be completely disbanded and reformed, requiring multilateral level coordination and multi-State agreement and involvement. Alternatively, States can take national or unilateral level measures²⁸⁴ to deal with ISDS issues or States may act plurilaterally or bilaterally to amend BITs to address specific issues in the agreements between them. The broad reform proposals that will be tabulated include those favouring dismantling the entire ISDS system and creating a new regime, terminating IIAs to exit the system and return to domestic or State to State dispute settlement or terminating IIAs to renegotiate.²⁸⁵ Multilateral, regional, bilateral and plurilateral reform options and those involving an overhaul of the entire system, are perhaps the most effective solution to the existing problems. However, collective action faces greater difficulties in implementation.²⁸⁶ This Section provides a tabular overview of the existing reform proposals that are most relevant to the specific challenges faced by small States below.

²⁸⁴ South Africa unilaterally notified Belgium, Luxembourg, the UK, Germany, France, the Netherlands, Spain, Sweden, Denmark, Greece, Italy, Switzerland that they will be terminating the existing BITs.

²⁸⁵ Berger, Axel. 2015. "Developing Countries and The Future of The International Investment Regime", 5

²⁸⁶ UNCTAD, "Reform of Investor-State Dispute Settlement: In Search of a Roadmap," 10



Existing Reform Proposals

<u>I. Multilateral Reform options</u>	<ul style="list-style-type: none">• Advisory Centre on International Investment Law• Regional Action• Standing Court• Review Mechanism
<u>II. Treaty Interpretation and Reducing Investor Centredness</u>	<ul style="list-style-type: none">• Party Participation in Treaty Interpretation• Change the Wording of Substantive Provisions• Reducing the Subject Matter Scope for ISDS Claims• Restricting Investors Who Can Bring Claims• Exhaustion of Local Remedies
<u>III. Arbitrator Appointment, Pool and Independence</u>	<ul style="list-style-type: none">• Code of Conduct• Guidelines for Selection of Arbitrators• Permanent Arbitrators
<u>IV. Cost and Time Management</u>	<ul style="list-style-type: none">• Consolidated Claims• Time Limits• Alternate Dispute Resolution• Early Discharge of Frivolous Claims
<u>V. Dispute Prevention</u>	<ul style="list-style-type: none">• National Level• Bilateral or Multilateral Level
<u>VI. Other Initiatives</u>	<ul style="list-style-type: none">• Transparency



I. Multilateral Reform options

<u>Existing Proposals</u>	<u>Proponents</u> ²⁸⁷	<u>Reform Elements</u>	<u>Considerations</u>
<p>a) Advisory Centre on International Investment Law</p> <p>Specific Challenges</p> <p>Financial and human resource incapacity, cost and duration</p>	<p style="text-align: center;">Morocco (A/CN.9/WG.III/WP.161)</p> <p style="text-align: center;">Thailand (A/CN.9/WG.III/WP.162)</p> <p style="text-align: center;">Costa Rica (A/CN.9/WG.III/WP.164) (A/CN.9/WG.III/WP.178)</p> <p style="text-align: center;">Turkey (A/CN.9/WG.III/WP.174)</p> <p style="text-align: center;">Republic of Korea (A/CN.9/WG.III/WP.179)</p>	<p>The creation of a Centre that is competent to assist under-resourced States in ISDS.</p> <p>Proposed options for form, structure and funding:</p> <ul style="list-style-type: none"> • Permanent staff or consultants or a mix of the two. • Legally independent intergovernmental body or a trust fund managed independently. • Financing provided by members of the centres (if organized as an intergovernmental body), beneficiaries (with exemptions for certain beneficiaries) and/or donors. <p>Proposed functions include:</p> <ul style="list-style-type: none"> • Selection and appointment of arbitrators. • Preparation of statements and evidence. • Development of legal arguments. • Representation at hearings. • Legal advice and advocacy at low cost. • Alternative dispute resolution services (mediation, conciliation). • Sharing of best practices. • Early assessment of risk to identify strategies and a course of action. • Assistance in amending international investment instruments.²⁸⁸ • Aid in establishing lead agencies in host States to deal with international investors. • Facilitate sharing of information relating to ISDS.²⁸⁹ 	<ul style="list-style-type: none"> • The Centre’s mandate should not be overloaded; resource constraints may ultimately prevent its establishment.

²⁸⁷ Secretariat, “Possible Reform of Investor-State Dispute Settlement (ISDS),” 5.

²⁸⁸ UNCITRAL Secretariat. 2019. “Possible Reform of Investor-State Dispute Settlement (ISDS) Advisory Centre.” <https://documents-dds-ny.un.org/doc/UNDOC/LTD/V18/057/51/PDF/V1805751.pdf>.

²⁸⁹ Ibid



II. Multilateral Reform options

<u>Existing Proposals</u>	<u>Proponents</u> ²⁹⁰	<u>Reform Elements</u>	<u>Considerations</u>
<p>a) Advisory Centre on International Investment Law</p> <p>Specific Challenges</p> <p>Financial and human resource incapacity, cost and duration</p>	<p style="text-align: center;">Morocco (A/CN.9/WG.III/WP.161)</p> <p style="text-align: center;">Thailand (A/CN.9/WG.III/WP.162)</p> <p style="text-align: center;">Costa Rica (A/CN.9/WG.III/WP.164) (A/CN.9/WG.III/WP.178)</p> <p style="text-align: center;">Turkey (A/CN.9/WG.III/WP.174)</p> <p style="text-align: center;">Republic of Korea (A/CN.9/WG.III/WP.179)</p>	<ul style="list-style-type: none"> • The Centre can also assist in capacity building through the incorporation of government lawyers in States’ defence teams,²⁹¹ training programs, trainee and secondment positions.²⁹² • The centre can also provide financial support for outsourcing. Provision of technical assistance and capacity building in the wider international investment regime. 	<ul style="list-style-type: none"> • The Centre should be independent and devoid of political influence.²⁹³ • Confidentiality, in terms of keeping the financial standing of states requesting assistance is a key consideration.²⁹⁴ • Avoiding conflict of interest, especially where the centre is involved in activities related to both alternative dispute resolution and defences services.²⁹⁵

²⁹⁰ Secretariat, “Possible Reform of Investor-State Dispute Settlement (ISDS),” 5.

²⁹¹ Sauvart, Karl P. 2019. “An Advisory Centre on International Investment Law: Key Features Academic Forum on ISDS,” no. September. www.jus.uio.no/pluricourts/english/projects/leginvest/academic-forum/.

²⁹² Ibid.

²⁹³ Ibid.

²⁹⁴ UNCITRAL Secretariat. 2019. “Possible Reform of Investor-State Dispute Settlement (ISDS) Advisory Centre.” <https://documents-dds-ny.un.org/doc/UNDOC/LTD/V18/057/51/PDF/V1805751.pdf>.

²⁹⁵ Ibid.

I. Multilateral Reform options

<u>Existing Proposals</u>	<u>Proponents</u> ²⁹⁶	<u>Reform Elements</u>	<u>Considerations</u>
<p>b) Regional Cooperation and Integration</p> <p>Specific Challenges</p> <p>Financial and human resource incapacity</p>	<p>European Union (Lisbon Treaty)</p> <p>Canada USA Mexico (NAFTA)</p>	<ul style="list-style-type: none"> Authorize the political bodies of regional organisations to negotiate IIAs.²⁹⁷ Inclusion of comprehensive investment chapters in regional trade agreements. 	<ul style="list-style-type: none"> This could facilitate the pooling of limited resources, thus improving financial capability and leverage of individual small States. This level of political integration, and cooperation places a major limit on a State's sovereignty. Thus, it is very difficult to achieve as each State is generally preoccupied with its own agenda.
<p>c) Standing Court</p> <p>Specific Challenges</p> <p>Cost, duration, inconsistent decisions, arbitrator independence and impartiality, investor centredness</p>	<p>European Union (A/CN.9/WG.III/WP.159/Add.1) EU–Singapore IPA</p>	<ul style="list-style-type: none"> Replacing the current system, with a centralized institutional structure. Permanent pool of adjudicators. 	<ul style="list-style-type: none"> The international investment regime is not a centralized multilateral system. It is questionable whether a centralized court would be equipped to deal with a multitude of investment agreements, varying on content and level of ambition. This option may be best suited for “a system with a unified body of applicable law”.²⁹⁸ This would require a complete change of the ISDS system presently and the cooperation of a lot of States.²⁹⁹

²⁹⁶ Berger, “Developing Countries and the Future of the International Investment Regime,” 21.

²⁹⁷ Example can be found in the Lisbon Treaty, which gave the European Union legal personality and the corollary ability to sign international treaties on behalf of Member States, in the areas of cooperation. This is codified in Article 21 of the Consolidate Version of the Treaty on European Union.

²⁹⁸ UNCTAD, “Reform of Investor-State Dispute Settlement: In Search of a Roadmap,” 3.

²⁹⁹ This reform could start of plurilateral, but this raises questions of whether there would be sufficient cases to warrant a standing court between two States or even a small number of States.

I. Multilateral Reform options

<u>Existing Proposals</u>	<u>Proponents</u> ³⁰⁰	<u>Reform Elements</u>	<u>Considerations</u>
<p>d) Review Mechanism</p> <p>Specific Challenges</p> <p>Consistency of decisions, review of erroneous decisions</p>	<p>European Union (A/CN.9/WG.III/WP.159/Add.1)</p> <p>Morocco (A/CN.9/WG.III/WP.161)</p> <p>Chile, Israel, Japan (A/CN.9/WG.III/WP.163)</p> <p>Ecuador, (A/CN.9/WG.III/WP.175)</p> <p>China (A/CN.9/WG.III/WP.177)</p>	<p>d.1 An Appeal Mechanism</p> <ul style="list-style-type: none"> “A standing body with a competence to undertake substantive review of awards rendered by arbitral tribunals.”³⁰¹ <p>d.2 Ad Hoc Review</p> <ul style="list-style-type: none"> Preliminary rulings by tribunals referred to another authoritative body for review. 	<ul style="list-style-type: none"> It should be taken into account that such mechanism may increase the time, length, and cost of proceedings.

³⁰⁰ Secretariat, “Possible Reform of Investor-State Dispute Settlement (ISDS),” 6.

³⁰¹ UNCTAD, “Reform of Investor-State Dispute Settlement: In Search of a Roadmap,” 3.



II. Treaty Interpretation and Reducing Investor Centeredness

<u>Existing Proposals</u>	<u>Proponents</u> ³⁰²	<u>Reform Elements</u>	<u>Considerations</u>
<p>a) Party Participation in Treaty Interpretation</p> <p>Specific Challenges</p> <p>Inconsistent decisions, widely interpreted clauses</p>	<p>European Union (A/CN.9/WG.III/WP.159/Add.1)</p> <p>Morocco (A/CN.9/WG.III/WP.161)</p> <p>Thailand (A/CN.9/WG.III/WP.162)</p> <p>Chile, Israel, Japan (A/CN.9/WG.III/WP.163)</p> <p>Ecuador, (A/CN.9/WG.III/WP.175)</p> <p>China (A/CN.9/WG.III/WP.177)</p> <p>South Africa (A/CN.9/WG.III/WP.176)</p> <p>Costa Rica (A/CN.9/WG.III/WP.164)</p>	<ul style="list-style-type: none"> • Increasing the contracting parties’ role in interpreting the treaty.³⁰³ • Allowing for binding joint party interpretations.³⁰⁴ 	<ul style="list-style-type: none"> • States need to be careful not to blur the lines between interpretation of the provisions and amendment of the substantive content. • This may cause due process issues if party interpretation occurs while proceedings are ongoing.

³⁰² Secretariat, “Possible Reform of Investor-State Dispute Settlement (ISDS),” 6.

³⁰³ Ibid.

³⁰⁴ Ibid.



II. Treaty Interpretation and Reducing Investor Centeredness

<u>Existing Proposals</u>	<u>Proponents</u> ³⁰⁵	<u>Reform Elements</u>	<u>Considerations</u>
<p>b) Change the Wording and Scope of Substantive Provisions</p> <p>Specific Challenges</p> <p>Widely interpreted clauses, treaty shopping</p>	<p>Canada USA Mexico (USMCA)</p> <p>Republic of Korea Central America (CA – Republic of Korea FTA)</p> <p>Singapore Sri Lanka (Singapore–Sri Lanka FTA)</p>	<ul style="list-style-type: none"> • Clarify the meaning and scope of the provisions to limit arbitrator discretion. • Alter the MFN clause to restrict the importation of more generous provisions from agreements signed in the past.³⁰⁶ • Refine the FET clause so that it does not provide more beneficial treatment than is granted by customary international law.³⁰⁷ • A more constrained meaning of indirect expropriation.³⁰⁸ • Alternatively, treaties should be drafted to exhaustively define the content of the right and obligation it accords. 	<ul style="list-style-type: none"> • These reforms require States to agree to revisit and redraft their existing agreements or create entirely new agreements. • It then requires the two States to come to a consensus on the scope and content of these rights and obligations, agreeing on new definitions, inserting clauses requiring exhaustion of local remedies and limiting which parts of the agreement can be the subject of disputes. • This type of reform may be difficult because it cannot be achieved unilaterally. Consensus between capital-importing and capital-exporting States may be very challenging because they tend to have different interests. Balancing investor rights with a States sovereign rights may be a difficult task. • Clarifying the language and restrict the scope of definitions and substantive provisions may enhance the transparency and predictability of disputes.
<p>c) Reducing the Subject Matter Scope for ISDS Claims</p> <p>Specific Challenges</p> <p>As above</p>	<p>Singapore Sri Lanka (Singapore–Sri Lanka FTA)</p> <p>Argentina Japan Argentina–Japan BIT</p>	<ul style="list-style-type: none"> • Limiting the types of claims that can be arbitrated and the jurisdiction of the arbitral tribunal. 	<ul style="list-style-type: none"> • Clarifying the language and restrict the scope of definitions and substantive provisions may enhance the transparency and predictability of disputes.

³⁰⁵ UNCTAD, “Reforming Investment Dispute Settlement: A Stocktaking,” 28.

³⁰⁶ Berger, Axel. 2015. "Developing Countries and The Future of The International Investment Regime", 25.

³⁰⁷ Ibid, 9.

³⁰⁸ Ibid.



III. Arbitrator Appointment, Pool and Independence

<u>Existing Proposals</u>	<u>Proponents</u> ³⁰⁹	<u>Reform Elements</u>	<u>Considerations</u>
<p>a) Code of Conduct</p> <p>Specific Challenges</p> <p>Arbitrator independence and impartiality, issues relating to the small pool of arbitrators and avoiding conflicts of interest.</p> <p>Transparency</p>	<p>European Union (A/CN.9/WG.III/WP.159/Add.1)</p> <p>Thailand (A/CN.9/WG.III/WP.162)</p> <p>Chile, Israel, Japan (A/CN.9/WG.III/WP.163)</p> <p>Ecuador, (A/CN.9/WG.III/WP.175)</p> <p>China (A/CN.9/WG.III/WP.177)</p> <p>South Africa (A/CN.9/WG.III/WP.176)</p> <p>Bahrain (A/CN.9/WG.III/WP.180)</p>	<ul style="list-style-type: none"> Establishment of a uniform set of guidelines to inform the ethics and conduct of arbitrators.³¹⁰ It would contain, broadly, concepts relating to independence and impartiality; diligence and integrity; and competence.³¹¹ It would also provide for disclosure of conflicts of interest. 	<ul style="list-style-type: none"> This code would be useful because it can militate against perceived biases or impartialities of arbitrators. As a consequence, the credibility of the system may likely be enhanced. A code of conduct for ISDS arbitrators requires collaboration among States. This may be difficult to achieve because there would be many different interests and standards across States of different sizes and levels of development. Without a centralised investment regime, it would be difficult to enforce such a code.

³⁰⁹ Secretariat, “Possible Reform of Investor-State Dispute Settlement (ISDS),” 8.

³¹⁰ Example of this can be found in Annex 29-B of the Canadian- European Union FTA.

³¹¹ Giorgetti, Chiara, and Mohammed Abdel Wahab. 2019. “A Code of Conduct for Arbitrators and Judges.” *Academic Forum on ISDS Concept Paper*, 4. www.jus.uio.no/pluricourts/english/projects/leginvest/academic-forum/.

III. Arbitrator Appointment, Pool and Independence

<u>Existing Proposals</u>	<u>Proponents</u> ³¹²	<u>Reform Elements</u>	<u>Considerations</u>
<p>b) Guidelines for Selection of Arbitrators</p> <p>Specific Challenges</p> <p>Arbitrator independence and impartiality</p>	<p>European Union (A/CN.9/WG.III/WP.159/Add.1)</p> <p>Thailand (A/CN.9/WG.III/WP.162)</p> <p>Chile, Israel, Japan (A/CN.9/WG.III/WP.163)</p> <p>Ecuador, (A/CN.9/WG.III/WP.175)</p> <p>China (A/CN.9/WG.III/WP.177)</p> <p>Turkey (A/CN.9/WG.III/WP.174)</p> <p>Costa Rica (A/CN.9/WG.III/WP.164 & A/CN.9/WG.III/WP.178)</p>	<ul style="list-style-type: none"> A predetermined selection process akin to those utilized in domestic and international courts.³¹³ 	<ul style="list-style-type: none"> This reform can add some structure to the current ISDS process. Similar to the way in which domestic judges are chosen based on certain regulations and according to a set process, this reform can utilise comparable safeguards and regulations to preserve the impartiality and independence of arbitrators. Akin to the above consideration's, there can be difficulty getting States to collaborate and also in enforcing this reform without a centralised supervisory agency.

³¹² Secretariat, "Possible Reform of Investor-State Dispute Settlement (ISDS)," 8.

³¹³ Bungenberg and Reinisch. 2018. "European Yearbook of International Economic Law Tribunals and Investment Courts to a Multilateral Investment Court, Special Issue: From Bilateral Arbitral Tribunals and Investment Courts to a Multilateral Investment Court, Options Regarding the Institutionalization." In , 15–20. Springer Nature Switzerland AG.



III. Arbitrator Appointment, Pool and Independence

<u>Existing Proposals</u>	<u>Proponents</u> ³¹⁴	<u>Reform Elements</u>	<u>Considerations</u>
<p>c) Permanent Arbitrators</p> <p>Specific Challenges</p> <p>Duration and cost, consistency of decisions, diversify arbitrator pool and independence of arbitrators</p>	<p>European Union (A/CN.9/WG.III/WP.159/Add.1)</p>	<ul style="list-style-type: none"> • Adjudicators appointed to serve for a predetermined term, independently from specific disputes.³¹⁵ • A permanent body of arbitrators for appeal may be created. 	<ul style="list-style-type: none"> • If States, or groups of States, are allowed to elect adjudicators to the permanent tribunal, this reform could provide small States with an opportunity for representation. Since, States would be able to elect arbitrators, small States can collaborate and elect representatives from their regions. This can ensure that the small States' perspective is accounted for amongst arbitrators • This reform is closely linked to the proposals relating to having a permanent investment court. Creating a permanent court would in fact entail the establishment of a permanent group of arbitrators • This can reduce double hatting³¹⁶, since members of the group will serve permanently as arbitrators and in no other capacities. • Arbitrators will no longer depend on the party they are serving for payment. This may benefit the independence of arbitrators. As a consequence, the credibility of the system may also increase.

³¹⁴ Secretariat, “Possible Reform of Investor-State Dispute Settlement (ISDS),” 7.

³¹⁵ Ibid.

³¹⁶ Giorgetti, Chiara, and Mohammed Abdel Wahab. 2019. “A Code of Conduct for Arbitrators and Judges.” *Academic Forum on ISDS Concept Paper*, 4. www.jus.uio.no/pluricourts/english/projects/leginvest/academic-forum/.



IV. Cost and Time Management

<u>Existing Proposals</u>	<u>Proponents</u> ³¹⁷	<u>Reform Elements</u>	<u>Considerations</u>
<p>a) Consolidated Claims</p> <p>Specific Challenges</p> <p>Inconsistent decisions, duration, cost and transparency</p>	<p>Morocco (A/CN.9/WG.III/WP.161)</p>	<ul style="list-style-type: none"> Where claims are submitted to arbitration that “have a question of law or fact in common, a Tribunal may, in the interests of fair and efficient resolution of the claims, and after hearing the disputing parties” determine the claims as one.³¹⁸ 	<ul style="list-style-type: none"> This reform will aid in consistency by reducing conflicting decisions. A judgement on a consolidate claim can have widespread impact, certain criteria and qualification requirements should be devised and satisfied before arbitrators are entrusted with such a mandate The <i>ad hoc</i> system for arbitrator selector may not work for this. A set group of arbitrators, selected by consensus, may need to be created for this to work. In ISDS parties’ consent is primary. Therefore, in this system of consolidated claims, parties should not be bound by the decision of arbitrators they did not select. In that vein arbitrators presiding over consolidated claims need to be chosen by all parties or from a standing court or tribunal elected by the States party to the dispute. This can reduce cost One tribunal presiding over multiple disputes means that the parties can pool resources to pay arbitrators and even to create a defence team. Additionally, multiple disputes can have a simultaneous decision, which can reduce time.

³¹⁷ Secretariat, “Possible Reform of Investor-State Dispute Settlement (ISDS),” 11.

³¹⁸ North American Free Trade Agreement (NAFTA), Article 1126.



IV. Cost and Time Management

<u>Existing Proposals</u>	<u>Proponents</u> ³¹⁹	<u>Reform Elements</u>	<u>Considerations</u>
<p>b) Time Limits</p> <p>Specific Challenges</p> <p>Duration and cost</p>	<p>European Union Singapore (EU–Singapore IPA)</p>	<ul style="list-style-type: none"> • Setting timelines for certain procedures in the arbitral process • E.g. a “maximum duration for specific procedural stages”.³²⁰ Expiry dates or limits on when investors can bring claims. 	<ul style="list-style-type: none"> • Time limits can improve the efficiency and efficacy of the system. Clearer timelines will make the system more predictable. Costs can be reduced and better budgeted because there is a clearer start and end date • Time limits can result in a “rushed” decision, that may not fully cover the scope of the dispute. This may raise questions about the legality and accuracy of the decisions.

³¹⁹ UNCTAD, “Reforming Investment Dispute Settlement: A Stocktaking,” 28.

³²⁰ Bungenberg, Marc and Reinisch, 2018. “European Yearbook of International Economic Law Tribunals and Investment Courts to a Multilateral Investment Court, Special Issue: From Bilateral Arbitral Tribunals and Investment Courts to a Multilateral Investment Court, Options Regarding the Institutionalization.” In , 15–20. Springer Nature Switzerland AG.

IV. Cost and Time Management

<u>Existing Proposals</u>	<u>Proponents</u> ³²¹	<u>Reform Elements</u>	<u>Considerations</u>
<p>c) Alternative Dispute Resolution</p> <p>Specific Challenges</p> <p>Less cost and time intensive than arbitration. Dispute prevention</p>	<p>European Union (A/CN.9/WG.III/WP.159/Add.1)</p> <p>Morocco (A/CN.9/WG.III/WP.161)</p> <p>Indonesia (A/CN.9/WG.III/WP.156)</p> <p>Chile, Israel, Japan, Mexico, Peru (A/CN.9/WG.III/WP.182)</p> <p>Mali (A/CN.9/WG.III/WP.181)</p> <p>China (A/CN.9/WG.III/WP.177)</p> <p>South Africa (A/CN.9/WG.III/WP.176)</p>	<ul style="list-style-type: none"> • Provisions for mandatory utilization of alternative dispute resolution options prior to arbitration. • E.g. Mediation and Conciliation. 	<ul style="list-style-type: none"> • Alternative dispute resolutions mechanisms offer “a high degree of flexibility and autonomy to disputing parties”. They can help preserve the investment relationship and avoid disputes in the first place.³²² • However, if unsuccessful, such procedures can enhance the burden on the parties and increase the cost and duration of the proceedings. • It may also be the case that although parties may potentially be able to amicably set their difference, they would still not be interested in continuing the investor-State relationship.

³²¹ Secretariat, “Possible Reform of Investor-State Dispute Settlement (ISDS) Dispute Prevention and Mitigation - Means of Alternative Dispute,” 9.

³²² UNCITRAL Secretariat. 2020. “Possible Reform of Investor-State Dispute Settlement (ISDS) Dispute Prevention and Mitigation - Means of Alternative Dispute Resolution, 9”.

IV. Cost and Time Management

<u>Existing Proposals</u>	<u>Proponents</u> ³²³	<u>Reform Elements</u>	<u>Considerations</u>
<p>d) Early Discharge of Frivolous Claims</p> <p>Specific Challenges</p> <p>Duration and Cost</p>	<p>Turkey (A/CN.9/WG.III/WP.174,)</p> <p style="text-align: center;">Morocco (A/CN.9/WG.III/WP.161)</p> <p style="text-align: center;">Indonesia (A/CN.9/WG.III/WP.156)</p> <p style="text-align: center;">Chile, Israel, Japan (A/CN.9/WG.III/WP.163)</p> <p style="text-align: center;">Costa Rica (A/CN.9/WG.III/WP.164 & A/CN.9/WG.III/WP.178)</p> <p style="text-align: center;">South Africa (A/CN.9/WG.III/WP.176)</p>	<ul style="list-style-type: none"> • Preliminary objection to claims that are unlikely to succeed.³²⁴ 	<ul style="list-style-type: none"> • Host States, as the primary respondents, may object to claims reaching to a merit stage, based on a preliminary assessment that the claim would be futile. • A system would need to be devised to deal with how an objection would be communicated and then dealt with by arbitrators. An example of how it may operate is that it can subsumed into the response to the request to arbitrate and then dealt with prior to any proceedings on the true merits of the case. • While potentially useful, it would still require a preliminary inquiry in to whether a claim is frivolous. This will still require time and resources to create a worthy <i>prima facie</i> case. • Additionally, if the preliminary objection is not fruitful then it would just have added time and cost to an already lengthy and expensive process

³²³ Secretariat, “Possible Reform of Investor-State Dispute Settlement (ISDS) Dispute Prevention and Mitigation - Means of Alternative Dispute,” 9.

³²⁴ Exemplified in Article 41(5) International Centre for Settlement of Investment Disputes, Arbitration Rules (2006); Article 28 United States-Uruguay Bilateral Investment Treaty.



V. Dispute Prevention

<u>Existing Proposals</u>	<u>Proponents</u> ³²⁵	<u>Reform Elements</u>	<u>Considerations</u>
<p style="text-align: center;">National Level</p> <p>Specific Challenges</p> <p>all aforementioned challenges</p>	<p style="text-align: center;">Republic of Korea (A/CN.9/WG.III/WP.179)</p> <p style="text-align: center;">Mali (A/CN.9/WG.III/WP.181)</p> <p style="text-align: center;">Brazil (A/CN.9/WG.III/WP.171)</p>	<ul style="list-style-type: none"> • Identify a lead State entity, to communicate with the investor, achieve consistency in the implementation of investment obligations, facilitate investor interaction with local authorities, and administer investment treaties and contracts.³²⁶ • Clarify obligations through “systematic compilation, mapping and evaluation of investment contracts and treaties”³²⁷ and ISDS case results. • Increase availability and easy accessibility of information relating to investment treaties and contracts. Identification of sensitive sectors, business, and contracts may facilitate the establishment and strengthening of preventive measures to avoid escalation of conflicts.³²⁸ 	<ul style="list-style-type: none"> • Coherency in rulemaking and availability of relevant information can aid in dispute mitigation and risk. This would enhance the certainty and transparency of the system and clarify how investment-related rules are implemented.³²⁹ • This area of reform can be aided through the implementation of an Advisory Centre.³³⁰ This Centre can provide information on dispute prevention to small States and develop model legislation and guidance on the creation of committees or commissions to deal with investors. • These types of measures require substantial financial resources to fund projects as well as to train and hire experts in the field.

³²⁵ Secretariat, “Possible Reform of Investor-State Dispute Settlement (ISDS) Dispute Prevention and Mitigation - Means of Alternative Dispute,” 5.

³²⁶ UNCITRAL Secretariat. 2020. “Possible Reform of Investor-State Dispute Settlement (ISDS) Dispute Prevention and Mitigation - Means of Alternative Dispute Resolution, 4.

³²⁷ Ibid, 5.

³²⁸ Ibid, 6.

³²⁹ Ibid.

³³⁰ Ibid, 8.



V. Dispute Prevention

<u>Existing Proposals</u>	<u>Proponents</u> ³³¹	<u>Reform Elements</u>	<u>Considerations</u>
<p>Bilateral or Multilateral Level</p> <p>Specific Challenges</p> <p>Cost, limited human resource issues</p>	<p>Republic of Korea (A/CN.9/WG.III/WP.179)</p> <p>Morocco (A/CN.9/WG.III/WP.161)</p> <p>Brazil (A/CN.9/WG.III/WP.171)</p> <p>South Africa (A/CN.9/WG.III/WP.176)</p>	<ul style="list-style-type: none"> Regular State-to-State communication and cooperation to prevent disputes or provide early management of complaints. <p>This involves the following:</p> <ul style="list-style-type: none"> Developing comprehensive databases. Training on investment and ISDS related issues <p>Coordinated access to documents and document management.³³²</p>	<ul style="list-style-type: none"> Cooperation, information sharing, and mutual assistance can help states pool resources and counteract deficiencies in individual States. Facilitating knowledge, skill, and technological sharing among States may reduce the probability of repeat offenses in that grouping, ultimately preventing the escalation of disputes.

³³¹ Secretariat, “Possible Reform of Investor-State Dispute Settlement (ISDS) Dispute Prevention and Mitigation - Means of Alternative Dispute,” 7–8.

³³² Ibid, 7.



VI. Other Initiatives

<u>Existing Proposals</u>	<u>Proponents</u> ³³³	<u>Reform Elements</u>	<u>Considerations</u>
<p>Transparency</p> <p>Specific Challenges</p> <p>Transparency</p>	<p>Canada USA Mexico (NAFTA)</p>	<ul style="list-style-type: none"> Granting public access to arbitration documents and arbitral hearings.³³⁴ Allowing the participation of interested non-disputing parties, such as civil society organisations.³³⁵ 	<ul style="list-style-type: none"> The more access private and public stakeholders have to information on ISDS, the less likely they are to commit repeat offences. Allowing non-disputing stakeholders to participate ensures that the interests of all affected parties can be accounted for in decision making.

³³³ Secretariat, “Possible Reform of Investor-State Dispute Settlement (ISDS) Dispute Prevention and Mitigation - Means of Alternative Dispute,” 7–8.

³³⁴ UNCTAD, “Reform of Investor-State Dispute Settlement: In Search of a Roadmap,” 3. ; An example of this is seen in Annex 1137.4 of the North American Free Trade Agreement (NAFTA).

³³⁵ Ibid, 6.



The previous tables demonstrates that a multitude of ISDS reform proposals already exist, across various dimensions. Small States may face difficulties deciphering which proposals are most apt for their consideration and implementation. Any contemplation on the most suitable reform options for small States must be contextualised by the afore-mentioned challenges and characteristics of small States. Thus, the ensuing Section will suggest concrete and tangible proposals to improve small State participation in ISDS within this context.

A major problem that many of the existing reform initiatives face is that they do not apply to existing treaties and in some instances even future disputes. Furthermore, the UNCTAD Working Group III discussion highlights and confirms that broadly the reform proposals lack consensus. It should also be noted that reform initiatives should not be taken in isolation. When the time comes for strategic planning for implementation, it should be acknowledged that certain reform initiatives (such as the proposal for an advisory centre) can rectify several of the challenges and make other reform options less viable or obsolete. The following recommended proposals acknowledges the merits and shortcomings of the aforementioned proposals. As such the authors utilises certain features of the existing reform to propose new and improved versions that are more suited to small States in the following section.



3.4 Recommended Reforms to Enhance small States Participation in ISDS

This Section will discuss concrete and tangible proposals for ISDS reform to improve the character of small State participation under two themes; (i) proposals to alter features of the existing systems and (ii) proposals to depart and replace it completely.³³⁶

As a general matter, we note that it remains clear the extent to which IIAs and ISDS aid in attracting FDI. As noted above, some studies find that IIA's have no, or even a negative, effect on FDI.³³⁷ Therefore, small States may consider replacing ISDS with other investment facilitation methods, which will be discussed below. Alternatively, small States can choose to act less drastically and preserve ISDS while taking measures to alter the existing system in their favour. It is assumed that small States agreed to IIAs containing ISDS provisions, because they would provide an incentive to investors and thus increase FDI within their State. Therefore, the proposals relating to altering the system are recommended so that this function of ISDS can be maintained. These two options are presented as alternatives. However, small States can start with altering the system in their favour with the ultimate aim of departing the system.

³³⁶ This is something South Africa did. For further reading Volume 34, Issue 2, of the Spring 2019 ICSID review focuses on the African experience in ISDS

³³⁷ Berger, Axel. 2015. "Developing Countries and the Future of the International Investment Regime," 30.



(i) **Our proposals to alter features of the existing system**

Altering the existing ISDS system		
<u>Proposal</u>	<u>Considerations</u>	<u>Potential Benefits</u>
<p>Centralised system for the International Investment Regime</p>	<ul style="list-style-type: none"> • This proposal would require multilateral collaboration between States. It entails the creation of a cohesive system and legal regime to manage international investment and by extension management of ISDS. • With specific focus on ISDS, the procedural aspect of this reform would entail the creation of a central investment court and appeal system for all disputes arising out of IIAs to be heard. Through this system rules and practices relating to ISDS can be harmonised. This includes co-ordination of investor and State obligations as well as investor rights. • In relation to the substantive rules of ISDS, the States that govern this centralised international investment regime can clarify the meaning of provisions, even before they become the subject of disputes. This will make the system more predictable. • It would also involve the development of a set procedure for selection of arbitrators on a case by case basis or as set group of arbitrators to hear all claims for a certain period of time. In the interest of small States, a system for selecting arbitrators on a case by case basis would be the better option because there is a greater opportunity for persons who understand the specific dispute and the host States particular economic and social position to hear disputes. This centralised system can also create a code of conduct for arbitrators. • This reform proposal can also create a set process and/or procedure for disputes. • Due to their lack of resources and international leverage, small States would not be able to create this system on their own. However, they can submit and support existing proposals of this nature in order to see a multilateral system come to fruition 	<ul style="list-style-type: none"> • Creation of a more predictable system. • Less expansive and investor friendly interpretation. • Reduced perception of arbitrator bias. • Greater diversity amongst arbitrators.



Altering the existing ISDS system

<u>Proposal</u>	<u>Considerations</u>	<u>Potential Benefits</u>
Review and Restructure Existing IIAs	<ul style="list-style-type: none"> • Instead of completely rejecting ISDS, small States should review the content and structure of their IIAs in an effort to circumscribe and clarify clauses such as the FET and FPS clause. • In doing this, small State should endeavour to promote corporate social responsibility through the creation of investor obligations and clauses mandating more compliance with domestic laws. • Member States should also thoroughly clarify and scope out the foreign investor’s pre and post establishment rights. • Additionally, these States should include provision for mandatory exhaustion of domestic remedies or other dispute resolution methods prior to ISDS. • This can either be done bilaterally through re-negotiation between the States in a BIT or a State can unilaterally terminate their BITs and endeavour to start over. 	<ul style="list-style-type: none"> • This reform specifically targets the challenges small States face in relation to the expansive interpretation of IIA standards. This reform can ensure that the obligations and rights in IIAs are definitively set out and avoid liability for legitimate State actions. • A method to ensure that investors act in the interests of the host States development and responsibility in relation to the environment and the corporate climate.



Altering the existing ISDS system

<u>Proposal</u>	<u>Considerations</u>	<u>Potential Benefits</u>
Model IIAs	<ul style="list-style-type: none"> • Together with the proposals for having a centralised system as well as restructuring the existing IIAs would be the development of a model IIA for small States. In developing new model IIAs, small States should take account of the recommendations UNCTAD has put forward to ensure that investment contribute to the sustainable development of the host State. • This model IIA should include the areas identified for review as standard elements. For example, it should address the duration and even maximum costs, arbitrator selection and the rights and obligations of parties. • This model IIA should have provisions reflecting modern needs, such as sustainable development and new investment facilitation goals. In this vein the model IIA must reflect the development status of the States and also aim to rectify the challenges they face as a result of the unique characteristics identified in Section one. • It would also be prudent for these model IIAs to be developed multilaterally or regionally, so the interests and resources of small States can be pooled. • Small States can utilise the already existing model IIAs created by IOs such as UNCTAD, as a base. 	<ul style="list-style-type: none"> • This reform can also circumscribe expansive interpretation and clarify rights and obligations



Altering the existing ISDS system

<u>Proposal</u>	<u>Considerations</u>	<u>Potential Benefits</u>
<p>Capacity building in International Investment Law</p>	<ul style="list-style-type: none"> • Small States should try to develop their capacity to respond to ISDS disputes. In order to do this, these States should pool financial resources in order to train and develop their human capital in various sectors that touch and concern investment. • Small States should develop “investment units” who are cognisant of the legal and economic ramifications of investment and the investment treaties of the State in particular. These entities should act as an intermediary between the State and investors and facilitate, investment start up, prevention of disputes and in the case of breaches the smooth resolution of disputes. • This type of development in the investment sector is crucial for a small State to improve the character of its participation in ISDS moving forward. 	<ul style="list-style-type: none"> • Dispute prevention, a State more cognisant of its IIAs and the international investment regime is better poised to avoid actions that would violate their obligations • This can reduce cost and duration. An in-house legal team capable of preparing arguments for the host State is cheaper than out-sourcing legal aid. Additionally, a well-versed investment legal team should be able to respond more efficiently to claims thus making the procedure quicker.



(ii) Our proposals to depart and replace the existing system

Departing from the existing ISDS system		
Proposal	Considerations	Potential Benefits
<p>Replace ISDS in favour of investment facilitation provisions</p>	<ul style="list-style-type: none"> • Discussions on investment facilitation are not novel³³⁸, but have gained renewed traction in recent years due to 1) aforementioned challenges with the current BIT/ISDS system³³⁹ and 2) academic research is inconclusive on whether the current system indeed promotes FDI.³⁴⁰ • Investment facilitation provisions mark a conceptual shift from an adversarial, limited State involvement approach, to a focus on cooperation, mutual trust, mutual benefit, and continued communication between the home and host States and the investors.³⁴¹ • It is more centred on investment promotion rather than simply investment protection.³⁴² • Most notably, investment facilitation has been a favourite of Latin American countries in particularly Brazil. The Brazil model Cooperation and Facilitation of Investment (CIFA) developed in 2013 highlights a novel strategic method focusing on dispute prevention and investment facilitation.³⁴³ • Currently Brazil has signed CIFAs with nine countries primarily from Africa and Latin America.³⁴⁴ • Although novel, these models are innovative and practical solutions for investment facilitation, creating an investor friendly environment. • Importantly for the purposes of this memorandum, ISDS is removed completely in favour of State to State dispute settlement and only as a last resort. 	<ul style="list-style-type: none"> • For a small State this would be advantageous because: <ol style="list-style-type: none"> 1) it allows for in a cost-effective manner of using regular diplomatic channels to settle disputes. 2) provides another layer, a barrier between the host State and investors.

³³⁸ See Berger, Gsell, and Olekseyuk, “Investment Facilitation for Development: A New Route to Global Investment Governance,” 2 - 3. Importantly, discussions have and continue to take place at the WTO as Members, both developed and developing have made calls to use the forum to develop a multilateral approach to investment facilitation. For example, a group of 70 WTO members after the 2017 Ministerial Conference in Buenos Aires signed a joint statement calling for the start of a structured discussion on investment facilitation.

³³⁹ Viera Martins, “Brazil’s Cooperation and Facilitation Investment Agreements (CFIA) and Recent Developments.”

³⁴⁰ Berger, Olekseyuk, and Gsell, “Investment Facilitation – A New Governance Approach to Promote Foreign Direct Investment for Sustainable Development.”

³⁴¹ Bernasconi-osterwalder and Brauch, “Comparative Commentary to Brazil’s Cooperation and Investment Facilitation Agreements (CIFAs).”

³⁴² Viera Martins, “Brazil’s Cooperation and Facilitation Investment Agreements (CFIA) and Recent Developments.”

³⁴³ UNCTAD, “Reforming Investment Dispute Settlement: A Stocktaking,” 12.

³⁴⁴ Berger, Gsell, and Olekseyuk, “Investment Facilitation for Development: A New Route to Global Investment Governance,” 2.



Departing from the existing ISDS system

Proposal	Considerations	Potential Benefits
<p>Replace ISDS in favour of investment facilitation provisions</p>	<ul style="list-style-type: none"> Albeit slightly outside of the scope of this memorandum, investment facilitation proposals, largely based on Brazil's CIFA³⁴⁵ have included: A joint committee of made up of treaty signatories would be created.³⁴⁶ This Joint committee is to monitor the implementation of the treaty as well as coordinate detailed investment cooperation and facilitation agendas.³⁴⁷ Having each party establish an ombudsman or “national focal point”³⁴⁸ within the government to act as one stop mechanism to provide support for foreign investors pre and post establishment. This focal point would not only provide useful streamlined information and assistance to the investor but would also investigate complaints and attempt to resolve conflicts before they get to arbitration.³⁴⁹ Formal dispute settlement would only occur at the State to State level and only after the conflict has been through the ombudsman, and the Joint Committee who are empowered to be proactive in spotting potential conflicts. Pushing for responsible business conduct. While many current BITs refrain from putting any obligations on foreign investors, Brazil's CIFA mandates that investors must contribute to sustainable development of the host and their local communities.³⁵⁰ This ranges from using local human capital to respecting the environment. Electronic streamlining and electronic governance is an important consideration for investment facilitation. It enables better transparency and a more efficient system for investors.³⁵¹ 	<p>3) Provide an alternative to ISDS that would promote greater cooperation between States and foreign investors.</p> <p>4) Fosters an environment for mutual trust and benefit that is continuous fostered and maintained.</p>

³⁴⁵ Siqueira, “What Can an Investment Facilitation Agreement at the WTO Do for Sustainable Development?,” 3.

³⁴⁶ Armand De Mestral ‘The Impact of Investor-State Arbitration on Developing Countries’, Centre for International Governance Innovation, 2017. <https://www.cigionline.org/articles/impact-investor-State-arbitration-developing-countries>.

³⁴⁷ Bernasconi-Osterwalder and Brauch Dietrich, “Brazil’s Innovative Approach to International Investment Law.”

³⁴⁸ See Siqueira, “What Can an Investment Facilitation Agreement at the WTO Do for Sustainable Development?,” 2. Interestingly, National Focal Points in investment facilitation, are largely borrowed from trade agreements. They are largely based on the enquiry points established in Trade Facilitation Agreements.

³⁴⁹ While part of the government, the ombudsman would have to be independent, and properly insulated to avoid corruption.

³⁵⁰ Bernasconi-Osterwalder and Brauch Dietrich, “Brazil’s Innovative Approach to International Investment Law.”

³⁵¹ Siqueira, “What Can an Investment Facilitation Agreement at the WTO Do for Sustainable Development?,” 4.



Departing from the existing ISDS system

<u>Proposal</u>	<u>Considerations</u>	<u>Potential Benefits</u>
State-to-State Dispute Settlement	<ul style="list-style-type: none"> Settling disputes State to State is also an avenue available to small States in lieu of ISDS. It also provides a jurisdictional layer between the State and the investor. This proposal however does risk becoming intertwined with the already political international arena. Small States undertaking this avenue must consider whether swapping out an investor for a State which has its own concerns is worth the added barrier. Small States lacking international political clout may be even further leveraged against when an investment dispute becomes a diplomatic dispute. 	<ul style="list-style-type: none"> Reduce cost in terms of bringing a claim but also in relation to the compensation awarded. Domestic damages are significantly less than international damages. More presentation of the small State perspective
Settlement of disputes through domestic courts	<ul style="list-style-type: none"> A further alternative to ISDS for small States is to settle disputes in the domestic courts and through alteration to existing domestic regulation. While ISDS may have been required to provide a level of confidence in small States to foreign investors looking to invest in the mid to late 20th century, it may not be entirely necessary. Reliable dispute settlement is only one aspect of obtaining FDI. Rather than signing onto compromising ISDS provisions, small States may want to focus on strengthening the existing institutions. An investor friendly environment can be created via the legislative and constitutional avenues already in place. This can be practically facilitated by removing visa requirements, strengthening Intellectual property rights, and tax incentives, <i>inter alia</i>. These acts will build up confidence in the host State negating what was assumed to be the primary incentive for ISDS. 	<ul style="list-style-type: none"> Practical and cost effective.



Chapter Four: Conclusions and Recommendations

This memorandum has endeavoured to explore the unique position of small States in the WTO's DSS and ISDS. The rationale for this undertaking was to provide tangible and concrete proposals to improve their participation in the systems. These proposals should serve as a catalyst for further discussions on small State participation by small State groupings. Both the ISDS and WTO's DSS have been the subject of intense review and criticism. This has resulted in demands for reformation of the systems by both small and large States. Furthermore, with the world coming to grips with the realities of a global pandemic and the resultant economic uncertainty, the need to have effective international systems in place to maintain the rule of law becomes urgent. This unique time is the perfect platform for small States to place their challenges and solutions. Yet none of the small States in CARICOM are actively involved in the WTO or ISDS reform discussion, which is a major problem

Based on our work, a number of common barriers have been identified, and recommendations made, to improve the experience of small States in ISDS and WTO DSS.

First, both the WTO and ISDS systems require costly undertakings to ensure effective participation. The experience of States like Barbados, St Lucia, Grenada and Belize in ISDS illustrates how the exorbitant costs of defending cases can nullify the benefits of encouraging FDI. Small States are under resourced and as such this poses as a constraint to its participation. Small States should make use of all opportunities presented to subsidize costs to participation. This includes making use of ACWL and WTO opportunities and advocating for an Advisory Centre on International Investment Law (ACIIL).

Secondly, participation in the system is human resource intensive. The DSP requires significant resources, time and access to large amounts of information. Small states have limited capacity at the domestic and international levels to effectively dedicate the human resources necessary for effective participation. Small States should firstly, make effective use of the trade and investment experts that are already available by creating opportunities and incentives for them to fully utilise their skills in the systems. Secondly, small States should utilise ACWL training opportunities and again, advocate for the ACIIL in the investment regime. They should also utilise other international and regional opportunities to develop resources in the fields. Pooling of resources as a region is also key to developing skilled human resources.



Third, small States have difficulties when attempting to actualize favourable outcomes or gains in both systems where rulings are made in their favour. In the WTO's DSS, the self-enforcing nature of remedies means that small States need to have the economic and political power to ensure that the respondent party complies. Small States lack this power and as such cannot enforce compliance. Antigua's experience in the *US-Gambling* case now stands as a cautionary tale as to date, Antigua has been unable to gain compliance from the WTO's ruling. Small States should coordinate and submit proposals for the introduction of new remedies that could allow small States to benefit from successful rulings.

Fourth, small States are highly underrepresented in both systems in the capacities of panelists, AB members and as ISDS arbitrators. Small States should be more active in nominating its experts in the fields for the positions of panelists, AB Members and as third parties in the WTO's DSS as well as opting for shared representation at the international level. Small States should also coordinate to ensure that the arbitrators chosen either in *ad hoc* processes or in a permanent tribunal come from their States, so that their perspective can be accounted for in the ISDS.

Fifth, in the context of the current reform efforts, small States must engage in the discussions taking place. Currently, there are reform discussions and proposals being submitted by numerous states in both dispute settlement systems. UNCTAD working group three has created a great platform for States to voice their concerns and has also triggered rule amendment in ICSID, in the context of ISDS. The WTO is also in a transitory state with several states advocating for reform of the system in light of the AB crisis and other general deficiencies in the system. It is time for small States to join the conversation actively and make sure that they are counted in these negotiations. To date, their voice has not been heard in either of these processes for reform.

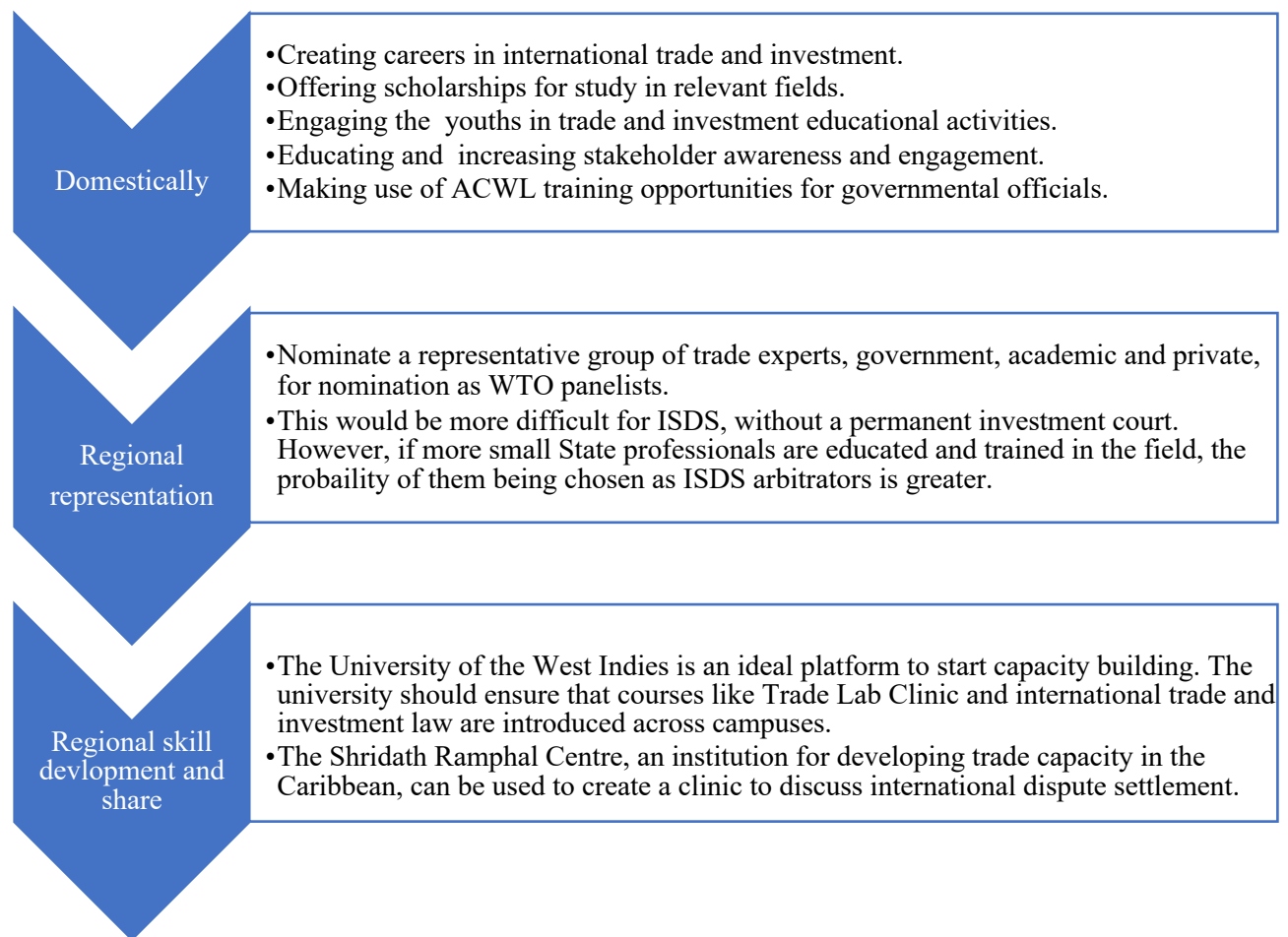
Key Areas

i. Capacity Building

Capacity building is one of the most important areas small States must invest in. Regardless of whether the entire international trade and investment regimes are complete changed, have minor reformulations or remain the same, small States must participate in the system. Professionals in small States need to be trained to operate and take advantage of the constantly changing 21st Century trade and investment regimes.



Otherwise small States will be left behind and continuously at a disadvantage. Limited resources due to restrictive land-based resources means that human capital development is of prime importance to small States. The stakeholders in these nations must really focus on what can be done at the domestic and regional level to strategically develop their human resource in these fields. It is imperative that small States ensure have trained personnel at various levels with the capacity to navigate both international systems. This include capacity building in all areas that touch and concern trade and investment so that small States are not only equipped to deal with disputes but also knowledgeable enough about the international regimes to prevent disputes from arising. In the CARICOM region the University of the West Indies should be utilised by the Member States as a tool to facilitate the development of expertise in the relevant areas.

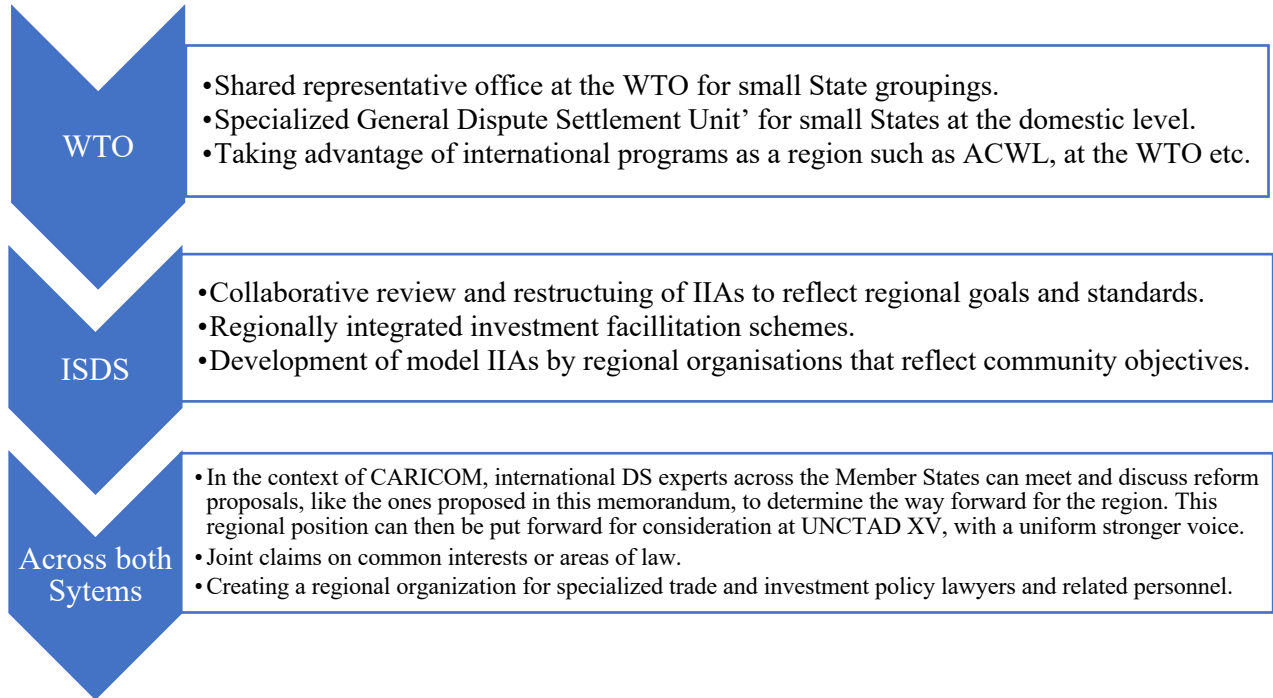


Infographic 1 Available capacity building initiatives



ii. Regionalism

To ensure that small States have a voice in the international arena, they need to first recognise that their inherent characteristics results in them having little influence as individual States at international levels. This is why regional integration and collaboration is key. Through regional integration and cooperation small States can combine their experiences, resources and facilitate skill sharing to strengthen their voices. Integration and cooperation at the regional level is the most effective means for small States to enhance their influence at the international level and, consequently, to successfully implement initiatives at the domestic level. CARICOM initiatives like the regional investment code and investment clauses templates are great examples regional tools that should be promoted and utilised by small States to improve individual participation in the international investment regime. In terms of the WTO, CARICOM should look for ways to deepen their level of integration so that Caribbean regionalism is relevant at the multilateral level. This memorandum acknowledges that harmonious integration among States may be time consuming and difficult to achieve. While small States demonstrably face similar challenges, regional cooperation would require States to relinquish some political autonomy and sovereignty which may be a difficult undertaking. While regionalism is a key factor in the success of some of these reform proposals, harmonious collaboration among states is perhaps an even more arduous task.



Infographic 2 Areas for regional reform

Finally, we recommend that more awareness and greater acknowledgement of the deficiencies that small States face in dispute settlement regimes at the WTO and under IIAs be generated in the Caribbean region and among the international community. It is our modest hope, that through this initial work and research, we will begin the conversation on how overcoming these obstacles can be best achieved.



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