

The ACWL: Enhancing the Accessibility of the WTO Legal System

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The ACWL was established in 2001 to level the playing field at the WTO by providing assistance in WTO dispute settlement proceedings and free legal advice and training to developing countries and LDCs. More than 20 years after its creation, this article describes the origins of and rationale behind the ACWL and assesses the impact of its services. It also explains the current informal discussions among ACWL Members to improve the accessibility of its services in the context of the broader WTO discussions regarding the dispute settlement system reform.

Keywords: Legal aid, developing countries, LDCs, accessibility, dispute settlement, World Trade Organization

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I INTRODUCTION

The Advisory Centre on WTO Law (ACWL), located in Geneva, was established in 2001 to provide legal aid to developing countries² and least-developed countries (LDCs) on WTO law. While the notion of legal aid for individuals to ensure fairness of the legal system is well entrenched in domestic law, the ACWL was a groundbreaking experiment in providing legal aid at the international level. In effect, the ACWL was a novel attempt to give practical effect to the principle stated by Judge Gilbert Guillaume, former President of the International Court of Justice, that 'access to international justice should not be impeded by financial inequality'.³

Since its inception, the ACWL has made a significant contribution to ensuring that developing countries and LDCs have the legal capacity necessary to enable them to

take full advantage of the opportunities of WTO membership. To that effect, the ACWL provides legal opinions and training on WTO law free of charge to its Members and the LDCs that are entitled to its services. In addition, the ACWL assists in WTO dispute settlement at fixed fees that are well below commercial rates.

As is well known, in recent years, the WTO dispute settlement system has been undermined by the controversy surrounding the WTO Appellate Body. In response to this crisis, throughout 2023, WTO Members have been engaged in extensive discussions about reforming the dispute settlement system. Among the issues raised has been the accessibility of the system. This issue incorporates two elements: whether the complexity of the system discourages smaller/less frequent participants and whether the system is prohibitively expensive. The second element regarding the costs also concerns the ACWL, which was established in part in order to reduce the costs of dispute settlement proceedings for developing countries and LDCs.

Accordingly, in recent months, ACWL Members have been meeting informally to consider whether to improve the accessibility of the ACWL itself. At the time of writing, these discussions have yet to be concluded. By the time of the WTO's thirteenth Ministerial Conference (MC13) in February 2024, however, the ACWL may have

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¹ ACWL's Report on Operations 2021, at 9, <https://www.acwl.ch/wp-content/uploads/final-report-on-operations-2021-for-website.pdf> (accessed 6 Dec. 2023).

² Throughout this article, the terms 'country' and 'developing country' include separate customs territories and countries with economies in transition.

³ Speech to the General Assembly of the United Nations, 30 Oct. 2001, quoted in Petina Gappah, *An evaluation in of the role of legal aid in international dispute resolution with emphasis on the Advisory Centre on WTO Law*, in *Agreeing and Implementing the Doha Round of the WTO* 308, 332, at 308 (Harald Hohmann, ed., Cambridge 2008).

made some changes to how developing countries and LDCs may access its services.

This note describes how the ACWL has, over the twenty-two years of its existence, enhanced the accessibility of the WTO legal system, and in particular its dispute settlement system, and explains how the ACWL's ability to do so may be ensured and expanded going forward.

2 THE GENESIS OF THE ACWL

The creation of the WTO in 1995 led to two significant changes in the multilateral trading system. First, while the General Agreement on Tariffs and Trade (GATT) covered only trade in goods, the WTO agreements included extensive new rules on issues such as trade in services and trade-related aspects of intellectual property rights. These new rules were particularly cumbersome for developing countries and LDCs to understand and apply.

Second, there were fundamental changes to the dispute settlement process that existed under the GATT. Originally, GATT dispute settlement was not binding. A party that was challenged in a dispute could block either the establishment of a panel to hear the case or the adoption of its report. By the end of the GATT era, a party could no longer block the establishment of a panel but could still block the adoption of an adverse report. Under the WTO, however, a defending Member may now delay (slightly), but not block, the establishment of a panel. Moreover, all panel reports are automatically adopted unless there is negative consensus not to do so (in other words, there must be unanimous agreement, including of the winning party, to block the report). WTO dispute settlement is now fully binding in a sense that the GATT system never was. Moreover, for the first time, the WTO dispute settlement system included a second tier, the Appellate Body, to consider appeals of legal issues decided by WTO panels. Thus, the WTO system is far more complicated and legalistic than the old GATT system, which had deep diplomatic roots. In the words of one early WTO panel, 'under the WTO, the rule of law has been strengthened through increased automaticity of dispute settlement and detailed integrated dispute settlement procedures. All the more so in this context of "thickening of legality"'.⁴

The breadth and complexity of this new system caused considerable problems for the smaller countries in the system. They lacked the legal capacity and resources fully to understand the new rules and to

defend their interests in the dispute settlement system. Accordingly, in the late 1990s, these countries raised concerns that due to these capacity constraints, they were not able to participate fully in this new WTO legal system. To some extent, this was already anticipated in Article 27.2 of the WTO's Dispute Settlement Understanding, which provides that the Secretariat should provide technical assistance on legal matters but only to the extent that it was not inconsistent with the impartiality of the Secretariat. This imposed obvious limitations on the extent to which the Secretariat could provide independent, unvarnished legal advice on potential disputes to developing country Members. To address this problem, at the initiative of representatives of both developed and developing countries led by the Netherlands and Colombia respectively, a group of WTO Members created the ACWL as an independent intergovernmental organization that would provide legal assistance to developing countries and LDCs. In 1999, at the WTO Ministerial Conference in Seattle, Members signed the agreement to establish the ACWL, which began operations in 2001.

At the signing ceremony in Seattle, Mr Renato Ruggiero, former Director-General of the WTO, emphasized the importance of the creation of the ACWL in the following terms: '[F]rom a systemic point of view, helping developing countries improve their participation in the multilateral trading system, contributes to the credibility of the WTO'.⁵ Similarly, H.E. Mr Gerrit Ybema, former Minister for Foreign Trade of the Netherlands, stated that the ACWL 'demonstrates the power of a simple idea whose time has come. I refer to the principle of effective access to justice, in addition to formal equality before the law'.⁶ Two years later, at a ceremony in Geneva marking the inauguration of the ACWL, the then Director-General of the WTO, Mr. Michael Moore, said that:

Today, and within the framework of the WTO dispute settlement system, the ACWL takes another, almost revolutionary, step forward in international adjudication, by establishing itself as the first true centre for legal aid within the international legal system.⁷

Two decades later, the ACWL has a permanent staff of fifteen people, has provided more than 3'600 legal opinions, and has participated in more than seventy WTO disputes.

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⁴ Panel Report, *India – Quantitative Restrictions*, WT/DS90/R, para. 5.101.

⁵ Former WTO Director-General Renato Ruggiero at the Ceremony Signing the Agreement Establishing the ACWL, Seattle 8 (1999), <https://www.acwl.ch/wp-content/uploads/documents-signing-ceremony-of-acwl-seattle-1999.pdf> (accessed 6 Dec. 2023).

⁶ Former Minister for Foreign Trade of the Netherlands Gerrit Ybema at the Ceremony Signing the Agreement Establishing the ACWL, Seattle 6 (1999), <https://www.acwl.ch/wp-content/uploads/documents-signing-ceremony-of-acwl-seattle-1999.pdf> (accessed 6 Dec. 2023).

⁷ Inauguration of the ACWL on 5 Oct. 2001, Speech delivered by the Director-General of the WTO, Mike Moore, <http://www.acwl.ch/milestones/> (accessed 6 Dec. 2023).

3 MEMBERSHIP OF THE ACWL

Membership of the ACWL is open to all WTO Members and countries in the process of acceding to the WTO. Developed countries may join the ACWL but, of course, are not entitled to its legal services. Instead, the ACWL's developed country Members (twelve at present) provide the bulk of the ACWL's funding.⁸ In joining the ACWL, these countries recognized that the credibility of the WTO legal system can only be ensured if all WTO Members can equally and effectively participate in it.

Developing countries that are Members of the WTO or acceding to it may become Members of the ACWL and use its services. At the time of writing, thirty-nine developing countries have done so. These countries must pay a one-off accession fee to become Members. In addition, they pay fees for assistance in dispute settlement proceedings that are well below commercial rates. For the purposes of determining these fees, developing countries are divided into three categories (A, B, and C) based on their share of world trade and World Bank income categories.⁹

In addition, any country designated by the United Nations as an LDC that is or is in the process of becoming a WTO Member can benefit from the services of the ACWL without becoming an ACWL Member. There are currently 43 LDCs entitled to the services of the ACWL. These LDCs do not have to pay an accession fee to access the ACWL's services and pay even lower fees in the event that they seek the ACWL's assistance in dispute settlement proceedings.

As discussed below, the question of whether the ACWL's accession fees and fees for dispute settlement proceedings are an impediment to developing countries taking advantage of the ACWL's services is currently being considered by ACWL Members.

4 INDEPENDENCE AND GOVERNANCE OF THE ACWL

The ACWL is an independent, non-political organization. Its mandate is expressly limited to legal advice. Therefore, the ACWL provides advice strictly on legal issues relating to WTO law and does not take positions on policy issues, on which its developing country Members and LDCs may have different views. Lastly, the ACWL's legal opinions are strictly confidential. The ACWL cannot make public its legal opinions and cannot disclose either the countries requesting the opinions or the nature of the matter in question.

This independence is ensured in part by its governance structure. The ACWL is governed jointly by its developed and developing country Members. All of the ACWL's Members participate in the General Assembly, which meets twice a year and, *inter alia*, elects the Management Board.

The Management Board (composed of six individuals who serve in their personal capacity) ensures the efficient operation of the ACWL and appoints the Executive Director. The independence of the Management Board is important in ensuring that the ACWL is in fact independent, and is seen to be independent of influence or control over its operations by its funding developed country Members.

5 THE SERVICES PROVIDED BY THE ACWL

The mandate of the ACWL is to provide its developing country Members and LDCs with: (1) legal advice on issues of WTO law; (2) assistance in WTO dispute settlement proceedings; and (3) training on WTO law.

Many readers and observers are most familiar with the work of the ACWL in dispute settlement proceedings. In practice, however, its day-to-day legal advice to the eighty-two governments entitled to its services may be its most valuable role in the WTO legal system. Many governments may participate in dispute settlement proceedings only occasionally, if at all. However, they all need day-to-day legal advice on legal issues arising out of their participation in the WTO legal system.

Thus, the ACWL provides legal opinions on issues of WTO law free of charge to its developing country Members and to the LDCs. These opinions are limited to issues of law and are provided solely at the request of a developing country Member or LDC. As noted, the ACWL may not pursue its own agenda or policies on particular issues. Thus, the ACWL provides developing country Members and LDCs with in-house legal capacity similar to that enjoyed by developed countries.

The ACWL provides around 200 legal opinions each year. Because these opinions are provided at the request of individual governments and are strictly confidential, the importance of this work is not always evident to the outside world. However, this advice is extremely helpful to the user governments. In annual surveys, users have consistently reported a very high degree of satisfaction with the ACWL's legal advice. One Member has said that '[t]he ACWL is one of the best and most useful organizations supporting developing countries to navigate the multilateral trade agreements'.¹⁰ Another user has

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⁸ The developed country Members of the ACWL are: Australia, Canada, Denmark, Finland, Germany, Ireland, Italy, the Netherlands, Norway, Sweden, Switzerland, and the United Kingdom.

⁹ The one-off accession fees are: Category A, CHF 486'000; Category B, CHF 162'000; and Category C, CHF 81'000. The legal fees are discussed below.

¹⁰ ACWL's Report on Operations 21 (2022), <https://www.acwl.ch/wp-content/uploads/final-report-on-operations-2022-for-website.pdf> (accessed 6 Dec. 2023).

explained: 'Our effective and active participation into the multilateral trading system are only possible thanks to the high quality of legal services provided by the ACWL'.¹¹

This legal advice covers a wide variety of concerns of developing countries and LDCs under WTO law. The opinions may address issues such as the day-to-day operations of the WTO or provide advice on legal aspects of ongoing negotiations in the WTO. At present, for example, the ACWL is frequently asked to provide legal advice on drafting issues arising in the negotiations on e-commerce and fisheries subsidies. The opinions may also provide guidance to governments that are trying to ensure that their own laws and regulations are WTO-consistent. In this sense, the ACWL's legal opinions perform a valuable function in helping avoid formal disputes. Finally, the opinions may advise governments on whether measures affecting their market access taken by other Members are WTO-consistent. These opinions sometimes lead to formal dispute settlement proceedings.

Regarding dispute settlement, to date, the ACWL has provided its support in more than seventy disputes, or approximately 20% of all WTO cases since the ACWL's first full year of operations in 2002. To put this in context, if the ACWL were seen as a 'country', this would make the ACWL the fourth most frequent participant in the WTO dispute settlement system over this period, behind the United States, the European Union, and China. In other words, the ACWL has acquired legal experience in WTO disputes similar to that of the major players in the system. The ACWL pools that experience and shares it with its developing country Members and LDCs in defending their individual interests to ensure they have access to the same level of legal expertise as the main players in the system. The ACWL assists the litigating country throughout the entire WTO dispute settlement process, from the request for consultations to the implementation stage, including the panel and appeal phases.

Unlike legal advice and training (discussed below), the ACWL charges fees for assistance in dispute settlement proceedings. The ACWL's fees are significantly lower than those charged by private law firms and, like the accession fees discussed above, vary depending on the category of Member. The fees are also capped for each step in the dispute settlement proceedings, which provides certainty to ACWL's developing country Members and LDCs that they will not incur unforeseen expenses.¹²

As with the accession fees, the fees charged by the ACWL for dispute settlement proceedings have raised

concerns that they do not facilitate developing country use of the dispute settlement system. As discussed below, this is also under consideration by the ACWL's Members.

Finally, the ACWL also provides training to government officials of its developing country Members and the LDCs. This training is also provided free of charge to these governments. The ACWL's core training activities include an annual training course on WTO law for Geneva-based delegates, with weekly sessions running from October-June each year. The course runs over a three-year cycle to coincide with the normal length of delegates' postings in Geneva. The course covers all issues of WTO law and includes a moot court exercise that provides delegates with practical training on how to prepare legal documents and to present a case in a 'WTO hearing'. Delegates may also take an optional exam at the end of the course. By providing this training to delegates representing their governments at the WTO, the ACWL fills an important niche. While the WTO has its own extensive training activities through the Institute for Training and Technical Cooperation (ITTC), for various reasons, the WTO's activities are focused on capital-based officials. By focusing on Geneva-based delegates, the ACWL improves their ability to represent their governments effectively in the WTO and, at the same time, familiarizes them with the work of the ACWL. The ACWL cooperates regularly with the ITTC on various capacity-building activities and values this cooperation.

The ACWL also conducts ad hoc country-specific seminars or workshops for developing country Members and LDCs. These seminars are tailor-made to address the specific legal issues of interest to the requesting country. The ACWL offers these seminars at its offices or, increasingly since the pandemic, by videoconference. If funds are available, the ACWL can travel to its Members' or the LDCs' capitals to provide this training.¹³ In addition, the ACWL offers training sessions for French-speaking delegates and periodically holds a discussion group for women delegates.

Finally, the ACWL's Secondment Programme for Trade Lawyers has been very successful. Each year, up to four government lawyers from ACWL developing country Members and LDCs join the staff of the ACWL as paid trainees for a nine-month period. The seconded lawyers participate in the ACWL's training activities and are given instruction in legal writing and various aspects of WTO law. They work with, and learn from, the ACWL's lawyers on WTO legal issues and dispute settlement proceedings, by conducting research on WTO law,

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¹¹ ACWL's Report on Operations 2021, at 23, <https://www.acwl.ch/wp-content/uploads/final-report-on-operations-2021-for-website.pdf> (accessed 6 Dec. 2023).

¹² The maximum fees that would be payable by each category of country for the ACWL's assistance in consultations, panel and Appellate Body phases would be: Category A: CHF 276,696; Category B: CHF 207,522; Category C: CHF 138,348; and LDC: CHF 34,160.

¹³ For budget and fairness reasons, the ACWL cannot travel to individual countries at its own expense to conduct training programmes. However, if the host government or funding partner can cover the ACWL's travel and accommodation expenses, the ACWL is happy to provide on-site training to its eligible governments. The training itself is free of charge.

drafting legal opinions, and preparing documents for dispute settlement proceedings. The purpose of the Secondment Programme is to build the participating governments' capacity on WTO-related issues through this unique training opportunity. To date, a total of sixty-two government lawyers from twenty different developing countries and fifteen different LDCs have participated in this programme. Approximately 77% of these are still working for their governments.¹⁴

6 ENHANCING THE ACCESSIBILITY OF THE ACWL'S SERVICES

Over its first twenty years of operations, the ACWL has shown itself to be a very important means of ensuring a level playing field in the rules-based multilateral trading system. The importance of the ACWL's role has long been recognized within the WTO system. Ten years after its creation, the then WTO Director-General Pascal Lamy said that the ACWL had early on 'acquired the authority and influence of a mature international organisation', and that it 'contributes to the effectiveness of the WTO legal system ... and to the realisation of the WTO's development objectives'.¹⁵ Similarly, five years later, the then WTO Director-General Roberto Azevêdo called the ACWL 'an integral part of the multilateral system'.¹⁶

On the occasion of the ACWL's twentieth anniversary in 2021, thirty-seven WTO Members took the floor during a meeting of the WTO's Dispute Settlement Body (DSB) to pay tribute to the work of the ACWL. Chad, on behalf of the LDC Group, said that '[f]or the LDCs, the ACWL [is] an extremely important institution. It ha[s] been invaluable in the support that it provided on legal issues connected with WTO agreements in all their respects and all of the legal matters it was involved in'.¹⁷ The European Union, a non-ACWL Member, explained the systemic importance of the ACWL in the following terms: 'Equitable access to the WTO's dispute settlement system and, for that purpose, access to high-quality legal advice and representation in such procedures benefited the entire WTO Membership'.¹⁸

Notwithstanding this success, in the context of the ongoing discussions on WTO dispute settlement reform, the question has arisen as to whether the ACWL's fee structure for accessions and assistance in dispute

settlement proceedings, described above, undermine its ability to fulfil its mandate to ensure a level playing field in the WTO legal system. According to the Preamble to the Agreement Establishing the ACWL, the ACWL was established 'to create a source of legal training, expertise and advice on WTO law *readily accessible* to developing countries [and] in particular the least developed among them' (emphasis added). In effect, therefore, the question is whether the ACWL's fee structure means that its services are *not* 'readily accessible' either to some of the developing country WTO Members that have not yet joined the ACWL or to developing countries that might not be able to afford fees for dispute settlement proceedings. A further issue, which is also under consideration in the WTO, is whether LDCs should be able to continue to access the services of the ACWL for a period after graduation without having to become Members of the ACWL.

At its meeting in July 2023, the ACWL's General Assembly discussed these issues. Following the discussion, the General Assembly decided to establish an informal working group with a mandate to continue to consider these issues and to report back to General Assembly before its December 2023 meeting.

At the time of writing, it has not been determined what, if any, action the General Assembly will take regarding the accessibility of the ACWL's services either at its December meeting or in advance of the MC13 in February 2024. In discussions, however, there has been an understanding that, just as at the time of the creation of the ACWL, 'a rules-based system and a dispute settlement system accessible only to a handful of its Members would undermine a basic principle of equality before the law'.¹⁹ At the time the ACWL was created, developed and developing countries worked together to try to ensure that the ACWL would fulfil its mandate of improving the accessibility of the WTO legal system. Now, as then, both developed and developing countries (and LDCs) within the ACWL appear determined to work together to resolve the questions before them and to enable the ACWL to continue and, where necessary, expand its good work over the past twenty-two years.

As with many issues, money is important. The ACWL has been very fortunate with the generosity of its funding developed country Members that have enabled it to do such good work since its creation. This has not been without its challenges in recent years, as the budget

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¹⁴ ACWL survey of all former Secondment Programme participants (2021).

¹⁵ ACWL, *The ACWL at Ten: Looking Back, Looking Forward*, Conference held at the WTO 3 (4 Oct. 2011).

¹⁶ ACWL's Report on Operations 2016, preface, https://www.acwl.ch/wp-content/uploads/final_report_on_operations_2016_website.pdf (accessed 6 Dec. 2023).

¹⁷ WTO Dispute Settlement Body, Minutes of the meeting of 27 Sep. 2021, WT/DSB/M/456, para. 10.10.

¹⁸ *Ibid.*, para. 10.34.

¹⁹ Former WTO Director-General Renato Ruggiero at the Ceremony Signing the Agreement Establishing the ACWL, Seattle 9 (1999), <https://www.acwl.ch/wp-content/uploads/documents-signing-ceremony-of-acwl-seattle-1999.pdf> (accessed 6 Dec. 2023).

constraints imposed by the pandemic, the war in Ukraine, and other economic problems have limited some Members' Aid for Trade funding. The appreciation of the Swiss franc has also affected the value of contributions made to the ACWL in currencies other than the franc. It is hoped that going forward – and perhaps even at MC13 – the ACWL's developed country Members will be able to continue and expand their funding of the ACWL. Moreover, the ACWL's developed country Members see the principle of burden sharing as important. Because the ACWL is seen as a 'public good' from which all WTO Members benefit, all developed country Members that are in a position to do so should participate in its funding. Thus, it is also hoped that new developed country Members or supporters of the ACWL will emerge to share the burden of financing its work.

7 CONCLUSION

When it was first established, the ACWL was very much an experiment in expanding the concept of legal aid, with which we are familiar from many domestic legal systems, onto the international level. After twenty-two years of operations, the ACWL has proven to be a very successful experiment in international legal aid and has become a key part of the WTO's legal system. As Director-General

Dr Ngozi Okonjo-Iweala said in the statement to mark the ACWL's twentieth anniversary quoted in the epigram to this note:

The ACWL is a testament to WTO members' commitment to an inclusive multilateral trading system, in which all members can take full advantage of the benefits of rules-based trade. Moving forward, the ACWL's continued work will be an important contribution to our efforts to strengthen confidence in dispute settlement and in the WTO.²⁰

At the ACWL, we very much appreciate the ongoing generosity of our developed country Members that see the ACWL as an important part of the rules-based multilateral trading system. Through their financial support, these governments enable us to fulfil our mandate to make that system readily accessible to developing and LDCs. We also appreciate the trust and confidence placed in us on a daily basis by the delegates and officials of the developing countries and LDCs with which we work. We look forward to continuing to work with both groups and to ensure that our services are readily accessible to all potential users. We also look forward to welcoming additional developed country governments that may be interested in supporting this valuable work.

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²⁰ ACWL's Report on Operations 9 (2021), <https://www.acwl.ch/wp-content/uploads/final-report-on-operations-2021-for-website.pdf> (accessed 6 Dec. 2023).