

# ARAB COUNTRIES' (UNDER) PARTICIPATION IN THE WTO DISPUTE SETTLEMENT MECHANISM

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## I INTRODUCTION

The World Trade Organization (WTO) commenced on January 1, 1995, after the General Agreement on Tariffs and Trade (GATT) 1947 was the principal multilateral agreement regulating trade among nations by reducing tariffs.<sup>1</sup> The signing of the Final Act Embodying the Results of the Uruguay Round of Multilateral Negotiations formally established the WTO.<sup>2</sup> The Final Act was the culmination of the negotiations launched in Punta del Este, Uruguay in September 1986.

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<sup>1</sup> See *General Agreement on Tariffs and Trade*, opened for signature 30 October 1947, 55 UNTS 187 (entered into force 1 January 1948). See also Jalil Kasto, *The Function and Future of the World Trade Organization: International Trade Law between GATT and WTO* (Kingston, 1996) 4.

<sup>2</sup> 'Over 100 Nations Sign GATT Accord to Cut Barriers to World Trade' (1994) 11 *International Trade Reporter (BNA)* 61.

Unlike the GATT 1947, the WTO is recognised as an organisation.<sup>3</sup> In addition, while the GATT 1947 covered trade in goods only, the WTO covers trade in services and intellectual property.<sup>4</sup> The WTO secures the smooth flow of trade among nations, settles trade disputes among governments and organises trade negotiations.<sup>5</sup> The WTO acts as both a forum for negotiating international trade agreements and the monitoring and regulating body for enforcing the agreements. Decision-making in the WTO is primarily by consensus.<sup>6</sup>

WTO binding disputesettlementprocedures, through Dispute Settlement Understanding (DSU), replaced the weaker dispute settlement process that had existed under GATT.<sup>7</sup> One principal criticism of GATT was that its dispute settlement mechanism was ineffective. For example, under GATT, dispute panels handed down

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<sup>3</sup> The WTO consists of primary and subsidiary organs. The four primary organs are the Ministerial Conference, the General Council, the Secretariat, and the Director General. The subsidiary organs of the WTO are the Council for Trade in Goods, the Council for Trade in Services, the Council for TRIPS, the Committee on Trade and Development, and the Committee on Budget, Finance, and Administration.

<sup>4</sup> See Asif H. Quaeshi, *The World Trade Organization - Implementing International Trade Norms* (Manchester University Press, 1996) 5.

<sup>5</sup> The WTO agreement contained in approximately 23,000 pages of agreements that incorporate, by reference, the GATT 1947, amendments to the GATT made in 1994 (GATT 1994), 17 multilateral agreements, four plurilateral agreements, Ministerial Decisions and Declarations. The WTO agreements regulate tariffs on trade in manufactured goods and agriculture, services, intellectual property, food, customs, dispute settlement system, and government procurement. Special provisions for developing nations include longer time periods for implementing agreements and commitments, special measures to increase trading opportunities for these countries, provisions requiring all WTO members to safeguard the trade interests of developing countries, and technical assistance and support to help developing countries build their infrastructure: Quaeshi, above n 4, 5.

<sup>6</sup> See Anna Lanoszka, 'The Promises of Multilateralism and the Hazards of 'Single Undertaking': The Breakdown of Decision Making Within the WTO' (2008) 16(3) *Michigan State Journal of International Law* 655, 662-663.

<sup>7</sup> See *Marrakesh Agreement Establishing the World Trade Organization*, opened for signature 15 April 1994, 33 *International Legal Materials* 1125 (entered into force 1 January 1995), Annex 2 ('Understanding on Rules and Procedures Governing the Settlement of Disputes').

findings that had to be accepted by both sides and the other Contracting Parties before they were adopted. Refusal by one Contracting Party such as the losing party meant that a panel report was simply set aside.<sup>8</sup> Thus, in effect, under the GATT dispute settlement mechanism, the losing party in a dispute could block the adoption of a panel ruling. The WTO created a more potent dispute settlement process than had existed previously. The DSU established firm deadlines to file initial submissions, appeals, and enforce rulings.<sup>9</sup> Also, the DSU rules govern notice, consultations, discovery, panel establishment and proceedings, and report circulation. Furthermore, the DSU set up a permanent Appellate Body to review appeals of panel decisions. Throughout its existence, the DSU has proved its efficiency in settling disputes between WTO members covering a whole range of WTO agreements. As such, the dispute settlement of the WTO and its Appellate Body has been described as the crown jewel of the WTO legal system.<sup>10</sup>

The WTO dispute settlement system has been in effect for nearly 17 years. Over the span of that period, a total of 130 cases have been decided by the WTO.<sup>11</sup> Of those 130 cases, no Arab country has ever initiated a case before a panel as a complainant,<sup>12</sup> and Egypt has been the only Arab country that was a respondent in a case.<sup>13</sup> Arab countries find themselves at a disadvantage when it comes to effectively litigating trade disputes before dispute settlement panels

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<sup>8</sup> See Michael Patrick Tkacik, 'Post-Uruguay Round GATT/WTO Dispute Settlement: Substance, Strengths, Weaknesses, and Causes for Concerns' (1997) 9 *International Legal Perspectives* 169, 175.

<sup>9</sup> See Aaron Catbagan, 'Rights of Action for Private Non-state Actors in the WTO Dispute Settlement System' (2009) 37(2) *Denver Journal of International Law and Policy* 279, 280.

<sup>10</sup> See Robert Howse, 'Process and Procedure in WTO Dispute Settlement: Moving the WTO Forward - One Case at a Time' (2009) 42(2) *Cornell International Law Journal* 223, 224.

<sup>11</sup> See Len Bracken, 'WTO Dispute System at Record Level of Activity, Wilson Says, Predicts AB Surge' *International Trade Reporter (BNA)* 27, 6 May 2010, 660.

<sup>12</sup> See *Overview of the State of Play of WTO Disputes – Addendum*, WTO Doc WT/DSB/49/Add.1, (11 May 2009) (Dispute Settlement Body Annual Report).

<sup>13</sup> See Panel Report, *Egypt-Definitive Anti-Dumping Measures on Steel Rebar from Turkey*, WTO Doc WT/DS211/R (8 August 2002).

and securing remedies against other WTO member states. Without Arab countries participation in the WTO dispute settlement system, it can be suggested that they may not know the law and therefore cannot avoid future disputes. Arab countries ought to participate in the dispute settlement system and act more assertively, as these are perhaps the best methods to gain expertise in winning disputes.

Under-representation by Arab countries in the WTO dispute settlement process is a danger to the long-term legitimacy and credibility of the WTO. The WTO is more than a table for trade negotiations among its members. The WTO also aims to achieve free trade and economic development.<sup>14</sup> If the WTO intends to achieve its stated principles, then it should be aware of inequities in the dispute settlement process and treatment of Arab countries. Developed countries should also work toward resolving the problems that prevent Arab countries from making use of the dispute settlement mechanism.<sup>15</sup> Utilisation of the WTO dispute settlement process would give Arab countries "renewed" faith in the WTO system.<sup>16</sup> In sum, the proper functioning of the dispute settlement mechanism is in the interest of all WTO members.

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<sup>14</sup> See Tomer Brode, 'The Rule(s) of Trade and the Rhetos of Development: Reflections on the Functional and Aspirational Legitimacy of the WTO' (2007) 45(1) *Columbia Journal of Transnational Law* 221, 232-234.

<sup>15</sup> See Thaddeus McBride, 'Rejuvenating the WTO: Why the US Must Assist Developing Countries in Trade Disputes' (1999) 11 *International Legal Perspectives* 65, 95. See also Andrea Greisberger, 'Enhancing the Legitimacy of the World Trade Organization: Why the United States and the European Union Should Support the Advisory Centre on WTO Law' (2004) 37(3) *Vanderbilt Journal of Transnational Law* 827, 855.

<sup>16</sup> See Raj Bhala, 'Discovering Great Opportunity in the Midst of Great Crisis: Building International Legal Frameworks for a Higher Standard of Living: Doha Round Betrayals' (2010) 24(1) *Emory International Law Review* 147, 181 (the initial goal for the WTO Doha Round was to boost trade with Arab countries, one that regrettably has been lost. The December 2008 draft modalities text is silent about the Arab world. There is the perception among Arab countries that the Round does little to address their serious problems. As such, Arab countries are in special need of integration into the GATT-WTO order).

The purpose of the present article is two-fold. First, the article examines the reasons as to why Arab countries do not actively participate in WTO dispute settlement proceedings.<sup>17</sup> Trade volume, lack of technical expertise, financial strains, political relations, enforcement, and language problems each play a role in Arab countries under-participation and are discussed herein. Second, the article provides possible avenues through which Arab countries can enhance their presence in the WTO dispute settlement process. In the process of examining these issues, the article highlights the case(s) in which Arab countries participated in the WTO dispute settlement system. However, before addressing these issues, the article will briefly discuss the development of the WTO dispute settlement mechanism.

## II DEVELOPMENT OF THE WTO DISPUTE SETTLEMENT

When the attempt to create an international trade organisation in the late 1940s failed, the successfully-negotiated trade agreement, the GATT, was left without a well-defined institutional structure. The death of the International Trade Organization was attributed to the domestic political situation in the US.<sup>18</sup>

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<sup>17</sup> The list of Arab countries includes: Algeria, Bahrain, Comoros, Djibouti, Egypt, Iraq, Jordan, Kuwait, Lebanon, Libya, Mauritania, Morocco, Oman, Palestinian Authority, Qatar, Saudi Arabia, Somalia, Sudan, Syria, Tunisia, United Arab Emirates, and Yemen. See Arab League, *Member States* <[http://www.arableagueonline.org/wps/portal/las\\_en/inner](http://www.arableagueonline.org/wps/portal/las_en/inner)> at 6 January 2012.

<sup>18</sup> The Truman administration confronted a new protectionist and isolationist Republican Congress. The US refused to join the International Trade Organization because of perceived threats to national sovereignty and the danger of too much intervention in markets. Congress feared that the International Trade Organization would be too much supranational. It was feared that there would be double delegation of power from Congress to the US President and from the President to an international organisation, thereby usurping the functions of Congress. In addition, the US Congressional support for the organisation was conditioned on dismantling of the British Imperial Preference system (Commonwealth system) devised at the Ottawa Conference in 1932; a system which was enacted partly in response to the US Smoot-Hawley Act, because, as the US contended, it contravened the most-favored-

Only a few articles with regard to dispute settlement were contained in the original GATT, most of which are centered on article XXIII. That article states that a member country may request consultations with another member country should it consider that the other member country's trade measure may lead to the nullification or impairment of its own expected benefit. Despite the rather skeletal framework of article XXIII, dispute settlement in the early stages of the GATT worked rather well, partially due to its small and homogenous membership.<sup>19</sup> Since its inception in 1947, the GATT evolved into a comprehensive framework of international trade laws as it exists today under the WTO. In 1995, the WTO was established following the completion of the Uruguay Round negotiations and the new dispute settlement procedures under the WTO altered several features of the previous GATT mechanism.

The creation of the DSU is a substantial step in the gradual shift from a diplomatic and power-based approach in the settlement of international disputes to a more legalistic, law-based approach.<sup>20</sup>

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nation rule. Because of the British Commonwealth system, US economic interests were excluded from the British market and its satellite countries or dominions, such as South Africa, Canada, and India. The British refused to yield their position unless they received assurances from Congress to lower American tariffs. However, the US administration did not lower its tariffs and stood for its pledge to Congress by dismantling the British Commonwealth system. The linkage between the most-favored-nation rule and the Commonwealth system was a factor for loss of support for the International Trade Organization. See George Bronz, 'An International Trade Organization: The Second Attempt' (1956) 69(3) *Harvard Law Review* 440, 447-449, 473-476.

<sup>19</sup> See Rachel Brewster, 'Shadow Unilateralism: Enforcing International Trade Law at the WTO' (2009) 30(4) *University of Pennsylvania Journal of International Law* 1133, 1136.

<sup>20</sup> Countries advocating the pragmatic approach, highlighted the ambiguity of GATT rules, the political sensitivity of trade disputes, and the complex trade-offs of competing interests that go into the formulation of any trade rule. Thus, those countries argued that GATT dispute resolution should not be formal, legal, or adjudicatory. See David K. Tarullo, 'Logic, Myth and International Economic Order' (1985) 26 *Harvard International Law Journal* 533. On the other hand, The US argued that the GATT rules will become more clear and predictable if the GATT dispute resolution is characterised by rule-based decisions rendered through an adjudicatory dispute resolution process. The adjudication approach will increase compliance with the GATT standards and will alleviate protectionist pressures. See John H. Jackson, William J. Davey

Dispute settlement procedures are central in the WTO's mechanisms designed to ensure the reduction of tariffs and non-tariff barriers to trade as well as the elimination of discriminatory treatment in trade relations.

The WTO dispute settlement is administered by a Dispute Settlement Body (DSB) which consists of the WTO's General Council. Among its powers, the DSB has the authority to establish panels, adopt panel and Appellate Body reports, maintain surveillance of implementation of rulings and recommendations, and authorise suspension of concessions and other obligations under the WTO agreements.<sup>21</sup> The dispute settlement system aims to resolve disputes by clarifying the rules of the multilateral trading system.<sup>22</sup> The WTO cannot legislate or directly promulgate new rules or regulations without explicit WTO member consent.

When a WTO member believes that another member has taken an action that impairs benefits accruing to it, both directly or indirectly, under the Uruguay Round Agreements, it may request consultations to resolve the conflict through informal negotiations.<sup>23</sup> The consultations procedure is a mandatory first step to the WTO dispute settlement process and is codified and further developed by the DSU. The DSU requires written requests for consultations clearly stating reasons for the request, the legal basis for the complaint and an explanation of the measures in question.<sup>24</sup> Consultations aim at assisting disputing members to reach a mutually agreed solution; however, consultations must be conducted

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and Allan O. Sykes, *Legal Problems of International Economic Relations: Cases, Materials, and Text on the National and International Regulation of Transnational Economic Relations* 339 (West Publication Co., 1995). See also Michael K. Young, 'Dispute Resolution in the Uruguay Round: Lawyers Triumph over Diplomats' (1995) 29(5) *International Lawyer* 389, 392-405.

<sup>21</sup> See Webb McArthur, 'Reforming Fairness: The Need for Legal Pragmatism in the WTO Dispute Settlement Process' (2010) 9(2) *Richmond Journal of Global Law and Business* 229, 232.

<sup>22</sup> See *Marrakesh*, above n 7, article 11.

<sup>23</sup> *Ibid* article 4.3.

<sup>24</sup> *Ibid* article 4.4.

in good faith before resorting to further action available to members under the DSU.

The DSU requires a member to respond to a request for consultations within 10 days, and the member is further required to engage in consultations within 30 days.<sup>25</sup> In the event that consultations after 60 days from the receipt of the request fail to yield outcomes that are mutually agreeable, members may request the establishment of a panel to resolve the dispute.<sup>26</sup> The consultation process is conducted without prejudice to the rights of any member in relation to the panel process and DSU.

Panels generally consist of three individuals with expertise in international trade law and policy.<sup>27</sup> These panelists hear and consider the evidence and then provide the DSB with a report which recommends a course of action within six months.<sup>28</sup> The DSB either adopts the report or decides by consensus not to accept it.<sup>29</sup> Alternatively, if one of the parties involved decides to appeal the decision, the report will not be considered for adoption until the completion of the appeal by the standing Appellate Body.<sup>30</sup> An Appellate Body report is adopted unconditionally unless the DSB votes by consensus not to accept its findings within 30 days of circulation to the membership.

The WTO Secretariat manages a list from which panel members are selected. The DSU contains detailed rules on the composition of panels and clarifies necessary steps and the role of the WTO Director General should parties fail to agree on the panel's composition.<sup>31</sup> Under the GATT dispute settlement system, only government officials served on panels; however, today the WTO

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<sup>25</sup> See *Marrakesh*, above n 7, article 4.4.

<sup>26</sup> *Ibid* article 4.7.

<sup>27</sup> *Ibid* article 8.1.

<sup>28</sup> *Ibid* article 12.7-8.

<sup>29</sup> *Ibid* article 16.4.

<sup>30</sup> *Ibid*.

<sup>31</sup> *Ibid* article 8.4, 7.

allows well-qualified non-government individuals to serve on a panel. The DSU forbids a potential panel member from serving on a panel if he or she is a citizen of a party to the dispute, or a citizen of a third party, unless the parties agree otherwise.<sup>32</sup>

The WTO panel process consists of two sets of submissions, two sets of rebuttals, two oral hearings, with accompanying questions and answers throughout, before the panel makes its interim report to the parties.<sup>33</sup> Thus, all evidence in the case is submitted and evaluated before any interim findings of fact, applicable law, or WTO violations are made by the panel.

As stipulated in DSU, a WTO panel is required to make an objective assessment of the matter before it, including an objective assessment of the facts of the case and the applicability of, and conformity with the WTO covered agreements.<sup>34</sup> Therefore, like any tribunal of first instance, WTO panels make findings of fact, applicable law, and, applying such law to the facts, violations of law. Appeals are limited to issues of law covered in the panel report and legal interpretations adopted by the panel.<sup>35</sup> The panel's findings on factual issues thus escape from appellate review. The appellate review process is limited to upholding, modifying or reversing the panel's legal findings and conclusions. The possibility of remanding a case to the panel is not provided for.

### III ARAB COUNTRIES AS COMPAINANTS OR RESPONDENTS

In the GATT, Arab countries wereseldom involved in disputes. In fact, in only one dispute was an Arab country involved as a main part, in other words as a complainant or respondent. The one country

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<sup>32</sup> See *Marrakesh*, above n 7, article 8.1.

<sup>33</sup> *Ibid* article 15.1.

<sup>34</sup> *Ibid* article 11.

<sup>35</sup> *Ibid* article 17.6.

was Egypt. The case concerned definitive anti-dumping measures imposed by Egypt on imports of concrete steel reinforcing bar (rebar) from Turkey.<sup>36</sup> Egypt divided foreign exporters for the purposes of an anti-dumping investigation into cooperative and non-cooperative companies. The whole case revolved around the relationship between what an investigating authority is obligated by the anti-dumping agreement to do in regards to procedural issues in an anti-dumping investigation, and what interested parties must themselves contribute in the way of evidence and argument. The panel found Egypt acted consistently with its obligations under the agreement in some parts. However, the panel decided that Egypt acted in violation of the agreement because the investigating authority had ‘examined’ all the relevant economic factors in article 3.4 of the anti-dumping agreement without ‘evaluation’ of these factors.<sup>37</sup> The panel also found that in respect of two Turkish companies (Icdas and IDC) out of five companies in the investigation, the Egyptian authority did not provide the two with ample opportunity to defend themselves and inform them that their submissions were being rejected, though they submitted, under article 6.8, all the necessary requested information.<sup>38</sup>

Egypt was also a respondent in three other cases.<sup>39</sup> Consultations between Egypt and the other parties in those cases within the WTO framework were successful in ending the disputes in question. Thus, Egypt's case with Turkey regarding the former imposition of a definitive anti-dumping measure on imports of steel rebar from the latter stands as the only case involving Arab country that went through all stages of WTO dispute settlement proceedings ending in a panel report.

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<sup>36</sup> See Panel Report, *Egypt-Definitive Anti-Dumping Measures on Steel Rebar from Turkey*, above n 13.

<sup>37</sup> Ibid [7.42-45].

<sup>38</sup> Ibid [7.252-266].

<sup>39</sup> See *Egypt-Import Prohibition on Canned Tuna with Soybean Oil from Thailand*, WTO Doc WT/DS205 (22 September 2000) (Request for Consultations by Thailand); *Egypt-Measures Affecting Imports of Textile and Apparel Products*, WTO Doc WT/DS305, (23 December 2003) (Request for Consultations by the United States); *Egypt-Anti-dumping Duties on Matches from Pakistan*, WTO Doc WT/DS327, (21 February 2005) (Request for Consultations by Pakistan).

Egypt has been active in this process, having been challenged on four occasions. No Arab country, however - including Egypt - has ever been a complainant. Obviously, Egypt, among all other Arab countries, is the most experienced in the WTO dispute settlement mechanism. The reason for this lies in the fact that Egypt has been a GATT/WTO member for a long time, unlike many other Arab countries whose membership is relatively recent (e.g. Saudi Arabia and Jordan). Despite this, Egypt's expertise in the WTO dispute settlement process is still lacking. For example, in the Egypt-Turkey anti-dumping case in which Egypt presented an excellent argument, Egypt's counsel was the law firm of Van Beal and Bellis of Brussels, Belgium, and not a local firm.<sup>40</sup> Dependence on foreign law firms could diminish as Arab countries develop in-house expertise.

#### IV CHALLENGES OF PARTICIPATION IN THE WTO DISPUTE SETTLEMENT MECHANISM

Lack of effective participation in the WTO dispute settlement process by Arab countries may indicate that they are not rule breakers. However, this is only part of the truth. Arab countries face several challenges that weigh on their choice whether or not to bring an action before the WTO. Among the challenges are total trade volume, lack of technical expertise and financial resources, political pressure and power relations, and cultural attitudes toward judicial settlement of disputes. Arab countries seem to have most of the same problems as other developing country members, but they suffer from more serious issues such as trade marginalisation, and their efforts to develop well-trained trade lawyers have lagged behind developing countries in Latin America and parts of Asia.<sup>41</sup> These challenges will be addressed herein, respectively.

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<sup>40</sup> See The European Commission, *Internet Chat with E.U Commissioner Pascal Lamy and Egyptian Trade Minister Youssef Boutros-Ghali, New WTO Round: Talking Trade-What's Going on?* (13 November 2002) <[http://europa.eu.int/comm/chat/lamy9/index\\_en.htm](http://europa.eu.int/comm/chat/lamy9/index_en.htm)>.

<sup>41</sup> See Bhala, above n 16, 180.

### A *Trade Volume*

Arab countries' minimal involvement in the WTO dispute settlement proceedings may be attributed to the modest level of their contribution to world investment and trade. Foreign investment in Arab countries is miniscule.<sup>42</sup> Over the years, Arab countries have experienced a 75 percent drop in its share of world export since 1980.<sup>43</sup> In addition, Arab countries are not significant exporters as they account for only about one percent of world exports of manufactured goods.<sup>44</sup> Arab countries account for approximately 20 percent of world fuel and mining exports.<sup>45</sup> Thus, Arab countries account for less than five percent of total world exports. Although oil is considered a major export for Arab countries, it is a product barely addressed by the WTO.<sup>46</sup> This state of affair makes Arab countries less accessible to dispute cases as either complainants or respondents.

However, low level of trade is by no means a completely valid barrier to WTO litigation. Argentina, for example, which accounts for only 0.6 percent of world trade, is one of the most challenged

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<sup>42</sup> See Gary G. Yerkey, 'US Trade Policy Overlooks Middle East Region, Could Hurt War on Terrorism, PPI Study Says' (2003) 20 *International Trade Reporter (BNA)* 323. (The entire Arab world received only \$13.6 billion in FDI, barely more than Sweden all by itself).

<sup>43</sup> *Ibid.*

<sup>44</sup> See World Trade Organization, *International Trade Statistics* (2011) <[http://www.wto.org/english/res\\_e/statis\\_e/its2011\\_e/its11\\_toc\\_e.htm](http://www.wto.org/english/res_e/statis_e/its2011_e/its11_toc_e.htm)>.

<sup>45</sup> *Ibid.*

<sup>46</sup> Since the GATT came into existence in 1947, there has been an informal understanding among contracting parties not to subject oil to multilateral tariff concessions negotiations. Some of the theoretical reasons for the apparent ambivalent attitude of contemporary international trade regime to oil trade include the definition of energy as good or service which in itself is not without controversy, location of energy at the heart of government economic thinking, and oil as a vital national asset not to be left to free international trade trajectories. See Francis N. Botchway, 'International Trade Regime and Energy Trade' (2001) 28(1) *Syracuse Journal of International Law and Commerce* 1, 11, 12.

nations before the WTO, after the US and the EU.<sup>47</sup> In addition, although Brazil accounts for about one percent of world trade, it has participated in 89 WTO cases heard thus far.<sup>48</sup> India is also an active participant in the WTO dispute settlement cases despite the fact that its share of world trade is under 0.8 percent.<sup>49</sup>

As Arab countries continue opening their markets, integrating fully into the world trading system, and increasing their economic output and growth, participation in the WTO dispute settlement proceedings will likely become an essential part of their trade policies. Such increase in economic growth and trade relationships would significantly increase the probability of frictions arising as a result of trade barriers, which exporting Arab countries may be willing to challenge in dispute settlement.

#### B *Lack of Technical Expertise and Financial Resources*

Another reason that Arab countries are not frequent users of the WTO dispute settlement system is a lack of expertise and knowledge of complicated WTO law with some complaints crossing between several WTO agreements. Bringing a case before a WTO panel is an extensive exercise that requires presenting evidence, preparing commercial data - which in some instances may not be provided by the other party involved in the dispute meaning that it must be obtained from other sources - studies, econometric modeling, and substantial documentation.<sup>50</sup> Moreover, under the WTO dispute settlement mechanism, the use of experts has become much more

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<sup>47</sup> See WorldTradeLaw.net, *List of WTO Complaints Brought Pursuant to the DSU* (14 January 2012) <<http://www.worldtradelaw.net/dsc/stats.htm>>.

<sup>48</sup> See Mesut Aydin, *WTO Dispute Settlement Mechanism and Developing Countries: Lessons for Turkey* (LLM Thesis, Fletcher School of Law and Diplomacy, 2007) 28 <[http://www.ekonomi.gov.tr/upload/BF09AE98-D8D3-8566-4520B0D124E5614D/Mesut\\_Aydin.pdf](http://www.ekonomi.gov.tr/upload/BF09AE98-D8D3-8566-4520B0D124E5614D/Mesut_Aydin.pdf)>.

<sup>49</sup> Ibid.

<sup>50</sup> See Gregory Shaffer, 'The Challenges of WTO Law: Strategies for Developing Country Adaptation' (2006) 5(2) *World Trade Review* 177, 182.

common.<sup>51</sup> In sum, launching a WTO case requires preparatory work in addition to the evolving need to present evidence, testimony, and economic data during litigation. With the lapse of time and the growing knowledge of the WTO law, one might expect Arab countries to use the WTO dispute settlement system more frequently.

Linked with the issue of technical expertise is that of the availability of competent staff. A major hindrance facing Arab countries full participation in the work of the WTO is insufficient human resources. Arab countries representation in the WTO is limited to a single or a handful of officials. Moreover, delegations of Arab countries in Geneva do not cover the work of the WTO exclusively, but they also participate in other Geneva-based organisations such as the United Nations and its specialised agencies including the United Nations Conference on Trade and Development, World Intellectual Property Organization, International Telecommunication Union, and International Organization for Standardization. Egypt, with its ten professional staff members, has the largest delegation among Arab countries.<sup>52</sup> The number of professional staff in Geneva-based WTO delegations for other Arab countries is: Bahrain - two; Djibouti - one; Jordan - two; Kuwait - two; Morocco - three; Mauritania - two; Oman - three; Qatar - one; Saudi Arabia - three; Tunisia - two; and United Arab Emirates - three.<sup>53</sup> Furthermore, an issue may arise in the future if poor Arab countries such as the Sudan and Somalia accede to the

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<sup>51</sup> See Joost Pauwelyn, 'The Use of Experts in WTO Dispute Settlement' (2002) 51 *International and Comparative Law Quarterly* 325.

<sup>52</sup> Egypt is one of a handful of Arab countries within the WTO that has an ambassador in Geneva appointed by the Ministry of Foreign Affairs and a trade mission, located in different premises in Geneva, whose staff are appointed by the Ministry of Trade and headed by a minister plenipotentiary. The two ministers and missions have divergent views on trade that lead to internal as well as external conflicts. See Fatoumata Jawara and Aileen Kwa, *Behind the Scenes at the WTO: The Real World of International Trade Negotiations* (Zed Books, 2003) 21, 171.

<sup>53</sup> Fakhry Hazimeh, Director of Economic Bureau, Permanent Mission of Jordan, Geneva, Switzerland provided information on Bahrain, Djibouti, Kuwait, Morocco, Oman, Saudi Arabia, Tunisia, and UAE (December 22, 2011) (on file with author).

WTO as they may not have the capabilities to have fully-fledged delegations in Geneva, one of the world's most expensive cities.

Being small in size is only one part of the equation. The other interlinked part is having skilled and versatile WTO delegations. Many of the trade representatives in Arab delegations attend numerous daily meetings - often taking place at the same time - without the ability to develop, much less maintain mastery knowledge.<sup>54</sup> Getting to know how WTO panels hold hearings and make decisions is critical for taking advantage of the dispute settlement system. Arab countries must dedicate a small portion of their annual budgets, despite their constraints, to train their personnel if they want to take part in the WTO dispute settlement process effectively and avoid being onlookers.

Moreover, litigating a WTO case, which may take several years, is very costly. A WTO case estimated to cost roughly US\$500,000 if taken through to the Appellate Body.<sup>55</sup> This figure could be increased substantially when a private law firm is hired to litigate the case before the WTO. According to estimates, private law firms can charge anywhere from \$250 to \$1,000 per hour in fees, leading to total fees anywhere between \$100,000 to over \$1,000,000.<sup>56</sup> Furthermore, these figures increase even further in intricate cases,

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<sup>54</sup> Staffing is very critical because of the need to participate in various meetings. The WTO has 67 bodies including 34 standing bodies open to all members, 28 accession working parties, and five plurilateral bodies. In 2001, there were nearly 400 formal meetings of WTO bodies, 500 informal meetings, 90 workshops and seminars sponsored by the WTO. Officials in the South Korean delegation complain about the workload of the WTO despite the fact that they have 30 staff. See Jawara and Kwa, above n 52, 22.

<sup>55</sup> See Chad P. Bown and Bernard M. Hoekman, 'Developing Countries and Enforcement of Trade Agreements: Why Dispute Settlement is Not Enough' (2008) 42(1) *Journal of World Trade* 177, 189-192.

<sup>56</sup> See James C. Hartigan (ed), *Frontiers of Economics and Globalization: Volume 6 - Trade Disputes and the Dispute Settlement Understanding of the WTO: An Interdisciplinary Assessment* (Emerald Group Publishing Limited, 2009) 167-190.

such as Japan-Photographic Film, where legal fees charged to Kodak and Fuji were reportedly in excess of US\$10 million.<sup>57</sup>

Due to their already constrained budgets, financial investment in WTO legal proceedings by the majority of Arab countries makes no or less sense. Therefore, unless Arab countries pool their financial resources together and invest in WTO dispute settlement proceedings it could prove very difficult for a single Arab country to initiate a case on its own. Access to the pool's fund and spreading the cost among Arab countries would therefore make WTO litigation more affordable.

### C *Political Relations and Pressures*

Arab countries take political considerations into account when deciding whether or not to file a complaint. A case in point was in the US genetically modified organism (GMO) case against the EU. Egypt may have been in a Scylla and Charybdis position when it decided to settle its dispute with the EU out of court. If Egypt supported the US in the sensitive GMO case, it would have upset its relations with the EU. By the same token, if Egypt did not support the US, it would have led to a souring in trade relations between the US and Egypt.<sup>58</sup> Ultimately, Egypt chose to settle the dispute with the EU without litigation. Perhaps, without EU pressure, Egypt may have pressed ahead with the dispute against the EU.

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<sup>57</sup> Hartigan, above n 56.

<sup>58</sup> See Gary G. Yerkey and Christopher S. Rugaber, 'US and Egypt Beginning to See "Eye-to-Eye" on Need for FTA but No Talks Scheduled Yet' (2003) 20 *International Trade Reporter (BNA)*, 1145 (quoting Boutros-Gali, Egypt's [former] foreign trade minister, saying that Egypt wants to begin the [US FTA] negotiations "tomorrow". However, the US has been cold toward negotiating FTA with Egypt. Some hint that this is because Egypt withdrew its support of the US in the Genetically Modified Organism case against the EU). See also Gary G. Yerkey, 'Grassley Concerned over Egypt's Failure to Support US in WTO Case over GMOS' (2003) 20 *International Trade Reporter (BNA)*, 1110.

Political pressure applied by developed countries or a threat constitutes a deterrent for Arab countries so that they do not bring a case in the first place. For example, developed countries could threaten to withdraw preferential tariff benefits under the Generalized System of Preferences (GSP), foreign aid, or food aid were an Arab country to challenge a trade measure by the US or EU.<sup>59</sup> Political pressure of threat therefore undermines Arab countries ability to effectively participate in the WTO dispute settlement process.

#### D *Enforcement*

Like other developing countries, a potential inability of Arab countries to enforce an offending developed country's compliance may make the use of the WTO dispute settlement process less attractive.<sup>60</sup> The WTO cannot force the offending country to remove the measure or pass an order to stop the measure from running.<sup>61</sup> Rather, the WTO primarily enforces its decisions by allowing the complaining country to undertake retaliatory actions against the offending country until the latter complies with the ruling.

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<sup>59</sup> See Andrew T. Guzman and Beth A. Simmons, 'Power Plays and Capacity Constraints: The Selection of Defendants in World Trade Organization Disputes' (2005) 34(2) *Journal of Legal Studies* 557, 569.

<sup>60</sup> This does not mean that developed countries do not comply at all with WTO panel decisions. See Leah Granger, 'Explaining the Broad-Based Support for WTO Adjudication' (2006) 24(2) *Berkeley Journal of International Law* 521, 523. See also David J. Townsend, 'Stretching the Dispute Settlement Understanding: US-Cotton's Relaxed Interpretation of Cross-Retaliation in the World Trade Organization' (2010) 9(2) *Richmond Journal of Global Law and Business* 135, 153-159.

<sup>61</sup> See Suzanne Bermann, 'EC-Hormones and the Case for an Express WTO Post-retaliation Procedure' (2007) 107(1) *Columbia Law Review* 131, 138 (In comparison, US civil procedure authorises a judge to adjudicate liability, order an appropriate remedy, and enforce that order. Also, according to US civil procedures parties may be enjoined from taking certain actions; a party's non-compliance under US federal law could lead to the initiation of contempt proceedings and result in a court-imposed penalty such as fines or imprisonment).

However, adopting retaliatory trade measures against the offending country inflict more damage to the trade of the complaining country than the damage that was initially inflicted on it by the offending country.<sup>62</sup> Moreover, a developing country retaliatory measure(s) against a developed country, such as the US or EU, is highly likely to have a relatively small impact on the economies of these developed countries.<sup>63</sup> Thus, an 'eye for an eye' approach could be counterproductive especially if the winning party in the case is a developing country.

A prominent case, the European Communities-Regime for the Importation, Sale and Distribution of Bananas, sheds light on the issue of non-compliance of developed countries with WTO decisions.<sup>64</sup> In the Bananas case, the EU trade measure was found to violate WTO obligations.<sup>65</sup> However, the EU easily absorbed the impact of Ecuador's retaliation while the EU took a further 30 months to comply with the ruling after the expiry of the reasonable period of 15 months established by the dispute settlement body and easily withstood 27 months of retaliatory measures.<sup>66</sup>

To reduce the problem of enforcement, some developing countries have put forward proposals - as potential alternatives to retaliation - by introducing financial damages, collectively-imposed sanctions, or mandating that only countries that have fully complied

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<sup>62</sup> See Ruth Gordon, 'Sub-Saharan Africa and the Brave New World of the WTO Multilateral Trade Regime' (2006) 8 *Berkeley Journal of African-American Law and Policy* 79, 104. See Clint Bodien, 'Cross-Retaliation in the WTO: Antigua and Barbuda's Proposed Remedy against the United States in an Online Gambling Dispute' (2008) 14(4) *Law & Business Review of the Americas* 847, 869.

<sup>63</sup> See Gordon, above n 62, 104.

<sup>64</sup> The heart of the dispute was the competing tensions faced by the EU between its obligations under the WTO and those under the Lome Convention to maintain preferential market access for certain developing countries. See Douglas Ierley, 'Another Look at the Dispute Over Bananas' (2002) 33 *Law & Policy in International Business* 615.

<sup>65</sup> *Ibid* 629-636.

<sup>66</sup> *Ibid* 641.

with previous decisions should be permitted to bring cases in the WTO.<sup>67</sup> However, at the moment, these alternatives seem to be an unrealistic solution in light of opposition from developed countries and the fact that the Doha Round is stalled.<sup>68</sup> Until a more plausible solution is devised, developing countries, including Arab countries, may not find it sensible to spend time and cost on a complaint in anticipation of their inability to enforce even a positive panel ruling. On their part, developed countries should understand that they cannot expect to have a stable and rule-based system if they comply with WTO decision(s) when it suits them and do not comply when it does not suit.

### E *Cultural Attitude*

Arab tradition and history may reveal other reasons for the limited participation of Arab countries in the WTO dispute settlement process. The Arab culture disfavors the adversarial process of litigation. The Arabic tradition has always preferred *sulh*, which embodies the concepts of settlement and reconciliation, over formal litigation.<sup>69</sup> Even arbitration, the principal form of alternative dispute resolution, has long been viewed skeptically and with hostility.<sup>70</sup>

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<sup>67</sup> See Jide Nzelibe, 'The Role and Limits of Legal Regulation of Conflicts of Interest (Part I): The Credibility Imperative: The Political Dynamics of Retaliation in the World Trade Organization's Dispute Resolution Mechanism' (2005) 6(1) *Theoretical Inquiries in Law* 215, 228-230. See also Bernard M. Hoekman, Aaditya Mattoo, and Philip English, *Development, Trade, and the WTO: A Handbook* (World Bank Publications, 2002) 77-78.

<sup>68</sup> Hoekman, Mattoo and English, above n 67, 85-86.

<sup>69</sup> Walid Iqbal, 'Courts, Lawyering, and ADR: Glimpses into the Islamic Tradition' (2000) 28(4) *Fordham Urban Law Journal* 1035, 1037.

<sup>70</sup> See Charles N. Brower and Jeremy K. Sharpe, 'International Arbitration and the Islamic World: The Third Phase' (2003) 97(3) *American Journal of International Law* 643 (the legal community throughout the Arab world is still manifesting its hostility to transnational arbitration mainly as a result of the great publicity devoted to the criticism of certain unfortunate arbitral awards rendered by western arbitrators who excluded, with terms of a humiliating nature, the application of the national applicable legal systems of Arab countries).

Negotiations and compromises are the traditional path.<sup>71</sup> It is a question of style. The preference for *sulh* is often a reflection of larger social and cultural perceptions of conflict generally. In Arab countries, the notion of conflict typically carries a highly negative connotation.<sup>72</sup> Viewed as disruptive and dangerous to social cohesion, conflict represents something to be avoided.<sup>73</sup> Understandably, this mindset makes formal litigation an unpopular dispute resolution mechanism in Arab countries, given its inherent adversarial elements.

In other cultures, litigation is considered the preferred mode for enforcing and settling differences. Countries with more litigious domestic norms tend to file more complaints at the WTO.<sup>74</sup> The US is well-known for its litigious society having the highest number of lawyers per population.<sup>75</sup> In contrast, Arab countries have a smaller number of lawyers per population.<sup>76</sup> This is a simple indication that if a country has a high number of lawyers, that country would be inclined to be more litigious.

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<sup>71</sup> See Rosa María González Tirados, 'Negotiation. An A-Z Guide' (2010) 48(6) *Management Decision* 1023–1027 (Arabs prefer to establish personal relations and resolve issues through mediation or continued negotiation).

<sup>72</sup> See Mohammed Abu-Nimer, 'Conflict Resolution Approaches: Western and Middle Eastern Lessons and Possibilities' (1996) 55(1) *American Journal of Economics and Sociology* 35, 46.

<sup>73</sup> *Ibid.*

<sup>74</sup> See Ji Li, 'From "See You in Court!" to "See You in Geneva!": An Empirical Study of the Role of Social Norms in International Trade Dispute Resolution' (2007) 32(2) *Yale Journal of International Law* 485, 496-499, 507.

<sup>75</sup> See Khosrow Fatemi (ed), *International Trade in the 21st Century* (Elsevier Science, 1997) 227-228 (the United States leads the world by a wide margin on the total number of lawyers and lawyers per million. It is also very interesting, or perhaps frightening, to further note that 35 percent of the lawyers in the world in 1992 lived, and presumably practiced law, in the United States).

<sup>76</sup> For example, Lebanon has approximately 8000 lawyers; Morocco has 9190 lawyers; Tunisia has 2800 lawyers; and Yemen has 250 lawyers. See Omar Zain, *Study into the Status and Tools Used by Lawyers in Arab Countries* (2004) 34-35,

<<http://www.pogar.org/publications/judiciary/lawyers-study.pdf>>.

In the future, the process may become more confrontational so that the Arab countries press their interests in trade disputes. Through litigation Arab countries would send a signal to other WTO members that negotiation is one option for resolving a trade dispute, but it is not the only option. Arab countries should employ litigation and negotiation at the same time because litigation plays an important role in informing negotiations.

#### F *Other Detriments to Effective Participation*

There are other hurdles that weigh negatively on Arab countries' choice to launch a WTO case, albeit to a lesser degree if compared with the hurdles discussed earlier. One impediment relates to language issues. Currently, the WTO uses three working languages (English, Spanish, and French).<sup>77</sup> Arabic, a language spoken by 280 million people, is not an official language at the WTO.<sup>78</sup> Arab officials must work in a foreign language in WTO dispute settlement procedures. Thus, these officials can be at a linguistic disadvantage.<sup>79</sup> Even if WTO agreements are translated into Arabic, it would be difficult, if not impossible, to translate highly legalistic and technical terms into Arabic without compromising the original meanings of the words. Therefore, Arab officials would need to master WTO agreements and to do so in a foreign language, namely English.

Another hurdle is the protracted period of the WTO dispute settlement process which could last up to five years. The period

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<sup>77</sup> See World Trade Organization, *Languages* (9 January 2012) <<http://www.wto.org/>>.

<sup>78</sup> One may argue that adding more working languages, such as Arabic, to the WTO could considerably complicate its work and put a heavy burden on its cost-effectiveness. See Daniel Pruzin, 'WTO Chief Urges Budget Increase, Highlights Dispute Settlement Logjam.' (2000) 17 *International Trade Reporter (BNA)* 1469 (the average panel report of 370 pages is typically delayed in its release by eleven weeks due to translation bottlenecks).

<sup>79</sup> See Kim Van der Borght, *Reform and Development of the WTO Dispute Settlement System* (Cameron May, 2006) 314.

includes consultation time, panel proceedings, and enforcement.<sup>80</sup> In addition, a motivated and well-funded party may cause significant delays and even derail the dispute settlement process by not providing the relevant information or if the information provided is missing essential details. For example, in a Brazilian case against US cotton subsidies, the US refused to supply information requested by Brazil concerning farm-specific contract payment and cotton planting information.<sup>81</sup> During the time when the case is being litigated, countries could lose their market share and even exporting opportunities. Thus, prolonged WTO dispute settlement proceedings force Arab countries to mull over their options before launching a case.

Governments in Arab countries are the only party assured of any decision-making role in international trade matters. This is attributed to, in part, the Arab countries' constitutions. For instance, the Jordanian constitution bestows the responsibility for negotiating international agreements on the government and tasks it with ensuring adherence to obligations emerging from these agreements.<sup>82</sup> At the same time, however, no clear procedures are provided in the constitution or elsewhere to facilitate consultation between the government and external stakeholders.

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<sup>80</sup> The average time between the establishment of a panel and the expiry of the reasonable period of time to comply is in general over two years or over four years once the consultation period is added. If the issue of enforcement is taken into consideration, then the period can be significantly prolonged. See Erin N. Palmer, 'The World Trade Organization Slips Up: A Critique of the World Trade Organization's Dispute Settlement Understanding Through the European Union Banana Dispute' (2002) 69(2) *Tennessee Law Review* 443, 455-459, 466-474. See also Shin-yi Peng, 'How Much Time is Reasonable? - The Arbitral Decisions under Article 21.3(c) of the DSU' (2008) 26(1) *Berkeley Journal of International Law* 323, 328, 331.

<sup>81</sup> See Daniel Pruzin, 'Brazil Asks Cotton Dispute Panel to Draw 'Adverse Inferences' against United States.' (2004) 21 *International Trade Reporter (BNA)* 541 (the United States countered that the information requested could not be supplied, as it was covered by the confidentiality provisions of the 1974 US Privacy Act. Brazil needs the information to help prove its claims that the contract payments are actually product-specific support, which then becomes actionable under WTO subsidy rules).

<sup>82</sup> Constitution of the Hashemite kingdom of Jordan 1952 (Jordan) art 33.

The relative size and strength of the sector to the total economy plays an important role in determining whether to launch a WTO case or not. If the sector in question contributes significantly to gross domestic product (GDP) compared with other sectors then the government can be induced to launch a case. However, this assumption is not correct in all cases. For example, a sector - like agriculture in the US - could make only a small contribution to GDP but nevertheless carry large political clout that forces the government to budge for its demands.<sup>83</sup> Thus, factors such as importance, size, and political clout influence the government's decision to launch a WTO case.

In the context of the WTO, consultative mechanisms between governments and the private sector in Arab countries are weak if not non-existent.<sup>84</sup> It must be remembered that the WTO is a government-driven organisation. However, governments represent their domestic industries and lobby on their behalf. Thus, the private sector in Arab countries should be included in WTO issues more frequently than is currently experienced, especially in disputes whereby the private sector is the one which alerts the governments to possible violations in order to bring a case. The private sector is better positioned to know the industry harmed or be familiar with the nature of the harm.

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<sup>83</sup> See J.W. Looney et al., *Agricultural Law: A Lawyer's Guide to Representing Farm Clients* (American Bar Association, 1990) 5-10, 191-205: (many of the US subsidy programs date back to the farm financial crises of 1930s and 1980s. Certain reasons may provide as an explanation for the divergent treatment of agriculture in the US Farming is viewed as a unique way of life dependent on natural forces which are beyond the farmer's control. Farmers are also viewed as a stabilising element in society because of their vital role in food and fibre production. Farmland is a major source of aesthetically and psychologically pleasing open space and locale for many non-farm recreational activities. Farmers are a distinct minority in the US; they constitute about two percent of the total population. Farmers receive specialised legal treatment as an attempt to protect them from the generally urban orientation of law and government. Lastly, their lack of participation beyond the production stage of agriculture is a contributing factor to their inability to attain adequate income).

<sup>84</sup> See Ali A. Soliman, *Role of the Private Sector in Arab Economic and Social Development* (Center for the Study of Developing Countries, 2004) 32-46.

The EC-GSP case between the EC and India illustrates the detrimental effect that lack of consultation between governments and other stakeholders can have in WTO dispute settlement cases. In that case, the EC had granted tariff concessions to 12 developing countries, excluding India, as part of its Generalized System of Preferences (GSP) scheme.<sup>85</sup> Only after a panel to hear the dispute had been formed and the proceedings were well underway did TEXTROCIL, an association representing the clothing sector, submit a memorandum to the Indian government calling on it to address the difficulties placed on the clothing sector by the Drug Arrangements.<sup>86</sup> Having acted independently, TEXTROCIL was obviously unaware of the measures already initiated by the government several months before in an effort to counter the impact of the Drug Arrangements. Notwithstanding the evident lack of coordination between the activities of the Indian government and those of the private sector, the information brought to light by TEXTROCIL provided useful evidence in the case against the EC and helped India win.<sup>87</sup> The fact that TEXTROCIL requested government intervention several months after the government had lodged a formal WTO complaint demonstrates the extent of the disconnect between the Indian government and private-sector stakeholders when it comes to WTO matters.

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<sup>85</sup> The concessions included special arrangements aimed at rewarding some of the beneficiary countries for their efforts in fighting drug production and trafficking (the Drug Arrangements). Implementation of the Drug Arrangements by the EC meant that the beneficiary countries enjoyed better tariff concessions relative to the excluded countries. India felt that this made it unjustifiably more difficult for its exports to enter the EC market, while also illegally taking away the benefits due to it being under the most favored nation (MFN) provisions in Article 1:1 of the GATT 1994 as well as paragraphs 2(a), 3(a) and 3(c) of the Enabling Clause. See Gregory C. Shaffer and Ricardo Meléndez-Ortiz, *Dispute Settlement at the WTO: The Developing Country Experience* (Cambridge University Press, 2010) 182-184.

<sup>86</sup> In its submissions, TEXTROCIL highlighted, among other things, the fact that the implementation of the Drug Arrangements had led to an increase in clothing exports going into the EC from Pakistan, one of the beneficiaries of the arrangements, and a decline in India's clothing exports to the same destination. See Shaffer and Meléndez-Ortiz, above n 85.

<sup>87</sup> *Ibid.*

Arab countries should build bridges with the private sector during WTO negotiations every time a dispute arises. Such bridges include the establishment of public-private partnerships.<sup>88</sup> Public-private partnerships can enhance a country's ability to provide credible commitments and mutually bear the costs of possible litigation. Moreover, critical inputs from the private sector can be helpful in terms of determining whether or not a particular WTO case is won or lost.

## V OTHER AVENUES FOR PARTICIPATION

Although Arab countries rarely participate directly in the WTO dispute settlement mechanism, there could be indirect avenues for them to enhance their intervention. One area in which Arab countries have been actively involved is their participation as third parties. Under WTO jurisprudence, only countries that have "substantial interests" at stake can participate in dispute proceedings.<sup>89</sup>

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<sup>88</sup> See Chad P. Bown and Bernard M. Hoekman, 'WTO Dispute Settlement and the Missing Developing Country Cases: Engaging the Private Sector', (2005) 8 *Journal of International Economic Law* 861, 873. For a discussion on how such partnerships can impact on the ability of a country to initiate disputes, taking the EU and US examples, see Gregory Shaffer, 'What's New in EU Trade Dispute Settlement? Judicialization, Public-Private Networks and the WTO Legal Order' (2006) 13(6) *Journal of European Public Policy* 832, 839-842: (In both the US and the EU, there is an established tradition of cooperation between government and local businesses in dealing with international trade matters. These public-private partnerships have come about as a result of the interdependence that has evolved between the two sides over the years. On the one hand, private businesses rely on the governments to represent their interests in WTO matters, including the dispute settlement mechanism. On the other, the governments have come to depend on the organisational, financial, political and informational resources possessed by some of the private businesses in order to achieve and sustain their objectives in the WTO).

<sup>89</sup> The expression "substantial interest" is not capable of a precise definition and accordingly may present difficulties for the WTO. It is, however, intended to be construed to cover only those countries which have, or in the absence of discriminatory quantitative restrictions affecting their exports could reasonably be expected to have, a significant share in the market of the country seeking to

Additionally, the Appellate Body amended its working procedures whereby it gives a third party an automatic right to appear at the oral hearing even though no written submission has been forwarded if there is a notification to the Appellate Body's secretariat compared with the previous practice where a written submission must be filed first before appearing at the hearing.<sup>90</sup> Although the amendment constitutes a step forward, the decision to allow a third party to participate in a case without previous written submission is left to the Appellate Body to decide on a case-by-case basis.

Thus far, four Arab countries have been involved as third parties in eight disputes. Egypt has been involved in five different disputes, Bahrain and Kuwait has been involved in one dispute, and Saudi Arabia has been involved in two disputes.<sup>91</sup> As third parties, Arab countries act merely as observers. However, there are instances when Arab countries actually made substantive submissions. For example, Egypt in the Bed Linen case, as third party, argued quite controversially that article 15 of the WTO Anti-dumping Agreement obligated the EU to explore the possibilities of constructive remedies

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modify or withdraw the concession. See Chi Carmody, 'Of Substantial Interest: Third Parties under GATT' (1997)18(4) *Michigan Journal of International Law* 615, 626, 637.

<sup>90</sup> See Appellate Body, *Annual Report for 2003*, WTO Doc. WT/AB/1 (May 7, 2004) 34-37.

<sup>91</sup> Egypt: *European Communities - Provisional Safeguard Measures on Imports of Certain Steel Products - Request for the Establishment of a Panel by the United States*, WTO Doc WT/DS260/4, (19 August 2002); *European Communities - Antidumping Duties on Imports of Bed Linen from India*, WTO Doc WT/DS141/19 (29 April 2003); *Turkey - Measures Affecting the Importation of Rice - Status Report by Turkey*, WTO Doc WT/DS334/14 (10 October 2008); *United States - Continued Existence and Application of Zeroing Methodology - Status Report by the United States - Addendum*, WTO Doc WT/DS350/18/Add.7 (9 July 2010), Bahrain: *United States - Definitive Anti-Dumping and Countervailing Duties on Certain Products from China*, WTO Doc WT/DS379/5 (29 March 2010), Kuwait: *United States - Definitive Anti-Dumping and Countervailing Duties on Certain Products from China*, WTO Doc WT/DS379/5 (29 March 2010), and Saudi Arabia: *United States - Definitive Anti-Dumping and Countervailing Duties on Certain Products from China*, WTO Doc WT/DS379/5 (29 March 2010); *China - Measures Related to the Exportation of Various Raw Materials*, WTO Doc WT/DS394/9 (18 May 2010).

before applying anti-dumping duties, and that the EU failed to comply with this provision, as it did not suggest to the Egyptian exporters the possibility of, for instance, price undertakings.<sup>92</sup> Egypt was of the view that article 15 imposes a legal obligation on developed countries any time they contemplate imposing anti-dumping duties, and it is therefore up to those developed countries then to suggest to the developing countries involved whether or not they would be interested in offering price undertakings.

Arab countries with vested legal interests can take part in WTO dispute settlement proceedings. The burden falls on Arab countries to make their own determination whenever they have interests at stake. Arab countries can test the waters as third-party participants to develop expertise. Third party participation is not that costly since a third party is not required to file a formal submission, and when it does, the submission can be short and non-technical in nature.<sup>93</sup> However, third party status is not a permanent solution or alternative to actual participation as complainants.

Arab countries may also have the chance to participate in disputes through *amicus curiae* briefs.<sup>94</sup> Morocco was the first Arab country, and indeed the first WTO member, to submit *amicus curiae*. In European Communities-Trade Description of Sardines case,

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<sup>92</sup> See Panel Report, *European Communities-Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India*, WTO Doc WT/DS141/R (30 October 2000).

<sup>93</sup> See Shaffer and Melendez-Ortiz, above n 85, 174-178.

<sup>94</sup> *Amicus curiae* means submissions by non-parties in WTO dispute proceedings. See Padideh Ala'i, 'Judicial Lobbying At the WTO: The Debate over the Use of Amicus Curiae Briefs and the US Experience' (2000) 24(1) *Fordham International Law Journal* 62, 84-86 (the solitary support of the US for *amicus curiae* submissions before the WTO Appellate Body can be attributed to the US legal system's historical familiarity with the institution of *amicus curiae* and its evolution from "friend of the court" to a "judicial lobbyist" within the US Supreme Court jurisprudence. The function of *amicus curiae* at common law was one of oral shepardising or the bringing up of cases not known to the judge).

Morocco submitted an *amicus curiae* brief.<sup>95</sup> Morocco submitted its *amicus curiae* even though it did not participate as a third party in the dispute at the panel level. The Appellate Body held that in its prior rulings on the issue, it had never distinguished between *amicus curiae* briefs from WTO members or from other sources such as individuals or non-governmental organisations (NGOs). The Appellate Body stated that it could not treat non-members more favorably than members themselves with respect to the submission of such briefs, and that nothing in the rules prevents a WTO Member from submitting an *amicus curiae* brief.<sup>96</sup> Ultimately, the Appellate Body went on to say that the Moroccan *amicus* submission failed to assist in the appeal because the factual information provided in the brief was not pertinent to the appeal.<sup>97</sup>

It seems that the Appellate Body added more rights to, and obligations on the part of WTO members setting an example for NGOs, academia, industrial associations to submit *amicus* briefs. However, filing *amicus curiae* briefs by Arab countries does not guarantee that WTO dispute settlement panels will take them into account in deciding cases. Panels have discretionary authority either to accept and consider or to reject information and advice submitted to it, whether requested by a panel or not. Further, *amicus* briefs must be "pertinent and useful" to the dispute in question otherwise they can be rejected as evident in the Sardine decision.

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<sup>95</sup> The dispute was between Peru and the EU. Peru had requested consultations with the EU following a Council Regulation (EEC No. 2136/89) that purported to lay down common market standards for trade in preserved sardines. Article 2 of the EU Regulation provided, *inter alia*, that only products prepared from *Sardina pilchardus* may be marketed as preserved sardines. In other words, only products of this species may have the word "sardines" as part of the name on the container. According to this regulation, *Sardino pssagax*, found mainly in the Eastern Pacific along the coasts of Peru and Chile could not be marketed as such. *Sardinops Sardina pilchardus* is found mainly around the coasts of the Eastern North Atlantic, in the Mediterranean Sea and in the Black Sea. See Appellate Body Report, *European Communities-Trade Description of Sardines*, WTO Doc WT/DS231/AB/R (26 September 2002) [166]-[167].

<sup>96</sup> *Ibid* [161]-[165].

<sup>97</sup> *Ibid* [167].

Regarding participation as panelists or as Appellate Body members the trend is that of satisfactory involvement. At the panel level, three Arab panelists were selected to rule in nine cases.<sup>98</sup> At the Appellate Body level, since 1995 two Arab nationals served as members. These were late Said El-Naggar of Egypt (1995-2000) and George Abi-Saab of Egypt (2004-2008).<sup>99</sup> The list of Arab panelists indicates a high level of professionalism.

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<sup>98</sup> These Arab panelists are: Maamoun Abdel-Fattah of Egypt, Magda Shahin of Egypt, and Nacer Benjelloun-Touimi of Morocco. Maamoun Abdel-Fattah participated in several cases; see, eg, Panel Report, *Brazil-Measures Affecting Desiccated Coconut*, WTO Doc WT/DS22/R (17 October 1996), Panel Report, *Canada- Measures Affecting the Export of Civilian Aircraft*, WTO Doc WT/DS70/RW (9 May 2000); Panel Report, *Canada-Measures Affecting the Export of Civilian Aircraft*, WTO Doc WT/DS70/R (14 April 1999); Panel Report, *United States-Definitive Safeguard Measures on Imports of Wheat Gluten from the European Communities*, WTO Doc WT/DS166/R (31 July 2000); Panel Report, *United States-Continued Dumping and Subsidy Offset Act of 2000*, WTO Doc WT/DS217/R (16 September 2002); Panel Report, *European Communities-Anti-Dumping Duties on Malleable Cast Iron Tube or Pipe Fittings from Brazil*, WTO Doc WT/DS219/R (7 March 2003); Arbitrator Decision, *United States-Continued Dumping and Subsidy Offset Act of 200-Original Complaint by the European Communities-Recourse to Arbitration by the United States under Article 22.6 of the DSU*, WTO Doc WT/DS217/ARB/EEC (31 August 2004); while Magda Shahin participated in one case: Appellate Body Report, *European Communities-Measures Affecting the Importation of Certain Poultry Products*, WTO Doc WT/DS69/AB/R (13 July 1998); and Nacer Benjelloun-Touimi involved in one case: *European Communities-Selected Customs Matters*, WTO Doc No. WT/DS315/1 (27 September 2004).

<sup>99</sup> Said El-Naggar sat on the bench of some of the important cases in the history of the WTO. The list includes *Japan-Taxes on Alcoholic Beverages*, WTO Doc No. WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R (4 October 1996); *European Communities-Regime for the Importation, Sale, and Distribution of Banana*, WTO Doc WT/DS27/AB/R (9 September 1997); *Brazil-Export Financing Program for Aircraft*, WTO Doc WT/DS46/AB/R (2 August 1999); *India-Quantitative Restrictions on Imports of Agricultural, Textile and Industrial Products*, WTO WT/DS90/AB/R (23 August 1999). Also, George Abi-Saab participated in important cases. The list includes *United States-Definitive Safeguard Measures on Imports of Wheat Gluten from the European Countries*, WTO Doc WT/DS166/AB/R (22 December 2000); *Mexico - Anti-Dumping Investigation of High Fructose Corn Syrup (HFCS) from the United States*, WTO WT/DS132/AB/RW (22 October 2001); *United States-Definitive Safeguard Measures on Imports of Certain Steel Products*, WTO Doc WT/DS248/R (11 July 2003); *United States-Sunset Review of Anti-Dumping Duties on Corrosion-Resistant Carbon Steel Flat*

Even if Arab countries are represented at the panel and Appellate Body levels, still Arab panelists are outnumbered by panelists from developed countries similar in size, such as New Zealand or Switzerland.<sup>100</sup> Panelists from these and other countries are selected more frequently.<sup>101</sup> This state of affair relates, in part, to the number of persons with legal expertise in trade matters. Further, adding more Arab panelists could lead to concerns among WTO members, especially other developing countries, about fairness in geographical representation.<sup>102</sup> Regarding the nationality of the panelists and Appellate Body members, Arab representation is quite encouraging.

There are some provisions in the DSU that give special treatment for developing and least-developed countries.<sup>103</sup> The special and differential treatment provisions have been less than effective due

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*Products from Japan*, WTO Doc WT/DS244/AB/R (15 December 2002); *European Communities -Conditions for the Granting of Tariffs Preferences to Developing Countries*, WTO Doc WT/DS246/AB/R (7 April 2004). For more on biographies of Arab Appellate Body members see World Trade Organization, *Appellate Body Members* (2012) <[http://www.wto.org/english/tratop\\_e/dispu\\_e/ab\\_members\\_bio\\_e.htm#abi\\_saab](http://www.wto.org/english/tratop_e/dispu_e/ab_members_bio_e.htm#abi_saab)>.

<sup>100</sup> In representation a patterns emerge: first, special privileges for the US, as the world's largest trader; second, special privileges for the world's four largest traders (currently, China, the European Union, Japan, and the US), a group known as "the Quad"; and third, a rotational system between developed and developing nations. See Jacob Katz Cogan, 'Representation and Power in International Organization: The Operational Constitution and its Critics' (2009) 103 *American Journal of International Law* 209, 232-233.

<sup>101</sup> Like the other members of the Quad, the US is also reserved a seat *de facto* on the WTO's Appellate Body. Katz Cogan, above n 100, 232-233.

<sup>102</sup> The WTO Dispute Settlement Understanding states that panel membership shall be broadly representative. See *Marrakesh*, above n 7, article 17(3).

<sup>103</sup> Examples include article 4.10 which states that members to give "specialattention" to the particular problems and interests of developing countries during consultations; article 8.10 which states that developing countries can require that at least one panelist in cases concerning them be a national of a developing country; article 27.2 which relates to the provision of the Secretariat of services of qualified legal if a developing country requests so. See Andrea M. Ewart, 'Small Developing States in the WTO: A Procedural Approach to Special and Differential Treatment through Reforms to Dispute Settlement' (2007) 35(1) *Syracuse Journal of International Law & Commerce* 27, 42-43.

to their vagueness and lack of procedures to guide their application.<sup>104</sup> For instance, article 12.11 of the DSU mandates that a panel's report should explicitly indicate the form in which account has been taken of relevant provisions on differential and more favorable treatment for developing country members. However, to date, article 12.11 of the DSU has been cited in three cases but was not taken into consideration in any of the panel's recommendations.<sup>105</sup> It may be noted that ineffectiveness can be considered part of a wider problem in the sense that a number of special and differential treatment provisions in various WTO agreements are of a declaratory nature and, in the absence of implementation rules, have not been of any practical use to developing countries.

An important step has been taken to assist developing countries in WTO dispute settlement through the establishment of the Advisory Center on WTO Law.<sup>106</sup> The Advisory Center is independent from the WTO and open to all WTO members, but only developing countries and economies in transition can use its

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<sup>104</sup> Ewart, above n 103, 42-43.

<sup>105</sup> In the case of the US against India on Quantitative Restrictions on Imports of Agricultural, Textile and Industrial Products, India referred to article XVIII:B of GATT on the balance-of-payments as a relevant provision on special and differential treatment. See Appellate Body Report, *India-Quantitative Restrictions on Imports of Agricultural, Textile and Industrial Products*, WTO Doc. WT/DS90/AB/R (Aug. 23, 1999). In the case against the US on Continued Dumping Subsidy Offset Act of 2000, Indonesia referred to article 15 on special and differential treatment in the Antidumping Agreement as being undermined by US action. See Appellate Body Report, *United States - Continued Dumping and Subsidy Offset Act of 2000*, WTO Doc WT/DS217/AB/R (16 January 2003). In the case of the US against Mexico on Measures Affecting Telecommunications Services, Mexico referred to GATS provisions on differential and more favorable treatment for developing country Members. See Panel Report, *Mexico - Measures Affecting Telecommunications Services*, WTO Doc WT/DS204/R (2 April 2004).

<sup>106</sup> The Advisory Center on WTO Law has been established to alleviate article 27.2 of the DSU problem which provides legal advice and assistance through the WTO Secretariat. To fulfill its mandate, the Secretariat dedicated only two legal affairs officers and engaged two consultants who are available one day a week. See Kim Van der Borgh, 'The Advisory Center on WTO Law: Advancing Fairness and Equality' (1999) 2(4) *Journal of International Economic Law* 723, 724-727.

services. Currently, four Arab countries are members of the Advisory Center.<sup>107</sup> However, there is no obvious reason why more Arab countries have not joined yet. Hence, it can be suggested that it is perhaps a lack of interest or lack of knowledge of the importance of the Advisory Center that is the reason for the limited membership to date.

The Advisory Center organises seminars on WTO jurisprudence, offers affordable legal advice on WTO law, provides support in WTO proceedings, and permits internships for officials dealing with WTO legal issues.<sup>108</sup> In other words, the Advisory Center on WTO Law manages many tasks that aim to assist developing countries in understanding WTO law and participating in its dispute settlement process should the need arises. The Advisory Center resembles a law office that specialises in WTO law, but has its own limitations. For example, the Advisory Center imposes limitations on the number of professionals and hours allocated per each case.<sup>109</sup>

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<sup>107</sup> Egypt, Jordan, Oman, and Tunisia are members of the Advisory Center. Egypt and Tunisia are original members of the Advisory Center which signed the agreement establishing the Center while Jordan was the first country to accede to the agreement followed by Oman. Late Said El-Naggar of Egypt, former Appellate Body member, held a seat in the management board for two years term starting 2001. See Advisory Center on WTO Law, *Developing Countries* (January 6 2012)

<[http://www.acwl.ch/e/members/developing\\_countries.html](http://www.acwl.ch/e/members/developing_countries.html)>.

<sup>108</sup> The Advisory Center sources of income are: user charges, revenues from an endowment fund, and traditional donor contributions. To function, the Advisory Center has an executive director and six experienced professionals who have an interest in advancing the interests of developing countries. See also Chad Bown and Rachel McCulloch, 'Developing Countries, Dispute Settlement, and the Advisory Centre on WTO Law' (2010) 19(1) *Journal of International Trade and Economic Development* 33-63.

<sup>109</sup> The estimated hours per case are 700 hours for a simple case. Another criticism directed toward the Advisory Center is the fact that there may be real duplication between its work and the work of the WTO Technical Cooperation Division. Even more, the Advisory Center executive director will have the power to decide whether a case brought to the Center by a developing country has legal merit or not. See Van der Borgh, above n 106, 728.

Despite these limitations, Arab countries should consider becoming involved in the Center until they have their own in-house counsels and deeper expertise in international trade law. Countries such as India owe part of their success in the WTO dispute mechanism to assistance from the Advisory Center.<sup>110</sup> Joining the Advisory Center seems to be at least a partial solution to some of the problems of under-participation described earlier.

There are a range of other measures at the disposal of Arab countries which can go a long way towards helping them participate effectively in the WTO dispute settlement mechanism. One such measure is making better use of academics in Arab universities, some of whom have specialised knowledge of international trade. These trade law specialists could be of tremendous help in handling international trade issues. An internship program could also be introduced to expose young Arabs from different sections of the public and private sectors to the way the WTO system works in practice.

## VI CONCLUSIONS

Arab countries fail to make significant use of the WTO dispute settlement system. Egypt has been the Arab country most frequently involved in the WTO dispute settlement process as a respondent in a stand-alone case, as well as a third party. The one area in which Arab countries have been comparatively active is in participation as third parties. However, no Arab country - even Egypt - has ever participated as a complainant. Marginal participation indicates that Arab countries have not fully engaged the WTO system and their role remains insignificant.

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<sup>110</sup> While the private industry, in India's triumph over the EC in the EC-GSP case, provided some of the evidence that was used in the substantive arguments, legal support for the dispute was provided by the Advisory Centre for WTO Law in Geneva. See Shaffer and Melendez-Ortiz, above n 85, 185.

Lack of effective participation is not confined to the WTO dispute settlement process itself - such as the issues of enforcement and proof of legitimate interest - but to other factors specific to Arab countries. These factors include insufficient human resources, financial constraints, trade volume, absence of private sector involvement, political considerations, and cultural attitude toward like-litigation proceedings. With the exception of Egypt and Saudi Arabia, Arab countries will operate at the margins of the dispute settlement system for many of the reasons identified.

Even if Arab countries do not use the WTO dispute settlement as complainants because of legal capacity for example, among other factors, they certainly could make use of *amicus curiae*. *Amicus curiae* briefs constitute a useful base to develop sound legal argument. Moreover, Arab countries could use the system by participating as third parties. To a certain degree, participation as third parties lead Arab countries to gain insights into the mechanics of the WTO settlement process and exposures to panel and Appellate Body procedures. Egypt and Saudi Arabia could help by sharing expertise, organising, and covering the cost of third party participation in cases of major interest to the Arab members. Egypt and Saudi Arabia also have the financial resources to encourage more trade training of Middle Eastern attorneys.

As members of the Advisory Center on WTO Law, those Arab countries are entitled to draw assistance from the Center which was originally established to enforce WTO rights of developing countries. Consequently, more Arab countries should become members of the Center and should make full use of this membership. The Center could then be used to give opinions and draft WTO arguments for the benefit of these countries.

Arguably, the options mentioned above do not form exclusive alternatives to litigation, but could be options used to protect Arab countries' trade interests. Furthermore, it is necessary to realise that litigation in matters of trade does not necessarily conflict with maintaining good political relationships among disputing countries.

Arab countries should, therefore, not shy away from utilising the WTO dispute settlement mechanism. Even if they are still not fully integrated in the multilateral trading system and if there is limited need for disputes, Arab countries ought to utilise the WTO dispute settlement mechanism. The dispute settlement mechanism is not only about disputes; it is an evolving body of international trade law principles that are increasingly being shaped by those WTO members who are active participants. Arab countries can no longer afford to ignore the WTO dispute settlement mechanism.