Low-income developing countries and WTO litigation: Why wake up the sleeping dog?

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ABSTRACT

The World Trade Organization (WTO) is one of the most judicialized dispute settlement systems in international politics. While a general appreciation has developed that the system has worked quite well, research has not paid sufficient attention to the weakest actors in the system. This paper addresses the puzzle of missing cases of least-developed countries initiating WTO dispute settlement procedures. It challenges the existing literature on developing countries in WTO dispute settlement which predominantly focuses on legal capacity and economic interests. The paper provides an argument that the small universe of ‘actionable cases’, the option of free riding and the assessment of the perceived opportunity costs related to other foreign policy priorities better explain the absence of cases. In addition (and somewhat counterintuitively), we argue that the absence of cases is not necessarily bad news and shows how the weakest actors can use the dispute settlement system in a ‘lighter version’ or in indirect ways. The argument is empirically assessed by conducting a case study on four West African cotton-producing countries (C4) and their involvement in dispute settlement.

KEYWORDS

World Trade Organization; dispute settlement; negotiations; least-developed countries; power; legal capacity; free riding; trade flows; cotton; subsidies.

1. INTRODUCTION

The judicial arm of the World Trade Organization (WTO) has attracted much scholarly attention in recent years. With the establishment of the WTO in 1995, trade dispute resolution changed from being a largely diplomatic process during the General Agreement on Tariffs and Trade (GATT)
times to a much more judicialized system. The most important inventions were the abolishment of the power to block the initiation of legal proceedings, the quasi-automaticity of adoption of rulings, the speeding up of the overall process and the creation of an appeal instance with significant autonomy. While a general appreciation has developed that the system has worked quite well, what stands out is the observation that no case has yet been seen at the panel stage with a least-developed country (LDC) as a complainant. What makes the absence of LDC cases more intriguing is that the success rate for filing a case in the context of the WTO is relatively high (see Horn and Mavroidis, 2008).

This paper addresses this puzzle of missing cases and offers an explanation for why we do not see disputes initiated by the weakest parties. The argument puts special emphasis on hitherto underspecified factors, including the small universe of ‘actionable cases’, the option of free riding and the assessment of the perceived opportunity costs related to other foreign policy priorities. Taken together they represent an extraordinarily high barrier to litigation entry for the weakest parties. In addition (and somehow counterintuitively), we argue that absence of cases is not such bad news and shows how the dispute settlement system offers additional options. We make a case that the judicial system provides LDCs with a ‘lighter’ version of participation as third party, which also strengthens their positions in the negotiations. The third party status assists LDCs in overcoming some of the existing obstacles to active litigation such as administrative capacity, domestic firms’ support and the toothless threat of trade sanctions. It also allows weaker parties to direct most of their resources to the negotiation track by using the results of the litigation process in strategic ways.

This paper applies a case study method. This allows us to investigate in greater detail the causal mechanisms related to key variables, such as capacity constraints or power asymmetry (Kim, 2008; Sattler and Bernauer, 2011). Our dependent variable takes the form of three outcomes which reflect different degrees of dispute participation: LDCs (1) filing a case as complainant; (2) joining as third party; or (3) abstaining from participation in WTO litigation. The empirical part discusses the experience of the four West African cotton-producing countries (C4; Chad, Benin, Burkina Faso, and Mali) in the WTO US–Upland Cotton case and in relation to the current Doha negotiations. This case is chosen, as it is one of the few cases where a group of LDCs has taken recourse to ‘lighter’ tools of WTO litigation.1 In terms of dispute settlement, it controls for some arguments that have been brought for non-participation, in particular limited economic interests (Guzman and Simmons, 2005) and lack of ‘legal capacity’ in a narrow sense (Kim, 2008) which allows us to pay more attention to factors that have so far been underspecified. Finally, the case also addresses the relationship between negotiations and litigation in order to overcome
the static view of current scholarship that largely treats both areas separately.

The paper is structured as follows. First, we discuss the literature on WTO litigation and developing countries. Second, we suggest that four variables have received insufficient attention in the current scholarship and offer a novel explanation for LDC’s degree of participation. Third, we assess the arguments by focusing on the Cotton case. We conclude by suggesting further avenues of research.

2. STATE OF THE LITERATURE

2.1. Existing studies on developing countries and WTO disputes

The role of developing countries in WTO dispute settlement has received wide attention. In particular, there have been a number of empirical studies using large data sets that focus on explaining the participation of developing countries in WTO dispute settlement (Allee, 2005; Bown, 2009; Busch et al., 2009; Davis and Blodgett Bermeo, 2009; Francois et al., 2008; Guzman and Simmons, 2005; Horn et al., 1999; Kim, 2008; Sattler and Bernauer, 2011). Most of the work has found that developing countries are underrepresented in dispute settlement (for an exception, see Busch and Reinhardt, 2003). While research on this question has been fruitful in advancing our understanding of the macro forces behind the use of WTO dispute settlement instruments, insufficient attention has been paid to data selection bias and to the causal mechanisms at play. On data selection, more recent work has tackled the concern of what constitutes the potential universe of cases more explicitly (see Allee, 2005; Bown, 2005; Francois et al., 2008; Kim, 2008; Sattler and Bernauer, 2010). Yet, with the exception of the work on trade remedies, the estimation of ‘potential cases’ has relied mostly on trade flow data. On causal mechanisms at work, it has been a challenge to offer adequate proxies for measuring key independent variables (e.g. legal capacity, power), controlling for the direction of causality and the causal process at work. The last issue applies in particular to testing the power hypothesis that posits that weak actors do not file because of fear of retaliation by the defendant party. In this respect, Guzman and Simmons argue that ‘case studies on how highly constrained complainants actually select their defendants would provide interesting contextual evidence’ (2005: 593). We accept this invitation and develop our explanation with the aim to advance the theoretical understanding of dispute initiation.

2.2. Dispute initiation

This section briefly reviews the literature on the key explanations for the observed lower participation rate of developing countries. A first set of
explanations focus on the market size and the economic asymmetry between the disputing parties (Horn et al., 1999). Large economies are more likely to be involved as disputes are correlated with trade flows and the degree of export diversification of economies (Sattler and Bernauer, 2011). A related argument put forward by Guzman and Simmons (2005) suggests that small states only bring cases that are of economic importance. In other words, the costs of litigation need to be compared with potential economic benefits. This comparison needs to include an ex ante assessment of the likelihood that the losing party would modify its WTO-inconsistent policies and of the practicability to apply retaliatory measures in case of non-compliance with WTO rulings (Bown, 2004, 2005; Bown and Pauwelyn, 2011). In addition, the lack of compensation schemes for incurred costs (retrospective penalties) does not encourage litigation entry.

Besides economic interests, trade flows and the likelihood of using retaliatory sanctions, research has focused on legal capacity constraints on the complainant’s side. In this respect, various proxies have been proposed to measure this factor. Horn et al. (1999) have focused on the size of the Geneva representation as a proxy. Busch et al. (2009) rely on interviews and surveys with WTO missions to capture existing resources. But also more indirect measures are used. Kim (2008) uses domestic bureaucratic quality measured by the degree of autonomy. Guzman and Simmons focus on a larger concept of capacity including ‘the resources available to identify, analyse, pursue and litigate a dispute’ (2005: 559). While most scholars suggest that the actual costs for arguing the case in court are less and less important for LDCs (but remain an issue for many other contracting parties), constraints on non-legal resource capacity are still widespread (see Bown, 2009). Kim (2008) argues that a more legalized system has made litigation costs a factor that profits developed countries to the detriment of developing countries.

The third group of explanations refers to power differences. In other words, the greater the dependence of the complainant state vis-à-vis the defendant state, the less the likelihood of filing. Small states ‘abstain from launching disputes due to fear that they either will not be able to enforce rulings in their favor, or will be subjected to some form of revenge from more powerful states’ (Francois et al., 2008: 4). Different proxies for power have been used to test this relationship. Bown (2005) finds evidence that bilateral assistance influences the decision to file. Similarly, Zejan and Bartels (2006) use official development assistance (ODA) flows by the EU and the US to test the relationship between power differences and filing. While Guzman and Simmons (2005) find no support for the power thesis, Sattler and Bernauer (2011) suggest that the power asymmetry could be a key explanation that needs further investigation.
2.3. Third party status in dispute settlement

In relation to participating as a complainant (or defendant) in a case, there is much less theoretical and empirical work on the involvement of third parties. What is often overlooked in the literature on dispute initiation is the existence of the third party option as a ‘light’ version of participation. Why do states choose third party status over co-complainant status or over abstention? What stands out is the empirical work by Bown (2005) that suggests no significant difference between factors that explain the filing of cases as complainants and participation as a third party. Yet, focusing on the implications of third party presence in WTO disputes, Busch and Reinhardt (2006) suggest that this type of indirect participation affects the likelihood of settling outside the court during the consultation phase. Disputes are more likely to end with rulings, and thus third parties control for negotiated cherry-picking with potentially discriminatory effects for those who are not part of the dispute.4

There have been only four cases in which LDCs acted as third parties. In two cases (EC–Bananas III and EC–Sugar), the LDCs were on the defendant’s side fearing a loss of EU market shares due to preference erosion.5 In one case (US–Shrimp), Senegal was a passive observer and did not make any active contribution to the case. By contrast, in ‘US–Upland Cotton’ two LDCs (Benin and Chad) took a more proactive role in the proceedings supporting the complainant.

A general weakness in the literature on explaining the filing of cases or the choice of third party status is that most contributions treat developing countries as a homogeneous group. Yet, different types of countries face different obstacles to litigation entry. Some small industrialized countries might face higher hurdles than emerging large developing countries. This calls for the development of a typological theory. In this paper, we focus on LDCs as a group and provide an explanation for their participation in dispute settlement.

3. ADDRESSING THE PUZZLE: OUR ARGUMENT

3.1. The dependent variable

As to the dependent variable, we suggest three outcomes along a spectrum from no participation to full participation: absence in litigation, third party status, and complainant status. Below we develop our argument in more detail and put forward a number of conjectures related to the degree of involvement in dispute settlement.

3.2. Beyond trade flows and legal capacity

While trade flows and legal capacity are valuable proxies for explaining overall participation by developing country cases, these factors cannot
explain the complete absence of cases involving LDCs. In regard to trade flows, many LDCs are competitive in some subsectors or product categories (in particular commodities). As many LDCs lack export diversity, regulatory barriers to key export markets quickly trigger internal reactions due to their economic importance. Similarly, LDCs can to a large degree address concerns related to legal capacity by drawing on external assistance. Legal experts from private law firms or the specialized Advisory Centre for WTO Law (ACWL) offer their services to LDCs free of charge (or at a very low rate) and also support them in compiling the necessary information to litigate, addressing some auxiliary costs related to litigation. In addition, the practice of the appeal instance (Appellate Body [AB]) over time has allowed parties to be represented by private counsel during hearings (Smith, 2004).

We posit that four factors have not received sufficient attention in current studies on WTO litigation. Addressing these variables more systematically could lead to a more nuanced assessment of the dominant factors affecting the role of low-income developing countries in litigation. First, the number of potential or ‘actionable’ cases is even lower for LDCs than is usually predicted from trade flow estimations. Market access to most of their key export markets is secured through contracts outside the WTO treaties, in particular preferential schemes. Thus, if LDCs suffer potential restrictions on access to export markets, these are often based on the change of unilateral concessions or internal regulation by the more powerful trading partner (Nottage, 2009). This applies in particular to changes in duty-free access schemes, the implementation of stricter technical or sanitary and phytosanitary standards or other non-tariff measures. Tariff changes cannot usually be challenged through the WTO unless they would exceed the so-called bound rates that apply to all states on a most-favored nation (MFN) basis.

Second, the possibility of free riding in dispute settlement has received little attention (Bown, 2005). Weak actors can directly profit from other parties bearing the costs of litigation if these other parties are sufficiently powerful to successfully challenge WTO-inconsistent measures. This applies in particular to cases where measures apply to all imports notwithstanding their origins and in particular to subsidy cases (Nottage, 2009). Free riding, however, could be hampered if litigating parties take recourse to a bilateral agreement which could potentially ‘nullify’ benefits for free riders. In order to benefit from a MFN-type of correction of a WTO-inconsistent measure by the losing party, joining a third party could represent a middle way of partially free riding and signaling to the involved parties not to go for a bilateral settlement.

The third issue relates to the role of power. While a growing number of contributions raise the question of power asymmetry, the analysis often poses methodological problems for researchers. This is because power is a relational concept, seldom observable and working in subtle ways in
practice. The signals of the stronger party do not always need to be explicit to affect the calculation of the weaker actor related to its alternative costs. We suggest that weak countries are often not willing to take a gamble in testing the readiness of strong actors to retaliate. The information asymmetry in dispute settlement relates to the lack of knowledge as to how the stronger party might react to bringing a case (either by bringing a case itself, non-implementation or by adverse reactions in other policy fields). We conceptualize power as the possibility of the stronger actor to ‘retaliate’, which affects the general welfare of the weaker party. In the case of trade policy two channels stand out: (1) the potential of offering (or limiting) market access to certain products by the strong state and (2) the potential of offering (or limiting) foreign aid by the strong state.

The fourth factor relates to the in-built preference of many trade diplomats to negotiate. Few ambassadors in Geneva have sufficient legal training to actively engage in dispute settlement. On the contrary, ambassadors have always defined themselves as negotiators (see Elsig, 2011). Putting priority on a legal approach would entail delegation to specialized legal experts and would deprive ambassadors of ways to actively engage in and influence the evolving agendas. In other words, bureaucratic interests in following the negotiation track trump interests in following legal proceedings.

Below we build upon above considerations and present our argument in more detail for the complainant status. We further conjecture that both actors within an asymmetric dyad have strong incentives to settle out of court. Then, we make a case that these incentives apply (albeit with less strength) to the third party status and elaborate on the costs–benefits ratio of this option.

3.3. Explaining outcomes

Complainant status. We do not claim that above factors exclusively apply to LDCs. We conjecture, however, that the composite effects of above factors are LDC specific and present a (sufficient) condition leading to the observed complete absence of LDCs in disputes in highly asymmetric cases.

How can we model the overall interest constellation within an asymmetric dyad? Let us start with the weak state that first monitors the situation. For simplicity, we assume three stages. First, the question whether a potential restrictive trade measure imposed by the stronger actor can be challenged through the WTO system arises. Second, the weak actor looks for opportunities for free riding. It monitors how other contracting parties are affected by an alleged WTO-inconsistent measure and whether stronger parties might litigate ‘on its behalf’. Third (and starting already in the second stage), the weak actor more seriously assesses the risks of launching a case. The high uncertainty about the strong actor’s reaction leads to a
risky strategic environment. The weaker actor might benefit substantially from the removal of a WTO-inconsistent measure (potential for gains), but it could also find itself in a position that is worse than the status quo (potential for losses), when the stronger party, besides non-implementation of a ruling, also applies some forms of retaliation.8 Potential negative effects are expected in bilateral relations, either in terms of loss of ODA or less preferential access to export markets.

From the above, we conjecture that the aggregate threshold for taking the legal route is high and leads weak actors towards testing other options, such as working towards a negotiated agreement supported by negotiator’s in-built preference for negotiations over litigation. This interest in settling outside the court coincides with the preference of the strong party in an asymmetric relationship. The preference ordering can be explained by the bigger parties’ investment in a rules-based system largely reflecting their interests (Ikenberry, 2006; Wilkinson, 2009). When cases are brought by small states, there is an underlying concern that leading actors need to demonstrate that the existing asymmetry of power is not affecting the outcome; as Smith argues ‘having endorsed the establishment of a more legalistic system, the largest trade powers cannot defy its rulings without risking harm to the institution’ (2004: 546). Put differently, the avoidance of litigating against an LDC reflects the overall interest of the strong actor to preserve the legitimacy of the system and its reputation as a sponsor of the WTO regime. At the same time, most (democratic) states face domestic constituencies that lobby against the implementation of adverse rulings, an issue that trade diplomats want to avoid. In asymmetric cases, we should therefore expect a low likelihood of an LDC filing a case. Neither party has a strong incentive to meet the other party in court; therefore, there will be efforts by both sides to find a manageable solution in the pre-WTO litigation setting prior to becoming visible in the WTO system or to push the issue onto the negotiation track.

Summarizing the above, we posit two expected observations:

Expected observation 1: In an asymmetric power relationship, the likelihood of weaker actors initiating cases is very low.

Expected observation 2: Both actors in an asymmetric power relationship tend to favour negotiated agreements over facing each other in a legal dispute.

Third party status. Being a third party represents a tempting alternative to being a complainant. The pre-condition for acting as a third party is that another stronger actor will litigate at the forefront (so step 2 has materialized). The key point here is that third party status is less risky as a strategy for weaker actors. It reduces some of the constraints for small players and still allows some potential benefits from free riding (e.g., Bown, 2005: 5).9
Third parties can intervene at various stages of the process (in the panel proceeding and the review stages) and enjoy the privilege of receiving information from the litigating parties. An LDC third party will also be treated in a favorable way by some of the panels and the AB. The AB in particular has introduced a number of procedural changes to encourage the participation of the weakest actors in the system. In addition, a third party may benefit from a change of policy of the losing party (and its interests may also have to be considered when the litigating parties take recourse to a bilateral settlement). While overall benefits might not be so different from complainant status, a third party clearly has fewer costs related to bringing the case, managing the proceedings and gambling on its bilateral relations with the defendant. The economic case needs to be less salient to trigger participation; less support from the domestic industry is needed. The third party can either invoke substantial or systemic interests. At the same time, as a third party, legal and additional requirements are lower as the complainant bears the ‘burden of proof’. In other words, a third party can rely on the legal reasoning of the main complainant. Finally, power differences might to some degree be moderated as a third party signals interests but does not take the other party to court. Yet, the stronger party is not eager to face the small country as third party in the court-like setting. This leads to following conjecture:

Expected observation 3: Third party status of an LDC is more likely the less important the anticipated negative effects appear to the weak actor in an asymmetric power relationship.

4. EMPIRICAL DISCUSSION: THE C4 CASE

The empirical section focuses on a case involving four West African countries producing and exporting cotton. It is one of the few publicly known cases where LDCs have been involved in some way in WTO dispute settlement procedures. This case controls for two key factors discussed in the literature that serve as barriers to litigation entry: legal capacity and economic interests. Therefore, it allows us to engage in a preliminary test of the expected outcomes based on our argument. The case study, relying on a process-tracing method, investigates the causal mechanisms that explain the degree of participation. While there have been a number of case studies written on various facets of the Cotton case, a systematic and theory-driven assessment is lacking (see Devereaux et al., 2006; Heinisch, 2006; Zunckel, 2005). First, we proceed by reviewing the genesis of the case (involving Brazil). Second, we discuss the factors in the literature that would suggest a more active engagement. Third, we turn to the factors that led to the decision to abstain from acting as complainant. Fourth, we discuss variation in third party status.
4.1. The genesis of the US–Upland Cotton case

In 2000, when the price of cotton hit record lows, US government subsidies to its cotton growers became an international issue. In 2001, Mr. Pedro de Camargo Neto, Deputy Agriculture Minister of Brazil, organized domestic support for launching a case against US cotton subsidies. In internal discussions, Camargo persuaded other ministries to support his initiative. At the time, the prospect of winning the case was far from clear, but Camargo argued ‘did we win, then we could influence the round, did we lose, then it shows that the Uruguay Round outcomes are biased against developing countries’.

In the same year, Mali underlined in the Special Session of the Committee on Agriculture (SSCA) at the WTO in Geneva the importance for African exporters of a substantive reduction of domestic support in other countries (WTO, 2001). On 13 May 2002, a new US farm bill was adopted which included an increase in support for US farmers of about 70% through direct and anti-cyclical payments. In June the same year, West and Central African Agricultural ministers explored a common strategy in Abidjan in order to address lower world prices (Pesche and Nubukpo, 2005: 49). Later in September 2002, Brazil repeatedly called for detailed information about US subsidies in the Committee on Agriculture. Brazil later officially asked for consultation on US subsidies practices at a meeting of the Dispute Settlement Body (DSB). In the second half of 2002 and early 2003, a number of Geneva-based non-governmental organizations (NGOs) organized workshops and lunch meetings with up to a dozen African countries in order to develop common strategies on cotton. Of this larger group, four West African countries stood out, as they were willing to take the issue up more actively.

On 6 February 2003, Brazil requested the establishment of a panel on ‘US–Upland Cotton’. The four West African cotton-producing countries called the C4 (Benin, Burkina Faso, Chad and Mali) decided against joining as co-complainant or launching a separate case. Benin and Chad subsequently opted for third party status. Burkina Faso and Mali abstained from acting as third party. On 8 September 2004, the panel decision on ‘US Subsidies on Upland Cotton’ largely sided with the complainant. The panel report was subsequently appealed by the US. On 3 March 2005, the AB decision was circulated, supporting the findings of the panel and calling upon the US to modify its WTO-inconsistent policies. In August 2006, Brazil unsatisfied with the low level of compliance with the panel’s ruling by the US requested the establishment of a compliance panel according to Art. 21.5 of the Dispute Settlement Understanding (DSU). Chad participated in these procedures as a third party. Sixteen months later in December 2007, the compliance panel circulated its report calling the US measures insufficient. On 20 June 2008, the AB upheld the ruling of the
compliance panel. In September 2009, the decision of the sanction award gave Brazil the right to impose countermeasures of the value of $147 million for the year 2006 and $294 million in 2007. After a list of potential targets for Brazilian retaliation was presented in March 2010, in June of the same year a deal was struck between Brazil and the US consisting of a short-term adoption of the US export credit guarantees and a fund for technical assistance to cotton farmers. This agreement is to expire in 2012 together with the current US farm bill.

4.2. The C4: Economic interests, legal capacity and actionable cases

Evidence suggests that the lack of economic interests, financial resources and legal capacity did not act as barriers to litigation entry. In terms of economic importance, the reliance of the C4 on cotton exports is significant (see also Baffes, 2004). A study by an International Monetary Fund (IMF) economist estimated that overall subsidies in 2001/2002 led to a loss of exports for West African countries valued at around $250 million (Goreux, 2003). Similarly, a study by Oxfam (2002) posited a direct link between the world cotton crisis and US subsidies.

In addition, economic actors demanded that their respective governments take action as early as 2001, when Mali’s cotton producers went on strike to protest against their diminishing incomes. Many organizations, not only those representing cotton farmers, such as L’Union Nationale des Producteurs de Coton du Burkina (UNPCB), producer organizations from Benin (FUPRO) and of Mali (Sycov) and the Réseau des Organisations Paysannes & de Producteurs de l’Afrique de l’Ouest (ROPPA), but also NGOs mainly focusing on rural development such as Service d’édition en langues nationales du Burkina Faso (SEDELAN), demanded that the governments in Western Africa needed to be more proactive in regard to the situation of cotton planters in the region. In June 2002, a group of Agricultural ministers from Central and Western Africa requested that preparation be made for launching a potential case (IDEAS, 2003: 19). In addition, the Agricultural Minister from Burkina Faso publicly asked in August 2002 for a more active engagement in the WTO/GATT and the launching of a case (Gouba, 2007: 90-1). In October 2002, at a press conference simultaneously organized in the C4 countries, ROPPA demanded the C4 governments to join Brazil in the consultations.

On legal capacity, evidence suggests that legal advice and support was available at very low costs. The most natural partner to address legal capacity concerns would have been the ACWL. In addition, the pro bono services of leading private law firms, such as White & Case, Sidley Austin and other Geneva-based law firms specializing in trade, were also available. Put differently, the variety of actors and their expertise could have
assisted the C4 in a dispute in terms of legal drafting, background research and representation.\textsuperscript{18} Financing additional personnel would have been necessary, because at the beginning of the case, only Benin had an official representation in Geneva.\textsuperscript{19} There were a limited number of initiatives to assist the C4. The most proactive of these initiatives was orchestrated by former WTO Deputy Director-General Ablassé Ouedraogo. With the support of the French government, he contacted a French law firm to prepare a case and traveled in Western Africa to persuade the respective governments of the merits of such an action.\textsuperscript{20} The law firm working for Brazil (Sidley Austin) was also reaching out to the C4. They signaled early on that they had an interest in having the C4 as co-complainants. Brazil realized that ‘it was much easier to make a case involving LDCs than large greedy Brazilian farmers against large farmers in the US’.\textsuperscript{21} Deputy Minister Camargo attempted to liaise with the C4 via the Ambassador of Benin, Samuel Amehou, and via Oxfam (Devereaux et al., 2006).

On the question whether cases are actionable, cotton was among the cases that fell under this category. Various forms of domestic support including export subsidies are regulated in WTO contracts to which LDCs have also signed up and are usually not regulated in bilateral agreements.

\subsection*{4.3. The gatekeepers and non-litigation}

If we exclude the lack of economic interests, legal capacity concerns, high costs and non-actionable cases as the main causal variables for the absence of the C4 as litigants, what remains? From the time of Mali’s first intervention on cotton subsidies and the decision of Brazil to launch a case, the West African cotton producers had more than two years to decide on their position in relation to litigation. The C4 had two options in terms of being a complainant, they could either act as co-complainant by asking for consultations jointly with Brazil in fall of 2002 or they could have asked for a separate case which had a good chance of being merged with the Brazilian complaint.\textsuperscript{22} Yet evidence suggests that the C4 was waiting until the last minute to decide. Let us focus on the remaining threshold factors (free riding, power and bureaucratic interests).

\textit{Free riding}. While demand for using a legal route was mounting, the C4 was clearly reluctant to pursue the legal option. In the words of François Traoré, representative of the Cotton Farmer’s Association in Burkina Faso, ‘Even Brazil reacted after we did. But our governments ( . . . ) decided that it was not appropriate to lodge a complaint’ (Traoré, 2005: 15). The Brazilian initiative seems to have affected the internal debates within the C4 governments. Many of the NGOs implicitly hinted at the possibility of free riding. IDEAS argued that if Brazil won the case and the US modified
its subsidy system, they could all profit (IDEAS, 2003). Interview material suggests that the option to rely on Brazil was an important element, but not discussed in public, as no one wanted to be accused of being a free rider. Similarly, a lawyer from ACWL suggested that there were many more cotton-producing countries that might benefit from a successful complaint by Brazil. They were, however, not visible at any stage of the process. Data on the economic importance of cotton suggests that other countries, in particular Ivory Coast, Cameroon and Togo, would also have had economic stakes (in terms of production and overall exports). The contribution of cotton to foreign exchange earnings is further significant for Angola, Burundi, Senegal, Tanzania and Uganda.

**Power play.** From the interviews and study of documents, it seems that the most important factor was the concern by the C4 that launching a case would impact on future development assistance. Figure 1 indicates the degree of dependence of the C4 in relation to overall ODA, which is measured as a percentage of gross national income (GNI). This rate has been significantly higher for Burkina Faso and Mali than for Benin and Chad in recent years.

Evidence from interviews suggests that perceived opportunity costs related to foreign policy priorities in relation to the US had a particularly

![Figure 1 Aid dependence. Source: World Bank World Development Indicators 2009.](image)
strong impact. Concerns about the foreign policy implications were reflected in heated and intensive debates in the capitals of the C4. The executive director of IDEAS traveled to West Africa in spring 2003 and met with many high-ranking officials. He recalled that ‘they were very reluctant, they were afraid to go against the US. They were happy that we did not advocate the involvement in dispute settlement’. The overarching concern was the dependence on foreign aid. Similarly, one of the C4 ambassadors in Geneva reported on the great reluctance to use litigation. ‘It was the first time that African countries were about to engage in dispute settlement ( . . . ) we were afraid ( . . . ) afraid that the bilateral relations could be harmed’. While the ambassador attempted to ‘tell the capital that it was our right as WTO member to launch a case ( . . . ) it was hard to get this message across’. Moreover, the Geneva-based ambassador received many phone calls from his ambassadorial colleagues who were based in Washington. They ‘thought that I was putting the bilateral cooperation at risk’. A Geneva trade official from Mali argued along similar lines: ‘The capital had been very concerned about the bilateral relations. Signals from the US or the EU are often not very explicit, but weigh heavily on our anticipation of potential effects’.

Interview evidence suggests that in particular the prospect of receiving additional aid allocation through the US aid program, called the Millennium Challenge Account (MCA), seems to have significantly affected the parties’ positions (with the exception of Chad). Figure 2 shows how US ODA for the C4 developed from 2001 to 2007. The data suggests that countries were particularly concerned about foregoing the future benefits from ODA. In early 2001 the US was not a key donor, its share for the C4 ranged between 1–11%, but as soon as countries became eligible for MCA funding figures went up substantially. Benin and Mali signed onto the MCA in 2006; this explains the surge of ODA (measured in commitments) in 2006 (for Benin) and 2007 (for Mali).

Power concerns also affected attempts to enlarge the C4. A partner from Sidley Austin recalled that they tried to get Senegal on board in the Cotton case. ‘We briefed a guy who was good, he went home, spoke to the President, and came back telling us that he couldn’t do it, ( . . . ) because a third of food aid originates from the US. He reminded us that the decision to change this is at the discretion of the agricultural secretary in the US’. Evidence further suggests that many NGOs advocated against taking the legal route. Not only Oxfam but also IDEAS and ICTSD were not enthusiastic about litigation. IDEAS argued in a position paper that the DSU is an instrument of last resort. It was also noted that African countries were vulnerable to political pressures in terms of trade programs (e.g., AGOA) and foreign aid. The briefing paper went as far as to argue that the launching of a case could be interpreted by the US as an unfriendly action. IDEAS advocated a consultation and mediation process with the
support of the Director-General of the WTO and bilateral negotiations as well as a stronger presence in the Doha negotiations (IDEAS, 2003). While advice from the NGO could be partially explained by their expertise, which is outside the field of legal proceedings, the position of ACWL was more puzzling. ACWL was not actively fighting for the case, even though this case seemed to be made for the institution. In response to a demand by Benin, it provided an assessment of the situation, which offered a rather sober outlook for the options, discouraging co-complainant status by arguing that even if the C4 won the case, it could not rely on sanctions, and signaling that the C4 might have a capacity problem.31

While the calculations of the C4 were strongly affected by potential repercussions on bilateral relations, there is no evidence that the US for its part used direct signals to convey unease about an LDC launching a case. In fact, officials at the Office of the United States Trade Representative (USTR) did not expect the LDCs to bring a case. They even seemed surprised that Brazil would bring a case. A leading US negotiator for agriculture recalled ‘We didn’t think that Brazil would bring a case, so we didn’t take serious talks from the C4 or other African states’.32 The US was caught by surprise; yet, they were optimistic that the case could be won. ‘We knew we had

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**Figure 2** Dependence on US ODA. Source: OECD, Commitments in ODA: current prices US dollar (2001–2007), US Dependence measures the percentage of ODA from the US in relation to total ODA.
some programs, but did not anticipate these to be strongly affecting the markets. He continued that, ‘there was also surprisingly little interaction during the consultation phase between the US and Brazil, so the issue of the C4 did not really appear in Washington’. 

**Bureaucratic interests.** As to bureaucratic interests, the interview material suggests that both sides in the dispute (the C4 and the US) had an inherent interest in pursuing the negotiation platform. As the Doha Round of trade negotiations started in 2001, both actors had the possibility of directing the issue towards the negotiation platform. This was particularly interesting for the C4. At the time of discussions about DSU participation, there was strong consensus on the need to push for a negotiated agreement. In May 2003, the C4 made their first significant appearance as a group, proposing a sectoral initiative in favor of cotton. On 10 June 2003, Burkina Faso’s President Blaise Compaoré visited Geneva to present the initiative at the Trade Negotiations Committee, the first time a head of state had addressed the WTO Members in Geneva outside a Ministerial Conference. Also in June, the Malian President, Amadou Toumani Touré, testified before the US House of Representatives International Relations Subcommittee on Africa. During the failed WTO Ministerial Conference in Cancun in September 2003, the cotton initiative received widespread support. After Cancun, the C4 demands received also more attention from the US. In July 2004, the US negotiated bilaterally with the C4. This helped conclude the July Framework Agreement, in which, on cotton, it is stated that it ‘will be addressed ambitiously, expeditiously, and specifically, within the agriculture negotiations’ and it called for the establishment of a Sub-Committee on Cotton (SCC), which should ‘ensure appropriate prioritization of the cotton issue’. Similarly, in the Ministerial Conference in Hong Kong, bilateral talks, assisted by the chairman of the negotiations, paved the way for the Ministerial Declaration. It was agreed that the cuts on cotton would be quicker and deeper than in other areas of agriculture.

While today’s negotiations are stalled, early bargaining processes led to encouraging signs as it was agreed to prioritize the tackling of cotton subsidies within the agricultural negotiations. This reinforced negotiators’ preference for the negotiations. What explains this preference for negotiations beyond negotiators in-built inclination (Elsig, 2011)? Two particular factors helped prioritize the negotiation venue for the C4: First, negotiations in the WTO context allow weaker states a number of strategic possibilities, such as coalition building. Not only were they acting as a group (the C4), but they also received support from other developing countries, in particular the African group. In addition, the chairman of the negotiations, Crawford Falconer supported the claim. These forms of assistance proved important for obtaining concessions, both in the July 2004 agreement talks and the Hong Kong Ministerial. Second, the Doha Development Agenda (DDA) provided the background conditions to push offensively
for the abolition of subsidies that negatively affected the prospect for LDCs’ exports. Cotton was flagged by several observers and participants as a key issue or ‘litmus test’ for the round (see Lamy, 2006). Camargo reflected on this preference ordering by arguing that ‘the sectoral initiative was quite successful (. . . ) I exchanged information with the Ambassador of Benin and understood that he was more interested in the negotiations’.41 The C4 further and indirectly used litigation as a strategic negotiation tool. In bilateral negotiations, they would tell the US side that ‘we could have litigated, but we want no adversarial relationship. We want to sit down as partners and find an agreement’.42

For the USTR, the preference for the negotiations was largely an attempt to embed the issue of cotton into a larger negotiation package. Negotiators’ hands were domestically tied. In the case of cotton, the domestic political economy of the US made it difficult to allow for concessions on a case-by-case basis. This is largely explained by the strong influence of the National Cotton Council (NCC).43 The US assumed that they could influence the course of action by suggesting substantial cuts on subsidies in the DDA.44 In the negotiations, the US could not stop the C4 from tabling proposals, but the negotiation logic provided opportunities for the US to engage in linkage politics and divide-and-conquer attempts. Yet, the US was surprised by the support the C4 received and their willingness to hold out. In particular, USTR Bob Zoellick underestimated their influence.45 ‘Overall the C4 demands were painful! And going into the 2004 July negotiations, we wanted to have an outcome; so we had to deal with the C4’.46 Given the experiences in Cancun and during the Geneva 2004 Ministerial talks, the US started in 2004 to put more emphasis on side payments. ‘We looked into how to assist the C4 in the short term either through capacity building or farmer-to-farmer support’.47 There is additional evidence that the US negotiators tried to weaken demands by the C4. Among more explicit side payments ranged the offering of a fund of $7 million to support West African cotton farmers. Agricultural Secretary Mike Johanns and USTR Rob Portman traveled to Burkina Faso in November 2005 to announce this new program called the West Africa Cotton Improvement Program (WACIP).48 Rob Portman was further quoted during the press conference that this initiative was ‘(. . . ) combined with other measures like debt relief, eligibility for Millennium Challenge Account assistance (. . . )’.49 As to the MCA, Benin and Mali were reminded that their proposals stood at $300 million and $212 million, respectively. Burkina Faso was given eligibility status for MCA assistance just two days prior to the trip.50 A year earlier, Burkina Faso had already been promoted to a status, where it could submit proposals.51 On the same occasion, it was announced that the NCC would be a key partner in WACIP, providing assistance in insect control and in using biotechnology. During the Ministerial Conference in Hong Kong later in the year, USTR Rob Portman announced cotton tariff
elimination for West Africa. For the US, it was clear that only a package deal could produce an outcome that the US could sell at home. As long as other industries did not raise voice in support of greater market access in industrial and services sectors, it was hard to balance the influence of the cotton industry (see also Kripke, 2005).

As to the expected observations, the evidence shows that the combined factors acted as barriers to dispute entrance (observation 1). At the same time, the lack of encouragement from important NGOs to pursue a legal action contributed to abstaining from filing. In addition, the US did not expect to be challenged by the C4, therefore there was no need to send out signals to them. The case further provides evidence that a negotiated agreement has been the preferred venue for both actors (observation 2).

4.4. To be third party or not to be . . .

While the C4 countries abstained from joining Brazil in filing a case against the US, Benin and Chad joined as third parties and Burkina Faso and Mali abstained. Benin was more active during the panel stage, while Chad was more engaged during later periods of the case. Originally all four parties at the level of ambassadors agreed to act as third party. They all sent a request to their capitals. In the case of Burkina Faso and Mali, it was argued publicly that they had missed the deadlines for some bureaucratic reasons. Yet, from the interviews, it seems more plausible that once again the fear of irritating the US was present. Of the C4, Chad was the least dependent on US aid policies in 2001–2002 (Figure 2), and Benin and Chad overall relied the least on ODA (see Figure 1). In addition, Benin for its part had an active ambassador based in Geneva. Benin was leading and coordinating the process in Geneva. Its ambassador carried some weight when persuading the capital that third party status was not comparable with complainant status. Nevertheless, the governments wanted to make sure that they were not the only third parties but part of a larger group.

In terms of the Geneva stakeholders, the NGO community was less concerned about the third party status. In an internal paper IDEAS argued that the C4 could profit from the legal work done by Brazil if they associated themselves to the Brazilian action as a third party. A WTO official suggested that ‘Benin and Chad were largely talked into this’. In particular, the law firm that was hired by Brazil to represent them in the case was very active in reaching out to the C4. They expected that the third party participation was important not on the legal side, but on speaking to the ‘high moral grounds’. A partner from Sidley Austin argued that we ‘tried everything to get the LDCs on board, ( . . . ) we thought that this would change the panel deliberations, as Brazil was not really a developing country in terms of agriculture’. Benin and Chad finally decided to take the third party option. Benin approached ACWL to be represented in the case, but there
was no agreement reached between the two parties. There are different explanations why ACWL did not represent Benin. One representative of the C4 argued that ‘ACWL didn’t send strong signals to us that they would want to defend us’. In the end, following a suggestion by ACWL, White & Case represented Benin and Chad on a pro bono basis. Later Chad was represented by ACWL during the appeal process.

The US for its part did not like to see the C4 countries participating as third parties. One legal councilor assisting Brazil argued that ‘the US hated it’. The US largely ignored the demands made by the C4 in the dispute settlement procedures. But they did not actively discourage the C4. They did not engage with Benin’s arguments during the process. They quickly came to realize that LDC participation could affect the panel’s deliberations. One USTR legal advisor submitted that in this case ‘the legal arguments were not as highly valued as they usually are’. But, he acknowledged that he had not fully realized that he was about to lose the case until his wife told him ‘that she read about the case in the New York Times! (. . .) at that stage I knew we would lose the case’.

As regards the expected observation 3, above evidence suggests that power asymmetry seems to be present, but can be overcome. In particular Chad was confronted with less foreign policy risks. It was less dependent on US foreign aid. On the contrary, US foreign aid seemed to rocket once Chad started to export oil to the US by 2005. In terms of Benin’s participation, from a power asymmetry view, its participation is less expected. Evidence suggests that the proactive role of Benin might have contributed to its stance. Its ambassador was persuaded over time that third party status was not too risky an exercise. He then transmitted this position to the capital which finally agreed. It is interesting to observe that Benin was not represented in the final implementation panel that looked into compliance. A Geneva-based official of Benin recalled that there was a change of minister at home and that the new minister again valued bilateral relations with the US too highly to become actively involved in litigation against the US.

4. CONCLUSION

In the current negotiations on reforming dispute settlement – which are conducted separate from the Doha Round – LDCs have submitted a number of proposals (see WTO, 2002a, 2002b, 2002c). One of the main concerns for low-income developing countries is the lack of extra-legal support. On the basis of the findings of this study, we posit that extra-legal assistance (e.g., financial assistance through a fund) will not prove sufficient to allow for more active participation in dispute settlement. This paper has argued that the literature has overestimated costs related to legal capacity and
economic importance and has not sufficiently explored other considerations. Therefore we are critical about addressing the legal capacity issue in isolation from other concerns.

The study further found that the absence of cases might not be such bad news, as witnessed through free riding in dispute settlement procedures and through the indirect use of the litigation system in the negotiations. Yet, asymmetry of power is here to stay. This calls for additional tools to envisage in view of mitigating negative effects of asymmetry, such as more power to the WTO Secretariat in assessing the overall compliance or the creation of a fund for LDCs to cover market access losses in case of non-compliance. As to other arguments found in the literature such as learning effects through participation in litigation, this case study cautions from too high expectations (Davis and Blodgett Bermeo, 2009). Learning effects are cancelled out as ambassadors are leaving Geneva and are often given completely different tasks at home. In addition, the C4 countries supporting the complainant in this case have not been very encouraged, given the long process, bureaucratic hurdles and continued non-compliance by the US.

As to future research, we posit the need for unpacking the developing countries’ incentives to litigate further. We have made a first step towards a typological theory by focusing on LDCs. If we take the case of an emerging economy, other factors might be more important than those characterizing the LDC category. Suddenly, another set of priorities emerges; as one ambassador from an emerging economy put it: ‘First, we have to address the costs for launching a case as we don’t have access to low-cost advice. The precondition for litigation is a strong demand by the domestic industry financing the claim and assisting the government over the whole process. Second, we have to address potential economic repercussions through the WTO. We have to assess the likelihood of another party in reaction launching a complaint against us’. This assessment suggests that while for LDCs it is mainly about foreign aid, more advanced developing countries seem more concerned about costs, market access and retaliation within the legal system of the WTO.

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NOTES

1 We allow for some variance on the dependent variable, as two countries opted for third party status and two countries abstained.
Costs for bringing a case are estimated at roughly $100,000, interview with WTO ambassador from a large developing country, 14 July 2009.

In their empirical test they rely on proxies, such as gross domestic product (GDP), the size of a countries’ WTO representation, the number of overseas embassies, non-military government expenditures, quality of bureaucracy and past participation.

Few cases that went to the panel stage had no third party participation (Horn and Mavroidis, 2008).

In EC–Bananas the involved LDC was Senegal and in EC–Sugar the participating LDCs were Madagascar, Malawi and Tanzania.

The ACWL was established in 2001. Its key function is to provide developing countries and LDCs with legal assistance. The ACWL is financed mainly by European states (Denmark, Finland, Ireland, Italy, the Netherlands, Norway, Sweden, Switzerland and the United Kingdom) and Canada. Clients pay different fees based on their level of development.

Examples of preferential schemes are the EU’s General System of Preferences (GSP) or the US African Growth and Opportunity Act (AGOA). Forms of preferential trade agreements involving LDCs include the EU’s new Economic Partnership Agreements (EPAs) with groups of African, Caribbean and Pacific States.

Retaliation in the form of filing a case against the weak actors is less feared.

Acting as third party could also be described as ‘bandwagoning’ instead of partial free riding; thanks to an anonymous reviewer for this point.

It went as far as to ‘allow third parties that fail to submit anything in writing to participate actively in oral hearings’ (Smith, 2004: 554).

Anecdotal evidence from the Antigua Gambling Case suggests that the US did not appreciate the rhetoric of the third parties trying to influence the procedures (see WTO Document DS285, cited in Busch and Reinhardt, 2006: 457).

The case study builds on primary and secondary sources as well as a dozen of in-depth interviews with involved actors in the dispute.

Simultaneously to the cotton case, Brazil prepared another complaint over agricultural subsidies against the EC (EC–Sugar) and deliberated a third case on Japan’s beef import regulations (which newer saw the light of day).

Interview with de Pedro de Camargo Neto, 23 September 2009.

In particular, the International Centre for Trade and Sustainable Development (ICTSD; www.ictsd.org), IDEAS centre (IDEAS; www.ideascentre.ch) and Oxfam (www.oxfam.org) were very active.

Other third parties to the dispute were Argentina, Australia, Canada, China, Chinese Taipei, European Communities, India, New Zealand, Pakistan, Paraguay, Venezuela, Japan and Thailand.

Nefeterius Akeli McPherson, a spokeswoman for the Office of the US Trade Representative, said in a statement that the fund might be used for international cooperation with Brazil and countries of sub-Saharan Africa that joined Brazil in the case.

This counterfactual argument is derived from the later experience in assisting Benin and Chad as third parties.


Interview with Nicolas Imboden, Executive Director IDEAS, 7 May 2009.

Interview with trade official from the Brazilian WTO mission, 14 October 2009.

ACWL report, on file with author.

Interview with former WTO ambassador from a C4 country, 25 May 2009.
Interview with trade lawyer from ACWL, 18 May 2009.

International Cotton Advisory Committee.

Data from UNCTAD, Information Note, 25 February 2005.

Interview with Nicolas Imboden, Executive Director IDEAS, 7 May 2009.

Interview with former WTO ambassador from a C4 country, 25 May 2009.

Interview with trade official from the Malian WTO mission, 26 May 2009.

Interview with Partner from Geneva Office of Sidley Austin, 23 June 2009; see also Diouf and Hazard (2005: 66).

ACWL report, on file with author.

Interview with a former US negotiator on agriculture, 7 January 2010.

Ibid.

Ibid., this was confirmed by a high official from the United States Department of Agriculture (USDA), interview, 4 November 2009.

It foresees a ‘complete phase-out of support measures for the production and export of cotton’.


In Cancun, the ‘Derbez draft text’ recognized the importance of a sectoral initiative on cotton (WTO, 2003).


Interview with a former US negotiator on agriculture, 7 January 2010.

Interview with WTO staffer, 9 June 2009; interview with high official from USDA, 4 November 2009.

Interview, 23 September 2009.

Interview with a leading US negotiator on agriculture, 7 January 2010.

The cotton industry is among the four highest agricultural campaign contributors and receives substantial levels of government support (Thompson, 2005). Congress is easily mobilized to defend the industry’s interests, see letter from Senators Cochran, Lincoln and Chambliss to USTR Zoellick, 8 September 2003.

Interview, 7 January 2010.

Ibid., Interview with Oxfam USA, 16 December 2009, see also Blustein (2009).

Interview, 7 January 2010.

Ibid.

Associated Press, 10 November 2005.

USDA News Release No. 0486.05, 10 November 2005.

The coincidence of timing was striking, in particular because Burkina Faso was not expected to be on the list that soon; interview with Nicolas Imboden, 7 May 2009.


The granting of rights to Brazil for applying cross-retaliatory measures against the US has induced export industries to engage and to counter the pressures from the cotton industry. The US has made initial steps to reform some of its assistance programs.

On the experience of Benin and Chad as third parties, see Zunckel (2005).

Interview with Nicolas Imboden, 7 May 2009.

Ibid.

Ibid.

Interview with WTO staffer, 9 June 2009.

Interview with Brazilian trade official, 14 October 2009.

Interview, 23 June 2009.
Furthermore, Chad is of considerable significance to Western interests in a number of regional conflicts. It plays an important role in the American-sponsored ‘Global War on Terrorism’ by fighting the Algerian ‘Salafist Group for Preaching and Combat’, which repeatedly violated the Chadian border. Chad is also involved in the conflict in Southern Darfur, and the Deby government received international backing for fighting Sudanese sponsored rebels.

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