

What to Do Before You Call the WTO

The Prelitigation Assessment of Trade Barriers

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TABLE OF CONTENTS

LIST OF ABBREVIATIONS AND ACRONYMS

ACWL	Advisory Centre on WTO Law
ADA	Anti-Dumping Agreement
AFTA	ASEAN Free Trade Area
ASCM	Agreement on Subsidies and Countervailing Measures
CAFTA	Central America Free Trade Agreement
COOL	Certain Country of Origin Labelling
DSB	Dispute Settlement Body
DSU	Dispute Settlement Understanding
EC	European Communities
EU	European Union
FTA	Free-Trade Agreement
GATS	General Agreement on Trade in Services
GATT	General Agreement on Tariffs and Trade
GMO	Genetically Modified Organisms
ICSID	International Centre for Settlement of Investment Disputes
IP	Intellectual Property
IPR	Intellectual Property Rights
NAFTA	North American Free Trade Agreement
NGO	Non-Governmental Organization
PPM	Process and Production Method
SPS	Sanitary and Phytosanitary
TBI	Trade Barrier Investigation
TBR	Trade Barriers Regulation
TBT	Technical Barriers to Trade
UNCITRAL	United Nations Commission on International Trade Law
US	United States
USTR	United States Trade Representative
WTO	World Trade Organization

FOREWORD

Lauded as a major achievement of the Uruguay Round, the World Trade Organization (WTO) dispute settlement system is today characterized by a rapidly growing body of jurisprudence that has become ever more legalized and increasingly complex. This, in turn, has put demands on the capacity of member countries seeking to engage in the system to advance and defend their trade interests. Developing country participation has increased dramatically since the time of the General Agreement on Tariffs and Trade (GATT), but just five countries account for more than half of all developing country complaints, while 75 countries have never been involved in a dispute either as complainant or respondent.

When the International Centre for Settlement of Investment Disputes (ICTSD) asked 52 WTO member states, including 40 developing countries, what they believed was the major advantage of developed nations in the multilateral dispute settlement system explaining this unequal engagement, 88 percent responded that it was institutional capacity.

Against this background of persisting capacity constraints in developing countries, ICTSD's Legal Capacity Project team works towards strengthening developing countries' legal capacity to empower them to fully participate in the multilateral trading system.

ICTSD believes that equal opportunity to participate in the rule making and rule shaping of the multilateral trading system is essential to ensure the system's fairness and conduciveness towards sustainable development. Only if countries can navigate this increasingly complex and legalized system will they be able to realize their development potential.

Following this conviction, ICTSD engages in a bottom-up assessment of conflict management and avoidance strategies deployed by developing countries of various sizes, geographical locations, and levels of development. Through a series of country studies, national and regional dialogues and thematic assessments, we have developed a catalogue of real-life experiences and working best-practices for trade conflict management, which we use to offer cutting-edge training and technical assistance in the area of legal capacity.

The present study is the newest addition to this publication series. It is published together with five other studies, all focusing on specific steps in the litigation process, outlining experiences and best practices for managing these tasks at the national level. Multi-stakeholder coordination and communication are at the core of the assessment, which takes a real-life, non-academic approach to the issue.

Written by Gary N. Horlick and Hanna Boeckmann, the present study considers the process of pre-litigation assessments. It focuses on three different types of assessment that can be undertaken before launching a WTO dispute — legal, economic, and strategic — and provides recommendations for complaining and responding countries as well as their private stakeholders.

We hope that you will find it interesting and insightful.

Ricardo Melendez-Ortiz
Chief Executive, ICTSD

EXECUTIVE SUMMARY

The crucial first step in any WTO dispute is determining whether there is an actionable dispute; that is, whether WTO prohibited trade barriers exist and whether it is politically, economically, and legally viable to take action. Having the capacity to identify trade barriers and assess their adverse effects is central to this exercise, and it has become even more significant since the shift to the legalized, fact-intensive WTO dispute system and increasingly complex international trade law.

The legal assessment will principally need to examine the prospects of success; from a legal, economic, and political perspective. It should consider all the potential arguments made in favour and against the position that a member state intends to pursue and the objective it hopes to achieve in litigating a case. The most relevant actors during this pre-litigation stage are the government and the economic agents (enterprises, private business, etc.), with civil society and other groups also contributing in certain cases.

The private sector is important at this stage because, in most instances, industry or industry associations are often in the best position to assess trade barriers. However, the decision to pursue a case at the WTO remains with the government, given that WTO dispute settlement remains a state-state affair, and the public interest may not necessarily replicate the interest of the affected private sector. Finally, public interest groups and, more often, government agencies play a role in identifying and assessing undue trade barriers.

Developing countries are often at a disadvantage in this exercise, because they either lack staff with the proper knowledge base or simply do not have the funding available to obtain the required legal expertise.

The objective of this study is to lay out the different nodes of analysis — legal, economic, and political — and the role of these various stakeholders in an effort to support countries on how to proceed once a trade barrier has been identified. It should also address the position of a country whose measures have been challenged by another country and that needs to decide whether to defend its policies. A similar analysis is needed in this context, yet the role of certain actors might be different.

The first node, the legal assessment, takes account of the likelihood of obtaining a favourable ruling by WTO adjudicators at the panel and Appellate Body levels by examining the legal merits of a case. Of course, countries will need significant legal expertise in order to successfully navigate this area of assessment. The private sector is often the driving force here, hiring private counsel to engage in an initial legal analysis in an effort to convince the government to pursue its claim at the WTO. Ensuring that the private sector has the possibility of initiating discussion within the government and entering into a dialogue is critical at this stage. Participating as a third party in disputes, joining the Advisory Centre on WTO Law (ACWL), and creating in-house legal expertise are just some of the ways developing countries can enhance their processes for preparing cases for WTO litigation.

The economic assessment of a trade barrier would include a cost/benefit analysis of bringing a dispute to the WTO, such as calculating the potential monetary gain of removing the trade barrier versus the cost of bringing the case to the WTO. The size and strategic importance of the industry affected by the trade barrier is another factor to consider along with the impact on employment and revenue. Again, most often, this kind of analysis would be conducted by private sector economists and consultants, but other actors may also play a role. For instance, Oxfam, a non-governmental organization dedicated to eradicating poverty, provided all the preliminary

economic analysis for Thailand in the *EC-Sugar* case. Likewise, civil society played a great role in the *US - Upland Cotton* dispute. Gathering and processing information on trade flows, barriers, and economic outlooks is essential at this stage. Yet, the analysis might have to go beyond the effects for one industry, as trade barriers can have important implications for the economy as a whole.

In terms of strategy, countries may want to consider the political consequences of initiating dispute settlement proceedings. These include but are not limited to assessing the relationship with the trading partner imposing the barrier, considering the nature of the trade barrier measure, whether it is temporary or permanent, and whether it is more beneficial to 'free ride' on the claims of other countries.

The author also engages in a review of procedures adopted by various WTO members for the private sector to petition for trade barrier investigations often with a view to initiating a WTO complaint. With a particular focus on the United States (US) Section 301 of the Trade Act of 1974, the European Union (EU) Trade Barriers Regulation (TBR), and China's equivalent mechanism, it is recommended that a similar model would be valuable for developing countries and could provide the infrastructure and procedures for industry complaints to be handled professionally.

1. INTRODUCTION[1]

"The law, in its majestic equality, forbids the rich and the poor alike to sleep under bridges, to beg in the streets, and to steal bread."

Anatole France, *Les Lys Rouges*

All WTO dispute resolution cases begin — formally — with a Request for Consultations, which can only be filed by a WTO member government. This fact, more than any other, shapes the entire WTO litigation process.[2] In practice, however, one could say that a WTO dispute starts considerably earlier, when a potential trade barrier is discovered that sufficiently affects the member's industry. At that point, the WTO member government will conduct a comprehensive assessment before initiating formal WTO dispute proceedings. This chapter will describe — based on anonymous interviews with officials of governments and organizations involved in the large majority of completed WTO disputes — how WTO member governments get to the point of filing a Request for Consultations. It will also suggest best practices for governments and private parties deciding whether to become involved in WTO litigation.

1.1 The WTO Dispute Resolution Process

For a better understanding of what has to be done before entering WTO litigation, the introductory part of the chapter will briefly explain the procedural underpinnings of a WTO dispute, discuss whether and to what extent an assessment is legally required before bringing a case, and outline the different types of complaints occurring in the Dispute Settlement Body (DSB).

First, after a government has filed the Request for Consultations, the respondent government must react to the request within 10 days. Otherwise, the complainant government may — according to Article 4.3 of the Dispute Settlement Understanding (DSU) — file a Request for the Establishment of a Panel. Normally, a respondent government replies to the Request for Consultations in time, and the parties have talks within a 60 calendar-day period, unless they have agreed otherwise. After the 60 days have passed, DSU Article 6 allows – but does not require – a Request for the Establishment of a Panel. In practice, consultations normally take 90 to 100 days.

While the respondent can 'block' the complainant's first post-consultations request for a panel (this is a vestige of former GATT practice), the complainant can file a second request a month or two later, which cannot be blocked. Once the panel is formally established, the two parties and the WTO Secretariat, according to DSU Article 8, discuss possible panel members. However, the complainant, at any time 20 days after the establishment of the panel, can have the Director-General name the panellists if no agreement has been reached per DSU Article 8.7. Once the panellists are named, activity moves very fast. Most panels have two hearings and at least two major briefs. Parties are required to give long written replies to literally hundreds of questions from the panel, all within the short panel proceeding period of six to nine months – as set out in Article 12.8 of the DSU. It is a very intense process, which explains why even countries with significant WTO expertise often hire outside counsel to help. In many countries, officials with WTO expertise cannot devote themselves entirely to the work at the panel stage, yet the speed of the proceedings and the increasing length of the written submissions require the dedication of much time.

Normally, after 6-12 months, the panel, according to Article 15 of the DSU, issues an Interim Decision to the two parties, who then review and comment on the findings (these comments rarely change the outcome). The final panel report is then circulated among all members and released publicly, and both parties have the right to appeal before the DSB adopts the panel report. No clear deadline is specified in the DSU for filing an appeal, but the adoption of a panel report should happen

between day 20 and 60 after the circulation of the panel report, so this period becomes the appeal deadline.[3]

The Appellate Body — according to DSU Article 17.5 — is expected to rule within a maximum of ninety days. However, some cases cannot be finished in that short period, due to the high complexity of the case and or simply backlogs of translation. After the circulation of the Appellate Body report, the case is far from being finalized. A victorious complainant must expect further work during the compliance stage, either through informal negotiations regarding the compliance with the ruling or in a series of arbitrations under Articles 21.5 and 22.6 of the DSU.

In short, undertaking a WTO dispute requires a significant commitment of nearly full-time personnel, which can be a real challenge for WTO member governments. Some governments, such as the EU and the US participate in so many disputes that they can rationally hire a very large staff of in-house WTO litigators, but even these two members struggle when local industry does not contribute legal support for a case. A comprehensive and detailed assessment of a case done early in the process somewhat alleviates the work during the very busy litigation proceedings.

1.2 What Pre-litigation Assessment is Legally Required?

Nothing in the DSU requires a legal or economic assessment before bringing a dispute. The DSU limits standing to members and, accordingly, asks a complaining member, in DSU Article 3.7, to "exercise its judgment as to whether action under these procedures would be fruitful." In WTO jurisprudence, this has been understood as conferring a broad discretion to the WTO member as to whether to bring a dispute or not. The Appellate Body in *EC - Bananas III and Mexico (HFCS DSU 21.5 Recourse)* affirmed the 'self-regulatory decision' a member makes according to DSU Article 3.7.[4] Thus, there is no requirement to legally or economically prepare the case before initiating a dispute. Moreover, the very low threshold the Appellate Body has set for standing in a WTO dispute might suggest that no economic assessment is necessary before a claim is brought. For standing in a dispute, even in highly economic matters, such as differences in tax treatment — e.g. in the liquor tax cases[5] — actual economic loss need not be proven. In *EC - Bananas*, the Appellate Body referred to a "potential export interest" as sufficient for bringing a complaint.[6] The WTO DSU leaves it up to the members to determine the extent to which they want to assess trade barriers before bringing a complaint. In practice though, members usually conduct a thorough analysis before bringing a trade measure to dispute settlement in Geneva. No government wants to lose face in the international trade community and gain a reputation for using the dispute settlement system without grounds.

After an overview of the nature of complaints that have generally been brought and that influence the pre-litigation assessment, this chapter will describe the different considerations that members include in their assessment of a trade barrier.

1.3 The Complaints

In the 427 complaints that have been filed with the DSB as of the time of this writing, several different categories of complaints can be discerned. The authors identify two main categories, which only represent a fraction of the possible categories.[7] The first and main category is cases brought to remedy an economic loss of the complainant's industry. The second is disputes that seem to be brought for not purely economic reasons.[8]

1.4 Where is the Economic Harm?

Although actual economic loss is not required for most WTO litigation, it seems that most disputes are brought for economic reasons. WTO disputes can be categorized according to the place where the complainant's industry suffers loss because of the trade barrier.

The vast majority of WTO complaints are the result of private economic actors asking their governments to deal with problems in export markets — Brazilian cotton producers complaining of US cotton subsidies; Bangladeshi battery makers complaining about India's anti-dumping duty; Chiquita banana (and many other banana producers in banana-exporting countries) complaining about the EU banana regime; Boeing complaining about Airbus and Airbus complaining about Boeing (involving third-country markets); and so on. This is unsurprising. While there are a number of cases without such direct, pressing economic loss in export markets (as described in further detail in section 3 below), the cases of direct economic loss are the most likely to be given priority by governments. Given the effort and costs related to litigating a WTO case, it is logical that a case must be worth being fought.[9]

The most frequent complaint is about economic loss in the market of the complained-of member.[10] Thus, the first completed WTO case was a complaint by Brazil and Venezuela against denial of access of their exports to the US market,[11] and one of the first GATT cases was by Chile complaining about the nullification and impairment of market access for Chilean fertilizer in Australia.[12]

Increased globalization has resulted in an increasing number of cases complaining about loss of exports to third countries (i.e., other than the respondent), such as the Brazil/Canada Aircraft and US/Europe Aircraft cases.[13] In theory, Brazil's complaint about US cotton subsidies would have applied to US exports of cotton to Brazil, and to Brazilian cotton exports to the US, but the focus was on Brazil's exports to third countries.[14] There are rumours of a possible complaint against China's export credit subsidies, which might cause (adverse) effects both on sales in the complainants' home market and in third-country export markets.

Finally, there are the much rarer cases with complaints about loss of market in the complaining member's market. In *EC - Aircraft* (DS316), the Appellate Body — reversing a panel's interpretation — found that several EU member states' contracts conveyed subsidies but not export subsidies, thus potentially affecting the complaining member's (*i.e.*, the US) market as well as the respondent's market.[15] On the other hand, issues involving exports of goods from the respondent to the complainant may well be handled on the national level, through trade remedies, such as antidumping duties, countervailing duties, or safeguards.

Even where there are only small economic interests at stake, the WTO dispute mechanism has served as a means for clearing out long-standing disputes. Peru's dispute with the EU over the nomenclature for scallops involved an economically small barrier (though important to one industry), and is a good example of an issue that could have stayed on the bilateral agenda for a very long time, because it was neither big enough to rise to the top of the agenda and require a solution by heads of government nor small enough to drop off the agenda. As a result, it was discussed for years by Peruvian and EC officials, but with no resolution, until Peru brought a complaint and won at the panel stage. The panel report was so scathing that the EU settled the case with a proviso that the report never be published. What has been published is a four-page report with no substantial content that only refers to a mutually agreed solution, with which the parties settled the dispute after the interim report was circulated and notified the panel according to Article 12.7 of the DSU.[16]

1.5 Non-economic Reasons for Filing a Complaint

Given that there is no requirement in the DSU of economic harm to bring most cases to the WTO and that there are a number of cases brought to the WTO dispute settlement mechanism without considerable economic loss, it seems evident that members might also be driven by non-economic motivations.

Few, if any, cases seem to have been filed purely in anticipation of future economic harm.[17] There is nothing in the DSU discussing the possibility of bringing a case based on anticipated economic harm. Even if it is technically possible to bring cases about future harm, WTO member governments — the only entities able to bring cases — may only focus on cases of actual harm. This must be the result, at least in part, of a pre-filing process of review of possible cases within each WTO member government.

A more subtle issue is cases designed to send signals, even where the economic impact is small. The *EU - Beef Hormones* case was brought by the US and Canada even though the maximum amount of beef they could sell in Europe, because of a Uruguay Round quota negotiation, was eleven thousand five hundred tons — well under half of 1 percent of the EU market at the time. Thus, even when the US and Canada won, they could not increase sales very much.[18] However, the case was brought more to send the signal to much larger markets, such as Japan and Mexico, and neither of those markets followed the EU path of growth hormones regulation.

With states as the only permitted WTO claimants, it would seem inevitable that WTO dispute settlement would see "political cases." Although some cases seem to have been brought for reasons mainly of domestic politics – the US brought *China - Windmills* at the behest of the United Steelworkers' Union, which was an early supporter of President Obama — it would seem that no purely political case lacking economic stakes involved has been filed.[19] At the domestic level, the US so far has decided against an investigation of the exchange rate of the renminbi in either a WTO subsidy or a countervailing duty case (that countervailing duty decision has been challenged in court).[20] While cases normally have economic goals, they can have political ones at the same time. For example, the *US-Cotton* case was brought by Brazil at the behest of its cotton industry as well as its general agricultural association. A successful public relations campaign by civil society, Oxfam, in particular, about the negative effects of US cotton subsidies on poor West African cotton farmers played a large role (those countries joined as third parties to Brazil's complaint).[21]

In *EU - Seizure of Drugs in Transit*, both India and Brazil had generic producers, with Brazil also being a purchaser, yet reportedly both also had political reasons to embarrass a developed country on medicines.[22] Another example falling in this category is *EU-Seals*.[23] Canada's direct economic loss in this case was quite small, but it had political capital to gain from standing up for traditional fishing villages in Newfoundland and for Native American First Nations, which have traditionally hunted seals because they eat large amounts of fish.

Sometimes, actors with an apparent economic interest in a complaint may not want to bring the case. In this situation, it may be up to the exporting country government to move forward without support from the private sector. So far, this has been mainly an issue for developed members with large multinational companies such as the EU and the US. For example, EU multinationals, in general, did not favour the EU complaint against the US Foreign Sales Corporations Tax, because it was estimated that as much as one-third of the economic benefits of the US export subsidy went to US affiliates of EU companies.Also, the *EC-Customs Procedures* case was brought by the Office of the United States Trade Representative (USTR) for small businesses with apparently very little US corporate support. This was in part because sophisticated US companies could use the differences in procedures at the different EC ports to 'pick and choose' which products to bring in at which EC ports to minimize customs duties and other issues.[24]

Notably, non-Chinese multinationals – including those from developing countries — claim to be reluctant to publicly attack China.[25] China is or will be the world's largest single market for many of the goods and services offered by those companies, and being a top supplier

in China may well be viewed as essential to corporate survival. Thus, reduced Chinese market access for imports may be irritating, but not enough to provoke an open fight. As a result, many cases may not be filed by the US and EU, even though they could win them. In 2010, the USTR reported Chinese trade barriers to US industry in almost sixty categories, ranging from trade in goods, services, investment, and intellectual property rights (IPR) protection, but only 8 of those listed have been the subject of WTO cases against China.[26]

Regardless of the impetus for a bringing a dispute, one can identify three major pillars that pre-litigation assessment should be built on, and each will be discussed in the following sections. In the authors' experience, which has been confirmed in a number of interviews with expert officials of the most active WTO dispute litigants, the extent and importance of each pillar vary from case to case. While almost all cases are based on economic loss, some cases are brought where the economic loss is quite small, but the domestic political sensitivity or systemic importance is significant.[27] This study will start with the legal assessment of a complaint, continue with an economic assessment and finish with the possible strategic assessment before bringing a dispute. It will also describe certain members' national codified administrative procedures for the private sector to bring cases to the attention and assessment of the WTO member government and finally frame recommendations for WTO litigants to improve their internal pre-litigation assessment of trade barriers in order to gain a stronger position in the litigation.

2. LEGAL ASSESSMENT

While many complaints in the WTO are not backed by a formal economic impact analysis, virtually all complaints are preceded by a thorough legal assessment. This section will describe who conducts the legal assessment and examine its scope, including important legal and strategic considerations as well as the option of joining as a third party. It will start with the situation of a complaining WTO member before bringing a dispute and finally discuss the legal assessment being undertaken in a defensive case.

2.1 Who Prepares the Legal Assessment?

Typically for the complainant, a legal analysis takes the form of a formal memorandum analysing whether a dispute settlement case will be legally successful. These memoranda are usually prepared within the ministry that is in charge of filing the cases. In the US, this is the USTR, and for the EU, the Directorate General for Trade of the European Commission in Brussels is in charge of pre-litigation analysis. Nevertheless, there may be wide variation in who prepares the analysis, or, more precisely, who delivers input into the formal memorandum. As already mentioned in the introduction, many WTO members, such as Australia, Brazil, Canada, China, the EU, Japan, Mexico, New Zealand, the US, and many others, can draw on the expertise of in-house WTO specialists who assess the legal implications of the trade barrier (some have arrangements with outside academic or private sector expertise as well).

However, some parties if involved in a WTO case — regardless of being the complainant or the respondent — make use of outside counsel. For instance, Panama as complainant and Colombia as respondent both sought the support of outside counsel in *Colombia - Ports of Entry*.[28] More recently, the Philippines hired outside counsel to advise the government as well as draft the submissions in the *Distilled Spirits* case.[29] Even those members with highly expert in-house trade manpower might benefit from the legal argumentation and information prepared by the industry's counsel. The USTR, with its 25 or 30 in-house, specialist trade dispute lawyers looks massive, but, in fact, the case-handling lawyers are overloaded with cases, and each trade dispute often has only one specialist working on it. Consequently, the USTR normally cooperates intensively with the outside counsel hired by the industry involved in a given case. Through that cooperation, the USTR remains in charge of the direction of the case and the drafting of the submissions, but benefits from the research assistance of the private counsel.

An example of a mechanism in a developing country that is in part similar to the USTR's cooperation with outside counsel but very different with respect to the funding and accessibility of WTO litigation is Brazil. A small office of highly sophisticated WTO experts in the Foreign Ministry, many with experience in Brazil's mission to the WTO in Geneva, manages the cases. However, cases are usually brought only if the local industry agrees to pay for outside counsel to help.[30] The outside counsel may provide research and submission drafting support, but the office in Itamaraty remains in charge.[31] The difference between both models of litigation management became clearly visible in the Brazilian Cotton Case, where unlike the Brazilian counterpart, the US cotton industry did not pay for a large legal support effort. Consequently, the USTR was outnumbered by the Brazilian officials as well as US lawyers and US academics all working on the side of Brazil.[32] The US might have lost the case even with more resources, and the example underlines the ability of some developing countries to use the WTO dispute settlement process on an equal (or better) footing with larger WTO members.[33]

With these examples, it becomes apparent that for poorer developing countries, WTO litigation involves at least two challenges of legal expertise and funding. Because of

these factors, WTO members established ACWL, which advises developing countries in WTO disputes from the consultations to the Appellate stage. The role of the ACWL will be discussed in section 2.3.

With regard to the content of the legal assessment, the following subsection will discuss different aspects that the authors recommend for consideration in the assessment regardless of whether a country is litigating on its own or with the support of the ACWL or external counsel.

2.2 The Nature of the Legal Assessment

Typically, the pre-filing legal assessment will discuss the likelihood of winning the panel and the Appellate Body proceedings. The assessment usually encompasses a detailed legal analysis, examining all relevant WTO obligations. Moreover, a member might also consider various strategic and tactical questions of how to handle the case. For example, a memorandum might embrace considerations of which line of argumentation appears to be the most successful, and whether some arguments should better be used as a 'last resort' strategy. Another important aspect to be considered in WTO dispute preparation is the potential arguments for the other side. Anticipating the other party's argumentation is essential to check one's own line of argumentation against deficiencies and to prepare for rebutting or even preventing the other party from making some arguments.

A further important consideration, where appropriate, might be the choice of forum. In some circumstances, it might be worth contemplating a claim under a different bilateral or regional trade agreement. For example, anti-dumping or countervailing duty cases might be brought under Chapter 19 of the North American Free Trade Agreement (NAFTA).[34] It is also worth noting that not all members include this question in their legal assessment of a potential trade barrier. For example, the EU reportedly does not usually consider its free-trade agreements (FTAs) as forums for bringing trade disputes.[35] This is different for trade in other regions. One of the most recent examples for a country to contemplate a regional forum might be the WTO case *Thailand – Cigarettes*.[36] The Philippines had thought about bringing the complaint under the ASEAN Free Trade Area (AFTA) agreement but then rejected the idea since AFTA's dispute settlement mechanism is not considered efficient.[37]

Furthermore, most legal assessments also discuss the option of reaching a settlement before filing the case and how best to achieve it. A settlement could be reached through different channels. Members typically use different bilateral and multilateral forums for discussions of trade barriers. These include the WTO Trade Policy Review Mechanism, the Transatlantic Economic Council, the US-China Strategic and Economic Dialogue, or more informal settings. A very prominent example for these efforts might have been the *Airbus/Boeing* cases, in which a settlement outside the WTO had been discussed throughout the proceedings.[38] In addition, a member might consider the utility of filing a complaint to 'encourage' settlement. In the authors' experience, this is mostly the case when the trading partners were not able to informally settle the case beforehand. Other trade practitioners are of a different view and believe that no cases have been filed with the intention to settle early. They put forward that if members are seriously willing to settle, they find a way to achieve a mutually agreed solution before filing. However, there are indeed some cases that have been filed and later withdrawn in return for an extra-forum settlement. Since the largest part of these settlements took place during consultations, the presumption of an intended early settlement seems fair to the authors.[39]

The legal assessment may also address the question of how the member will "win" compliance. Some practitioners involved in trade disputes disagree. In their view, such an analysis already anticipates a failure of the losing respondent to comply with the

decision of the DSB, although also in their experience most of the members comply, and this consideration should not be part of the legal analysis. The EU Commission only takes the compliance stage into its pre-litigation considerations if a negative record of compliance or other signals prompt it. In most cases, it assumes good faith and expects the respondents to comply.[40]

Typically, the legal assessment will also include an analysis of the areas of vulnerability for the complaining member. Some countries are clearly willing to proceed in the presence of risks as demonstrated by the US in *EC - Aircraft* and Canada in *Brazil - Aircraft*, given the reality of likely counter-cases.[41] Noteworthy in this context was the US failure to protect its exporters in anti-dumping and countervailing duty cases overseas until quite recently, with only three cases (out of 228 cases against US exports) filed prior to 2010 in *Canada - Grain Corn, Mexico - HFCS*[42] and *Mexico – Anti-Dumping Measures on Rice*.[43] In light of the long history of the US defending its own trade remedy practices, those cases were only brought as a result of strong political pressure. For example, *Mexico - HFCS* was demanded by a 96 to 0 vote in the US Senate. However, a complainant might be well advised to consider its own domestic trade regime with respect to the complaint barrier. Being vulnerable to the same or a similar complaint considerably weakens the argumentation and easily prompts a counter-complaint.

Finally, countries vary in the degree of certainty of "victory" that is necessary to initiate a case. The US, for example, will not file a case unless it is virtually certain of winning. In the experience of the authors, consultations according to Article 4 of the DSU will not be requested unless the US is at least 90 percent confident it will win. The painful exception is the complaint in *Japan - Photofilm*,[44] widely viewed as being filed as a result of Kodak's heavy lobbying campaign in Washington, since the USTR had reservations about the chances of success.[45] Doubts about a successful litigation later materialized as the panel ruled in favour of the Japanese practice regarding imported photo film and paper, but with very useful language for the US on nullification and impairment.[46]

Other WTO members seem willing to file cases with slightly less chances of success. According to an official in the Directorate General for Trade of the European Commission, the EU brings a case before the DSB when it is convinced that the chance of winning is higher than 75 percent, such as 80 percent or 85 percent.[47]

The exact degree of certainty of victory required to file a complaint depends on what objective the member pursues in litigating cases. If the only goal is abolishing the trade barrier, a high chance of winning seems inevitable. If the member pursues the broader goal of litigating issues that are systemically important, it may well venture a dispute it is less certain to win. A member thinking about going to formal WTO dispute settlement will clearly factor its chances of a successful outcome into the legal assessment and general cost- benefit analysis of initiating the case.[48]

Evidence is another important prong for the preparation of a WTO case. The question of whether a potential panel will be convinced by the evidence presented plays an important role in the assessment of the trade barrier or chance of winning the case.[49] One can think of numerous pieces of evidence, but their usefulness or necessity depends on the circumstances of the given case and its underlying legal argumentation. Generally, a complaining member will present all useful and accessible evidence. Usually, it has collected parts of it already throughout the trade barrier investigation, either by itself or through cooperation with the private sector. The respondent, likewise, will present all evidence that is necessary in its view to defend the WTO consistency of its measure. Generally, members involved in disputes use all information obtained during consultations (formal as well as informal) and in WTO committees. These are reflected either

in documents — such as questionnaires or protocols — or official WTO documents – such as the Trade Policy Review Mechanism (TPRM) reports, reports of the various committees, like technical barriers to trade (TBT) or sanitary and phytosanitary (SPS) committee reports, domestic reports such as the National Trade Estimate Report on Foreign Trade Barriers in the US or the equivalent Trade and Investment Barrier Reports in the EU. For example, in the recent dispute *Philippines - Distilled Spirits*, the complainants presented official statistics regarding the market share of the different distilled spirits that were initially prepared and published by the Philippine Department of Agriculture with regard to its GATT Article III:2 claim. They also relied on reports regarding consumer tastes and behaviour as well as a study on cross-price elasticity in the Philippines liquor market.[50]

In addition, a complainant member will ideally present all relevant official and unofficial declarations and announcements of the responding member's officials, official statistics and, of course, any relevant drafting history regarding the measure. Most striking with respect to public announcements and the assessment of evidence by a panel is probably the report in *EC-Approval and Marketing of Biotech Products*.[51] To determine whether the European Communities (EC) applied a "de facto moratorium" to suspend the approval of genetically modified organisms (GMO) and GMO-containing products, the panel examined numerous documents and public announcements of EC officials, including an official speech by the then-EU Commissioner for Trade, in which he referred to such a "moratorium."[52]

What are probably the most complex issues regarding evidence in WTO disputes occur in the context of complaints against SPS measures based on scientific evidence. A prominent example is the *EC-Beef Hormones* dispute. The EC contended that the ban of growth hormones was based on a sufficient risk assessment and risk management as set out in SPS Article 5 through different scientific reports and public scientific conferences and symposia as well as studies, articles, and opinions by scientific experts.[53] The complainant US had similarly copious evidence. The panel and the Appellate Body were not convinced that the measure was consistent with the obligations under SPS Article 5. The Appellate Body clearly stated that the EC had not conducted a risk assessment that supported the import ban of growth hormone-fed beef products.[54] Respondents and – even more so – complainants are well advised to gather evidence early on in their examination of the trade barrier and conduct the legal assessments clearly in light of the available evidence.

2.3 The Third-Party Option

Another frequent topic for legal assessment is whether to become a third party in a case brought by another member, or instead to file one's own "copycat" complaint and join it to the original case. Typically, a member joins as a third party when it has a relatively weak trade interest in the dispute and does not consider it necessary to fully engage in litigation. In a recent example, *Brazil-Aircraft*, the EU had only a small trade interest because only one member state, Germany, was negatively affected.[55] According to a study by Chad Bown, Japan, the EU, and the US are the primary third parties.[56]

Besides benefits from being a third party to a dispute, there may also be disadvantages. The most striking two benefits are that it is more cost-friendly, since the parties typically conduct the extensive legal analysis and the third party benefits from the removal of the trade barrier when the claim is successful. The caveat of not joining the complaint as a third party is that the member will not be able to appeal or retaliate against the unsuccessful respondent. Retaliation, in some circumstances, can be desirable for the member to pursue its trade interests. This downside is best illustrated by the dispute *US - Cotton* where four West African countries received what appears to be bad advice (at least in retrospect) when they decided to

become third parties with Brazil rather file their own cases.[57] This left the four West African countries not only without the ability to appeal independently, but also without rights to compensation at the end of the case. Brazil, a relatively wealthy country, now receives USD one hundred seventy million a year from the US to avoid retaliation while the four much poorer West African countries get nothing.[58]

Nevertheless, the third-party route also holds instructional value. In this respect, the dispute settlement mechanism has recently seen an interesting dynamic. Many newly acceded WTO members or those that have not previously had a strong interest in dispute settlement start their engagement with a third-party case. The paradigm example is China, which was a third party in nine panels before its first Request for the Establishment of a Panel. Furthermore, in its first panel, China was part of a very comfortable group of eight members challenging the US steel safeguard, and it was joined by seven more members as third parties.[59] China then followed this initial period with another fifty seven cases in which it was a third party before finally filing its first solo WTO case in September 2008 in *United States – Anti-Dumping and Countervailing Duties*.[60] Clearly, third party submissions might serve as training ground for new staff.

2.4 Recommendations

In light of the above discussion, the following recommendations might be helpful for developing countries dealing with the preparation of cases for WTO litigation and decisions on whether to bring them:

- The first task for a developing country WTO member in preparation for WTO litigation is to become familiar with the process before any litigation occurs. As of this writing, a total of 35 developing countries have participated as parties in WTO litigation, and many more have been third parties. That number includes Bangladesh, the only least developed country to bring a dispute.[61] Cases have been brought by 175 developing countries representing 40.98 percent of the total four hundred twenty-seven cases at the time of this writing.[62] Consequently, it is likely that any given developing country is likely to be involved in WTO litigation at some point. Although many developing countries do not have the resources to make elaborate preparations, certain steps can be taken without massive expense.

- Participate in one or more cases as a third party. Several developing countries, including most notably China, have done this as a form of preparation.

- Join the ACWL. There is a sliding scale to join, but a least developed country can join for as little as CHF 50,000. Once a part of the ACWL, this membership must be used. A developing country would be well advised to take an issue in one of its bilateral relationships with another WTO member, and discuss it with the ACWL to start learning how the process works.

- Create in-house WTO expertise. Most, although not all, developing countries have a mission in Geneva with people assigned to the WTO. Monitoring the daily functioning of the WTO, with its numerous committee meetings, as well as observing litigation as a third party, should be part of the Mission's responsibility. And, equally important, delegates who have served in those roles in Geneva should remain involved with WTO issues when they are posted back home. Often, there are bureaucratic obstacles-such as if the mission is part of the foreign ministry — to keeping people on WTO assignments, but a conscious attempt should be made to track people who have served in the mission to the WTO and recapture them from time to time in their career so the expertise is not lost. In addition, many developing countries have students in programmes, such as the World Trade Institute at the University of Berne, the Georgetown University Law Center, Columbia Law School, National University of Sin-

gapore, University of Cambridge, and University of Geneva and many others. Many of those students would be very valuable as interns in a country's Mission to the WTO in Geneva, or working in related offices in countries' capitals. Efforts could be made to seek those people out, or at least welcome them when they apply.

- Create a central inquiry point for private entities interested in WTO litigation (and make sure other government agencies send complaining parties there).

- Establish a central office to handle the legal analysis for each case. This will not only assure consistency of analysis — and thus avoid politically embarrassing contradictions — but also serve as a training centre, and people from this office can be rotated after three or four years to other offices where WTO expertise is relevant. This office could be part of the same office as the central inquiry point referred to above. The size and nature of the legal analysis office will vary depending on the resources available and, most importantly, the anticipated number of cases. Countries, such as China, the EU, and the US, and to some extent Brazil and Canada, can anticipate being in numerous cases at once. This is also true for countries that are in addition members of regional trade agreements with active dispute settlement mechanisms. Those with enough anticipated cases should be equipped to handle the complete litigation of at least some of those cases 'in-house.' At the other end of the spectrum, a smaller country with less money and less case volume might not be able to justify even a single full-time employee for this office. Having one person with some legal background or legal training perform this function, even along with other functions, and using the opportunity to train different people in sequence, means that the government will soon have three or four people with useful knowledge of WTO law and litigation at different places in the government.

- Require that any party requesting the initiation of a WTO case provide at least an initial legal analysis. This may be difficult to sustain, particularly in smaller countries with less sophisticated industries, as they may well view it as the government's role to perform this kind of work. Nevertheless, the government needs to know what the requesting company or industry thinks is the issue and what remedy is being sought (knowledge of WTO law outside of a very small number of government officials is often quite vague, and you may well be asked to go to the WTO to seek unavailable remedies, such as injunctions for monetary damages or recourse for non-WTO issues, such as the environment or investments). If the complaining entity's legal analysis is good, it will save government resources. If it is faulty, it will provide an opportunity for dialog about the best way to achieve the goal if it is not possible through WTO dispute settlement.

- It is crucial to subject the legal analysis to second opinion(s). It is better to find any flaws before the other party or a panel points them out. Preferably, you have a multidisciplinary team. One official suggested involving lawyers and economists to prepare in a comprehensive manner an analysis of the dispute from all possible angles.

- Also, ideally, the complainant would write its First Submission to the Panel before requesting the Establishment of a Panel to identify any evidence needed (and any holes in the legal case, of course). If that is not possible, the complete legal assessment should be done as early as possible.

- The legal opinion also needs to be vetted on an inter-ministry basis. Because many WTO obligations play out "inside the border," they may well affect actions by ministries, which normally pay no attention to WTO issues. A government needs to know if the legal position it takes in one case would have an adverse effect on measures taken by other ministries.[63]

2.5 The Defensive Case: A Respondent's Legal Analysis

As for the respondent, the legal analysis follows the same pattern. The responding WTO member will assess everything in the complainant's claim to decide whether and how to defend the case, or whether and how to settle it. Its assessment could well mirror the complainant's analysis. However, there is one pivotal difference that somewhat disadvantages the responding party. Due to the tight deadlines in the WTO panel proceedings, the respondent does not have much time to spend on the assessment to prepare for the consultations and first written submission. In addition, certain factors are more significant for respondents than for complainants, such as:

Reputation. A responding WTO member might consider the effect of the case and litigation on its reputation more than a complainant does. The most important concern is that, given a potential infringement of WTO law, one does not wish to get a reputation for overt or deliberate non-compliance with WTO rules. Thus, giving up as a respondent too quickly and without any rebutting of the complaining members' arguments, especially if the non-compliance is too obvious, can create a bad reputation. Moreover, a WTO member should try to avoid a reputation for giving up on a case as soon as challenged, since this might simply invite more challenges. However, on the other hand, a member will not want to defend its inconsistent measure for too long, since pursuing an already lost case for many members involves an unnecessary cost burden.[64] This entails very intricateand essential considerations that require a careful weighing and balancing of the factors.

Domestic Politics. The allegedly non-compliant measure was taken for a reason, often a domestic political one, so some WTO members visibly defend almost all measures through to the Appellate Body's final decision, to be able to tell their interest groups that the government fought at every step. But, this runs the risk of creating a negative image for litigation purposes, in which panels and the Appellate Body assume that defences are put up to show tenacity to domestic interest groups rather than sincere arguments. The responding member, more than the complaining member, will weigh the importance of the domestic policies, which clearly depends on how influential the affected domestic constituency is, against the impression it will leave with the Appellate Body.

3. ECONOMIC ASSESSMENT

The "economic assessment" done before filing a WTO dispute can be divided into three categories, which have considerable overlap.[65]

First, certain cases require a fairly sophisticated economic analysis in order to determine whether there is a chance of success. "Adverse effects" subsidies cases under Articles 5-7 of the Agreement on Subsidies and Countervailing Measures (ASCM), and many cases on the Agreement on Agriculture, require an economic component, so, in these scenarios, analysis must be done before the case is filed.[66] Similarly, the Appellate Body decision in the *Japan — Alcoholic Beverages II* seems to invite duelling economic tests of "like" or "directly competitive and substitutable products" under GATT Article III:2 Sentence 1 and 2 (such as through price elasticity).[67] Later, in the *Korea - Alcoholic Beverages* case, the Appellate Body stated that an economic analysis is not required. It confirmed to the panel that a quantitative analysis should not exclusively determine whether the spirits are in a competitive or substitutable relationship.[68] Nevertheless, litigants in subsequent cases like *Philippines - Distilled Spirits* arranged such economic assessments before the case began.[69]

A second type of economic analysis, and the type most frequently completed, is a cost-benefit analysis. This highlights the problems for small and especially developing countries. Even though the ACWL provides legal services at quite low rates for the poorer developing countries (as discussed further in section 2.3) richer countries are inevitably advantaged over poor countries in their ability to muster the necessary resources for WTO dispute resolution. This disparity is exacerbated by size in the WTO. The US, the EU, China, and Canada all have decided that they are likely to be in enough cases at any one time to justify hiring full-time WTO experts on staff. To bring a case (or, for that matter, to defend one), their first question is not "how will we pay for it?" In effect, the cost of bringing or defending cases for those large countries is a fixed cost. By contrast, smaller countries cannot rationally keep a large staff of WTO lawyers,[70] so if a case comes up, money must be found on an *ad hoc* basis. In effect, the cost becomes marginal, rather than fixed. Even worse, for a small poor country, it is less likely that they will be able to easily raise the money than for a large rich country. Thus, the cost-benefit calculation is very different for big rich countries than for small poor countries.[71]

In practice, big, developed countries do very little sophisticated economic analysis before bringing cases that do not require such analysis. Usually the 'benefit' in the analysis is calculated by looking at the lost actual or potential sales caused by the alleged WTO-inconsistent trade barrier, typically in consultation with that government's private economic actors seeking the case. As noted above, those governments often have no cash costs involved – even smaller developed countries have enough staff to do the work in-house, sometimes with outside consulting on a relatively low-cost basis. The real 'cost-benefit' test is often done by the private sector interests, as they decide whether it is worth the money to provide the necessary legal and economic resources to assist their government in prosecuting or defending a case. Again, this is usually not a sophisticated economic model, but rather a vote by a board of directors or executive committee or a decision by a general counsel whether to spend a certain amount of money and to budget for it (or, frequently, make a special assessment to members of the association). There may be no formal measurements of the benefits at all — each company has its own internal estimate of how much it is losing because of the trade barrier and votes accordingly. The same is true in developing countries that follow the Brazilian model of having the affected private industry normally pay for legal services.

The third common form of "economic assessment" for developing countries is "where can we get the resources?" The difficulties of assembling the resources necessary to mount a WTO case are so daunting that most developing countries have never brought a case. Those resources include not just the legal resources to analyse the trade barrier and ascertain if there is a legally convincing case, but also the infrastructure necessary — or thought to be necessary – to bring the case. These include a mission in Geneva, which can make the formal notifications and filings and coordinate with ACWL or a law firm; a small but knowledgeable cadre of people with WTO expertise in the relevant ministry in the capital; links to the private sector to educate it and to get information from it; and so on. These resources, which are already established in many developed and advanced developing countries (Brazil is a good example, with a carefully chosen and trained staff of WTO experts, an active core of high quality professionals in the Geneva mission, and pre-established trade associations in Brazil[72]) must often be created on an ad hoc basis for any given case in a smaller country with less frequent exposure to WTO cases. Perversely, and precisely because the entire infrastructure must be created on a one-time basis, it is more costly for a small developing country than for a large developed country to generate funding for a single case. To some extent, this is a problem of development beyond the reach of the WTO institutions, but on the other hand, the credibility and legitimacy of the institution depends on having all of its members able to take advantage of/use its facilities, and the empirical data are that this is not the case at present.

Why so little pre-filing economic assessment? This raises the question why large, rich governments do not assess the economic impact of a measure in each case before filing. First, an economic assessment is not legally required; second, the governments use the analysis prepared by the industry; and finally, the cash cost of bringing a dispute to the WTO as such is not very high.

3.1 Most Cases have no Legal Requirement to Conduct a Complex Economic Assessment

There is no legal requirement for an economic impact analysis before a case is brought. As pointed out already in the introduction, the WTO Dispute Settlement Mechanism employs a relatively low threshold for a case to be admissible. Various panels and the Appellate Body have noted that the WTO Agreement does not set out any specific requirements for a right to bring a claim.[73] Article 3.7 of the DSU permits the member to assess whether a complaint is fruitful.[74] In *EC - Bananas*, the Appellate Body found that this provision grants "broad discretion" and self-regulating power to the members. Confirming the panel's position, the Appellate Body reasoned that, because of the economic interdependency between the members, any digression from the negotiated trade rules of one member is highly likely to affect several others, may it be directly or indirectly. This implies that all members have an interest in enforcing the rules. The Appellate Body found that the US, as a minor banana producer, had sufficient interest in pursuing its claim against the EC's banana regime under the GATT, since it had a potential export interest. It went on to note that the impact of the EC's banana rules on the world market is highly likely to affect the US internal banana market.[75] This ruling made clear that only an attenuated economic interest is necessary for bringing a complaint if a trade interest might potentially be affected.[76]

The Panel in *Korea - Dairy* went further and noted that the WTO Agreement did not set out any requirements regarding an "economic interest."[77] It also referred to Article 3.8 of the DSU, according to which any infringement of a WTO obligation is presumed to be a nullification or impairment of the benefits under the WTO Agreement.[78] The panel appears to imply that no actual economic loss is needed. However, it went on to find that the EC, being a dairy exporter, had sufficient interest to pursue the claim against the Korean dairy safeguard

measures.[79] The same rationale can be found in Article XXIII.1 of the General Agreement on Trade in Services (GATS), which gives any member the right to initiate proceedings against other member that allegedly violates its obligations.[80] Certain types of cases in practice require economic assessments, but they are not legally mandated.

This has most recently been affirmed by the Appellate Body in *U.S. — COOL*. While clarifying that there is no legal requirement for panels to assess the actual trade effects of a measure in the context of an Article 2.1 TBT claim, the Appellate Body did not reject the panel's evaluation of the two studies submitted regarding the trade affects (or the absence of any such affect) of the Certain Country of Origin Labelling (COOL) measure. The panel had evaluated both studies in a fairly extensive manner and finally concluded that Canada's study was more 'robust.' Therefore, the US study could not rebut Canada's *prima facie* case for negative effects of the COOL measure on import shares and prices.[81] The Appellate Body appeared to approve of the panel's assessment of content and the reasoned conclusion.[82]

3.2 Practical Reasons: It is the Private Sector that does the Economic Analysis

The major complaining governments typically do not conduct a formal economic analysis of a trade barrier prior to filing a case. There is no need for such an economic impact assessment, since the private sector usually analyses the economic impact of trade barriers, and brings a trade barrier to the attention of the government. Before starting the case, most governments require the private sector to deliver whatever data is needed.[83] Later in the proceedings, the government will rely on these data and build the argumentation on it, as well as economic analyses done after the Request for Consultations.

However, some cases do require an economic analysis. In *United States — Upland Cotton*, a case that required economic analysis to show adverse effects, Brazil relied initially on a model maintained by the International Cotton Advisory Committee (a Brazilian official was the chairman) to decide whether to bring the case. The Netherlands funded a study of the cotton issue for the West African third parties in the case. In another case requiring an economic analysis of adverse effects, *European Communities — Export Subsidies on Sugar*, Oxfam and the Netherlands Economic Institute performed detailed analyses of the EC sugar program, and Australian private economists and a Brazilian consulting firm were hired to help with the case.[84] Economic analysis was also provided by government economists.[85] Interestingly, the recent panel in *US - COOL* paid a great deal of attention to the parties' detailed economic studies, even while acknowledging the analyses were not legally required by the TBT provisions at issue.[86]

3.3 Cost – Benefit Analysis: Bringing the Case?

Another possible reason formal economic modelling is uncommon may be that there is no need for a serious cost-benefit test for the complaining member, since the actual cost for a government to litigate a trade dispute before the DSB is generally low. As described in much greater detail below, the member government itself may not be paying any of the costs (if the industry is paying them), or may treat the costs as fixed costs (if the economic analysis can be done by in-house economists, especially in the same ministry or agency).

First of all, it is important to note that the WTO does not impose charges for dispute settlement proceedings. In this respect, it differs greatly from an investment arbitration tribunal under ICSID or United Nations Commission on International Trade Law (UNCITRAL) rules. Moreover, the WTO Agreement does not contain any provision that the unsuccessful member is subject to paying the other side's costs, as could be the case with respect to investor-state disputes under the ICSID rules.[87]

In addition, the cost of bringing a case is dependent on many factors. First and foremost, the total cost depends on whether the member has an in-house legal infrastructure and how advanced it is. (The USTR has more than 30 in-house lawyers for WTO cases, while at least 20 WTO member countries do not even have a mission to the WTO in Geneva or any full-time WTO dispute resolution lawyers).

The AWCL, which was founded by members, supports developing countries in WTO disputes. For the 30 developing country members participating in the ACWL in Geneva, the cost of a case is limited to a total of CHF 276,696 to pursue or defend from the request for consultations through the Appellate Body proceedings.[88] Where the ACWL cannot provide legal counselling — typically for reasons of conflict — it has established a list of outside law firms from which the responding member can choose. The ACWL arranges for firms to charge no more than CHF 276,696 and subsidizes the fees to that point.[89] Of course, even this fee may be too much for a poor country.

Since the cost of bringing a case is so low (compared with the cost of a private jet for the head of state for example), the real question becomes how to measure the economic impact of winning or, equally important, the economic impact of not bringing the case. These costs and benefits might not easily be assessed, but the economic value of overturning the measure is usually quite tangible. In general, there are three different outcomes. First, the winning complainant can determine the value of gaining more market access, involving prospective higher market share and profits, or the right to retaliate up to a certain amount. Second, in case of a negative outcome of its petition for help, the industry will suffer a loss through the trade measure remaining in place. The negative impact of the already impeded business will continue. The third possible outcome is the respondent wins and can maintain its measure. Depending on the nature of the measure, this again involves a measurable economic impact. In addition to burdening the imported good insofar as it increases its price on the member's market, tariffs also contribute to the governmental revenue even if only to a small extent, as do anti-dumping, countervailing duties, or safeguard measures - although each could be a net negative for the economy.

Finally, it should be mentioned that the costs of bringing a dispute or defending one's trade measures have usually been such a small fraction of the complained-of losses that a cost-benefit analysis is not the major roadblock to filing a case. One of the reasons for this might well be that members have different reasons for pursuing a WTO case. Sometimes systemic considerations may be factored in. Governments file or defend disputes that have only small economic implications. This was the case in *United States - Broadcast Music*.[90] The EU brought this case on behalf of the rather small Irish music industry that was affected by the US copyright measure. There are number of other cases that are triggered by political or systemic reasons.[91] A dispute might have implications for other pending disputes, as well as controversies that have not yet been brought to a dispute stage and are still subject to a pre-litigation dialogue. Thus, a ruling by a panel or the Appellate Body in a particular direction will give useful guidance for bringing future cases. Moreover, the beauty of bringing a case with a rather small economic interest is that in case the complaint is unsuccessful, the economic loss is not too painful.

These considerations are well illustrated by the EU Commission's practice in deciding whether to support a WTO case. According to an official in the Directorate General for Trade of the European Commission, the final decision to file a complaint is not merely an economic decision. Legal and political interests can well balance out the lack of a strong economic interest and present strong reasons for the Commission to bring the case to WTO dispute settlement mechanism.[92]

3.4 Recommendations

Based on research and experience, the economic assessment seems to be the most underdeveloped aspect of preparation for a case. In view of the potential economic gains and losses from a WTO case, and a commitment of national prestige once a case begins, possible plaintiffs and respondents should undertake a serious economic analysis before a case is filed, including at least:

- The economic analysis most crucially should look at 'opportunity cost'/'collateral damage'/impacts on other sectors of the national economy. Very frequently, this is not done. It would seem obvious that attacking another country's barriers to one's exports is good, but one needs to be sure that the importing country's industry is not owned by your own nationals, or that the economic consequences of increased exports are not negative for some other sector of your economy (perhaps by higher prices on necessary inputs to local manufactures). This is much more of an issue for small, and/or less diverse economies than for the large diversified economies.

- The economic analysis needs to be forward looking. This means, in particular, taking into account what other competitors might do if a market barrier is removed. To take the obvious example, China turned out to be the major beneficiary of the removal of the Multi Fibre Arrangement.

- As recommended already for the legal assessment, the First Submission to the Panel ideally would be written before requesting a panel. If that is not possible, economic assessments, which will be relied on in the case must be completed and critiqued before the decision to file.[93] As economists will point out, in many circumstances a country benefits when it removes the trade barrier. So a comprehensive economic analysis is even more necessary for a respondent, to shape its response to a case, in terms of legal defence and in terms of a settlement outcome. In the economic analysis, both sides, but especially the respondent, should calculate the likely magnitude of authorized retaliation in the case. This topic often dominates conversations of the case in smaller and developing countries with what are often wildly exaggerated conjectures.[94] While the government of the responding country is unlikely to want to publish its estimate of likely retaliation, it would help internal discussions a great deal to have a good calculation. More generally, an economist working with the lawyers can help identify likely compliance scenarios.

- Most fundamentally, members need to recognize the increased use of economic analysis in cases even where not required but to make their prima facie case (or to rebut the complainant's arguments) (*US - COOL*,[95] *Philippines - Distilled Spirits*[96]). Apparently, two economists from the WTO Economic Research Division are now assigned to assist each panel.[97] Logically, the lawyer-dominated offices that handle WTO cases in members such as Brazil, China, the US and other countries will/should add Ph.D. economists as a result. That would create a pool, which could even lead to more Ph.D.—level economists on panels (only two have served on panels so far, it appears).

4. STRATEGIC ASSESSMENT

In addition to legal and economic assessments of trade barriers, a member might have to take rather strategic aspects into consideration before finally deciding to bring a dispute to Geneva. While WTO cases are usually not brought for solely political reasons, there are complaints that have clearly been influenced by political considerations.

Examples include retaliatory cases[98] and cases that have been brought for systemic reasons. None of these cases are pursued for purely systemic or political reasons, and the industry in the complaining member always has had an economic interest in the dispute settlement. But, economic interest may be relatively insubstantial for the member and may be seen as not worth pursuing in Geneva without a contingent systemic or political interest.[99]

This part mainly applies for the complaining member (which could be the respondent in a retaliatory dispute). With regard to politically motivated cases, both parties might have a strong interest in either bringing a case or defending a domestic tax, a particular regulation or other measures. Systemic cases exist for the complainant as well as respondent. They might be driven by a stronger systemic interest for the complaining member but may equally be systemically interesting for the respondent that seeks clarification regarding the WTO consistency of its measure. This may be of importance for a government if there are similar trade measures already in place or the WTO member plans to adopt kindred measures.

Note, with regard to retaliatory cases, the authors think that bringing a WTO case as retaliation for another dispute by itself should not be a strategic consideration. Nevertheless, in a large number of cases it appears to be a considerable motivation for bringing a complaint.

4.1 Retaliatory Cases

The WTO already has a history of retaliatory cases. Here, two categories can be identified. First, disputes that have been brought as a direct counter-charge and, second, disputes that have been initiated to strike back for an earlier dispute on a different matter. Examples for the first category are the *Aircraft* cases. *US-Aircraft* was brought because the US had filed *EC-Aircraft*, as were the respective second complaints in DS347 and DS353.[100] Similarly, *Canada-Aircraft* (DS70) was filed in response to *Brazil-Aircraft* (DS46).[101]

Moreover, it is no secret that members file complaints in response to earlier and unrelated disputes. These have been ide US-Anti-Dumping and Countervailing Duties ntified as a second category of retaliatory cases. For example, it is contended that the US initiated *EU-Aircraft* because the EU had successfully contested the US Foreign Sales Corporations FSC Tax.[102] But, the FSC case itself is rumoured to have been filed because the US had joined the *Bananas* dispute.[103] Interestingly, more rumours are that the *Airbus* case was the reason the EU filed a complaint in the *US-FSC* compliance stage.[104] A less prominent example fitting in this category is *Australia-Quarantine Regime*, which was rumoured to have been brought as a response to *EC-Trademarks and Geographical Indications*.[105]

More recently in this category, an EU anti-dumping case against Chinese fasteners led to a Chinese anti-dumping case against EU fasteners and a Chinese WTO case against the EU anti-dumping duties, which led to a EU WTO case against the Chinese duties.[106]

4.2 Cases Not Filed for Strategic Consideration

Another interesting consideration for a complainant is whether there are any political obstacles to bringing a case. A major aspect of this analysis is knowledge of the relationship with the potential responding member. Japan, for example, notably never brought a GATT case against the US, which provided Japan with military security during the Cold

War. Early complaints against threatened US duties on Japanese luxury autos were settled in the early stage of consultations.[107] James Durling concluded that the Japanese reluctance of spoiling the good relations with the US only changed after the 'Film dispute.'[108] Nevertheless, after that, it did not bring a WTO case against the US until it was joined by eight other members challenging the US steel safeguards in 2002.[109] At the same time, however, the Republic of Korea has brought nine complaints against US trade barriers to WTO dispute settlement.[110]

It has been argued that developing countries would think twice before bringing a WTO complaint against a developed country. For example, developing countries might fear losing important development aid if they complain against a developed country's trade regime. Some arguments are made that developing countries hesitate to attack their donators' trade barriers.[111] However, there might be other reasons for not bringing a case to the formal WTO dispute settlement, but instead negotiating with the barrier-imposing member about the abolition of the barrier in a different forum or, at least, before requesting consultations.

4.3 Systemic Considerations

Systemic considerations may also play a role in the decision to bring a WTO case. These cases are brought and even fought through in order to clarify either specific legal questions or jurisdictional issues and to build the body of WTO jurisprudence.[112] There are many examples, but this section limits the discussion to two striking examples.

Legal clarification seems to have been sought by China in the complaints against the US on the simultaneous imposition of anti-dumping duties and countervailing duties in several trade remedy cases on steel pipes, tires, tubes, and woven sacks in *US-Anti-Dumping and Countervailing Duties*.[113] China challenged not only the imposed duties, but also was eager to clarify the interpretation of the term "public body" in SCM Article 1.1 (a) (1) as well as the inconsistency of "double remedies" under the WTO legal system. Another case that was driven by jurisprudential or systemic interest was *EU-Hormones*.[114] Canada and the US both filed complaints against EU directives prohibiting the importation and marketing of meat from cattle fed with certain growth hormones although the market share of both meat producers in the EU was limited by EQ quotas to less than a fraction of 1 percent. Thus, although the case was not of high economic relevance, both countries sought to clarify the principal concerning the use of growth hormones and the question of scientific evidence in SPS cases. Both complaining members also used this long-lasting dispute to send a signal to other larger beef markets, such as Japan and Mexico not to adopt similar measures.

4.4 Political Considerations

Despite rather negligible economic interest, some cases might have a political value for the complaining member as well as for the responding member that does not want to be seen giving up without a fight.[115] These political considerations can be either domestically motivated or have a more general political value. For the first sub-category, two Canadian cases come to mind.[116] First, in *EU – Asbestos*, Canada filed a complaint against a French decree banning the importation and marketing of asbestos products.[117] The economic loss for the Canadian asbestos industry was considerable, but it was negligible for Canada as a whole. However, at that time the asbestos industry's existence in one of the Canadian provinces was important for the Canadian government, which wanted to be seen as standing up for that part of its constituency.

The second dispute is the Norwegian and Canadian complaints against the EU seal product regulation banning the importation and marketing of seal products in the EU.[118] Canada does not sell much in terms seal furs and other seal products to the EU. Its main markets are Russia and Asia. In this respect, it is noteworthy that in one of the complaints in *EC – Seal Products II*, Canada complained about

Belgian legislation that also prohibited the transit of seal products through its territory.[119] This dispute appears to be of more economic relevance for Canada since the seal products might well be shipped through Belgium on their way to Russia or Asia.

Economic impact aside, it appears to have been important in domestic politics for Canada to stand up for its seal hunters in these two disputes. Canada pursued these cases to show that the economic interests of affected provinces were an important political issue for the Canadian government.

Moreover, the *EU-Seal Products I* and *II* also serve as a prime example of the respondent standing up for a domestic constituency. The EU, as respondent in three seal product disputes, has very strong environmental and animal welfare-interest groups in the European Parliament and several non-governmental organizations (NGOs) and interest groups. Lastly, animal welfare recently became an objective of the Treaty of Lisbon.[120]

A final example is the two EU–Seizure of Generic Drugs in Transit disputes.[121] India and Brazil filed complaints against the seizure of generic drugs that were off-patent in India and Brazil and seized in transit from India to Brazil in the Netherlands. By the time both complainants contacted the EU Commission about the incident, the consignments had already been released and were en route to Brazil. The economic loss seems to be miniscule if not non-existent. The motivation for both complainants could be systemic – clarifying the question of whether intellectual property (IP) protection applies to goods in transit that are off-patent in the producing member and the destination member. It could also be political – blaming the EU and Netherlands for their overly strict IP protectionist regime and impeding the sale of necessary life-saving drugs in Brazil, respectively.

5. PROCEDURAL ASPECTS OF TRADE BARRIER ASSESSMENT

This final section lays out how various members procedurally handle their trade barrier assessment and discusses different procedures by which the private sector can petition a trade barrier investigation and thus initiate a WTO complaint.

5.1 Internal Political Decision-making Process to File a WTO Complaint

Most countries have some form of inter-ministerial review of trade policy decisions, to make sure that no important interest is ignored when decisions are made. In the US, for example, the USTR checks either formally or informally before filing a case with an "inter-agency review" that includes at least the Departments of State, Commerce, Treasury, and Justice. It also includes any other agency that might be involved, like the US Department of Agriculture in agricultural cases, or potentially the Department of the Interior, the Library of Congress (which is responsible for copyrights in the US) and even the Department of Defense in certain cases.

Similarly, the EU employs "inter-service consultations." The European Commission only files a WTO complaint following a decision of the Commission itself. The Directorate General for Trade of the European Commission is in charge of preparing this decision and will cooperate with other relevant Commission Services, like the Directorate General Taxation and Customs Union or the Directorate General of Agriculture.[122] Before a case is brought, the EU Commission will inform the "Trade Policy Committee," which was formerly the "Article 133 Committee," consisting of representatives of the 27 member states, and seek their informal confirmation.[123] Achieving this confirmation, according to an official in the Directorate General for Trade, is usually not too difficult. The member states generally support the enforcement of trade rules strongly and do not discuss the filing of the case in much detail.[124]

Thus, in both countries, it is a central institution – the USTR and Directorate General for Trade respectively — that manages the cooperative trade barrier assessment and dispute settlement.[125]

5.2 Has the Private Sector a Right of Trade Barrier Investigations?

This section will describe different approaches to trade barrier assessment and examine whether the respective national regulations provide for a subjective right to petition for the filing of a WTO complaint. Interestingly, only a few countries have formal regulations vesting the interested, potentially affected, industry with the right to request investigations of trade barriers.

The US has a formal procedure for petitions requesting trade barrier investigations in Section 301 of the Trade Act of 1974.[126] Under this procedure, almost any entity can file a petition requesting the USTR to conduct investigations of a foreign country's WTO obligations. These could be economic actors, such as Kodak in *Japan - Photofilm*,[127] unions like the United Steelworkers in *China - Windmills*,[128] and non-economic entities such as individuals or organizations. In July 2011, the USTR rejected two Section 301 petitions to investigate FTA cases under the Central America Free Trade Agreement (CAFTA) by two individuals and under the Israel FTA by the "Institute for Research: The Middle East."[129] However, there is no requirement that a Section 301 be filed for a WTO case to start, and, after concluding the investigation, USTR has been given broad discretion to pursue the WTO case or to decline to do so.[130]

In practice, Section 301 is not used much. US industry seems to prefer a more informal way of communicating with the government about trade barriers. Indeed, almost all Section 301 cases are filed as public relation devices, and

very few entities spend the time and money on Section 301 rather than dealing with USTR directly to try to start the process. During this informal dialogue, USTR sometimes recommends that the entity file a Section 301 petition. A prominent example for that request was the case in *Japan — Photofilm*.[131]

The EU analogy of Section 301, the TBR, seems to be used more frequently.[132] But even so, only 12 of the EU WTO cases since 1995 were based on TBR petitions. The Directorate General for Trade of the European Commission is in charge of the investigations, but it heavily relies on data input from the private sector. Since the TBR's entry into force in 1995, 27 petitions were filed and investigations were started. Nine cases were settled after TBR proceedings without initiating a WTO case, which shows that it is a useful tool for the industry to investigate and fight trade barriers.[133]

Like the EU, China adopted a similar mechanism to Section 301 a couple of years ago with Rules on Trade Barrier Investigation (TBI).[134] As Han Liyu and Henry Gao pointed out in the ICTSD studies preceding this study, it has been used only once.[135] Furthermore, they concluded that the TBI as such is not the problem. Rather, the deficient accessibility and structure of the relevant governmental division and the lack of representation through industry associations is what impedes communication.[136]

The findings regarding all three examples of legal instruments provoke the question of whether such a formal trade barrier investigation regulation is a necessary precondition for the successful pre-litigation preparation of WTO disputes. Most members heavily involved in WTO litigation do not have such a formal instrument, and where it exists, it is not often used, since most investigations are launched after the industry has sought informal dialogue with the government.[137] Developing countries might especially face institutional and financial challenges to employ a formal procedural instrument. However, the authors recommend putting in place a uniformly conducted and fast procedure for the industry to bring trade barriers to the attention of the member. This procedure should be equally open to all industries and for any kind of trade barrier allegations and guarantee that the government assesses all complaints with regard to their WTO (or FTA) consistency. This way, the government can begin from early on to assess the barrier and can, as soon as possible, involve external counsel, be it a private law firm or the ACWL. The authors think that the inquiry point recommended above (in section 2) as a central office should not only manage the cooperation between the different governmental actors as well as the industry, but also provide the infrastructure and procedure for industry complaints to be handled professionally.

6. CONCLUSION

The pre-litigation assessment of a trade barrier is an essential part of a WTO trade dispute. Questions taken into account at this early stage will avoid surprises for the litigant before the panel or the Appellate Body. A comprehensive and thorough preparation of the dispute from early on is the groundwork for the litigation of a trade dispute. Recommendations are aimed at providing developing countries with a better toolset for litigating trade disputes.

More generally, as the history of trade disputes has shown, the WTO dispute settlement mechanism provides a good system in which the developing countries can solve trade disputes, especially with the support of the ACWL. In addition to the recommendations for the developing country complainant as well as respondents, the following more systemic recommendations should be considered:

More support should be given to the ACWL, as it has proven that it can provide high-quality legal services at a relatively low cost for developing countries. In addition, thought should be given to extra resources for the ACWL to create in-house economic analysis functions (suitably labelled, as the ACWL is limited to legal analysis) to improve the tools available to the ACWL lawyers. Many academic economists would be delighted to work on such projects, especially if a publishable product can be designed.

Perhaps some disputes could be avoided by better WTO scrutiny of new measures enacted by WTO member governments. Some governments and legislators assess the WTO consistency of legislative proposal during the adoption process.[138] Even if this does not avoid WTO disputes once the measure is in place, it at least draws the government's (and other relevant actors with interest in WTO disputes) attention to issues of WTO consistency.

ENDNOTES

1 Much of the information in this chapter is from anonymous interviews with officials at entities responsible for the vast majority of WTO trade cases. We would like to express our appreciation for those unnamed sources.

2 This is the most important factor in determining whether cases are brought to the dispute mechanism and for assessing whether to bring them. Private individuals can 'complain' in certain other international fora like, for example, the Inter-American Commission of Human Rights, by potentially submitting the case to the Inter-American Court of Human Rights (See Article 44 and 66 of the American Convention on Human Rights, 22 November 1969, available at http://www.cidh.oas.org/Basicos/English/Basic3.American%20Convention.htm) (Last visited: 17/04/13); the European Court of Human Rights (See Article 34 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, 4 November 1950, available at http://www.echr.coe.int/NR/rdonlyres/D5CC24A7-DC13-4318-B457-5C9014916D7A/0/ENG_CONV.pdf) (Last visited: 17/04/13); and the hundreds of bilateral investment treaties (BITs) with investor-state dispute mechanisms that allow private investors to sue governments for damages (See, e.g., Section B of the US 2004 Model BIT; Treaty Between the Government of the United States of America and the Government of [Country] Concerning the Encouragement and Reciprocal Protection of Investment, available at http://www.state.gov/documents/organization/117601.pdf) (Last visited: 17/04/13). While a full discussion of the pros and cons of this limitation are beyond this chapter, its importance as a factor "conditioning" the entire WTO dispute mechanism cannot be overstated.

3 In practice, there is some flexibility. For example, recently, the DSB granted a grace period to the US and Mexico (after a mutual agreement) to decide on the appeal of the report in *US—Tuna II* (See DS381, available at http://www.wto.org/english/news_e/news11_e/dsb_11nov11_e.htm (Last visited: 17/04/13)).

4 Appellate Body Report, European Communities — Regime for the Importation, Sale and Distribution of Bananas, Second Recourse to Article 21.5 (DS27), WT/DS27/AB/RW, 135-138; Appellate Body Report, *Mexico - Anti-Dumping Investigation of High-Fructose Corn Syrup (HFCS) from the United States*, Recourse to Article 21.5 (DS312), WT/DS/132AB/RW, 74.

5 *Japan - Taxes on Alcoholic Beverages* (DS10, DS11), *Korea - Taxes on Alcoholic Beverages* (DS75, DS84), and *Chile - Taxes on Alcoholic Beverages* (DS87, DS109, DS110), *Philippines - Taxes on Distilled Spirits* (DS396, DS403).

6 Appellate Body Report, *EC-Bananas, supra* note 4.

7 The following only present a few cases. The authors do not intend to present a full categorization of all disputes, which would go beyond the purpose of this chapter.

8 Chad Bown presents a categorization by industrial sector, see Bown, C. *Self-Enforcing Trade, Developing Countries and WTO Dispute Settlement,* pp. 73-77.

9 The costs and especially efforts are still high for those members with in-house WTO experts (See section 2). As this chapter will show, there might be other than purely economic reasons for pursuing a case or defence (See section 3).

10 Chad Bown describes disputes over lost foreign market access according to the 'observability' of the alleged trade barrier. See Bown, C. *Self-Enforcing Trade, Developing Countries and WTO Dispute Settlement,* pp. 77-81.

11 *United States - Standards for Reformulated and Conventional Gasoline* (DS2, DS4).

12 *Australia - Subsidy on ammonium sulphate* (BISD II/188).

13 *Brazil - Export Financing Programme for Aircraft* (DS46); *European Communities and Certain Member States- Measures Affecting Trade in Large Civil Aircraft* (DS316, DS347)/ *United States - Measures Affecting Trade in Large Civil Aircraft* (DS317, DS353).

14 *United States - Subsidies on Upland Cotton* (DS267).

15 Appellate Body Report, *European Communities and Certain Member States - Measures Affecting Trade in Large Civil Aircraft,* WT/DS316/AB/R.

16 Panel Report, *European Communities - Trade Description of Scallops,* WT/DS12/R. WT/DS14/R, p.3, the Mutually Agreed Solution is published as well, WT/DS12/12, WT/DS14/11.

17 It is worth noting that WTO Agreements permit national trade remedy cases based on "threat of injury" – GATT Article VI:1, ADA Article 3.7 and ASCM Article 15.7.

18 *EC Measures Concerning Meat and Meat Products (Hormones)* (DS26, DS48).

19 *China - Measures concerning wind power equipment* (DS419).

20 US Department of Commerce, *Aluminium Extrusions from the People's Republic of China,* case number C-570-968.

21 *United States - Subsidies on Upland Cotton*, supra note 14.

22 *European Union and a Member State- Seizure of Generic Drugs in Transit* (DS408, DS409).

23 European *Communities - Certain Measures Prohibiting the Importation and Marketing of Seal Products* (DS369, DS400, DS401).

24 *European Communities - Selected Customs Matters* (DS315).

25 As reported for many sectors in China at ''Innovation and the Global Marketplace: A discussion on American Innovation, Trade and the Next 10 Million Jobs," Conference PBS and Aspen Institute, 14 December 2011, Washington, DC.

26 Office of the United States Trade Representative, "2010 National Trade Estimate Report on Foreign Trade Barriers, China," available at http://www.ustr.gov/about-us/press-office/reports-and-publications/2010 (Last visited: 17/04/13) (However, some of those trade barriers might well be WTO consistent).

27 *See, e.g., European Communities - Seals, supra* note 18; *European Communities - Measures Affecting Asbestos and Products Containing Asbestos* (DS135); US – United States – Section 110(5) of US Copyright Act (DS160), "Irish Music"; *European Communities - Selected Customs Matters, supra* note 25.

28 *Colombia - Indicative Prices and Restrictions on Ports of Entry* (DS366).

29 *Philippines - Taxes on Distilled Spirits, supra* note 5.

30 The government has paid for participation in defensive cases, and there are rumours that someone (the government perhaps) had to make up for a shortfall in one industry-funded complaint.

31 For a very detailed study of the Brazilian WTO litigation policy, see Shaffer, G., Sanchez Badin, M. R. and Rosenberg, B., "Winning at the WTO: the Development of a trade policy

community in Brazil", in Shaffer, G. and Meléndez-Ortiz, R. (eds). *Dispute Settlement at the WTO, The Developing Country Experience* (2010) Cambridge University Press, pp. 21-105.

32 *United States – Subsidies on Upland Cotton, supra* note 14.

33 Nevertheless, in this context it should be stressed that the ability depends on the financial strength and willingness of the local industry funding the cases and cannot be applied by all industries in Brazil and all developing countries. This view has been confirmed by a number of experienced trade lawyers in interviews.

34 North American Free Trade Agreement, 32 I.L.M. 289 and 605 (1993), available at http://www.nafta-sec-alena.org/en/view.aspx?conID=590 (Last visited: 17/04/13).

35 Telephone interview with an EU official. One possible reason is that the EU has not made use of its FTA Dispute Settlement Mechanism, which it has introduced relatively late. Regarding the dispute-preventing policy of the EU under FTA, see Garcia Bercero, I. "Dispute Settlement in European Union Free Trade Agreements: Lessons Learned?" in Bartels, L. *Regional Trade Agreements and The WTO Legal System* and Broude T. "*From Pax Mercatoria to Pax Europea:* How Trade Dispute Procedures Serve the EC's Regional Hegemony", Working Paper 4/04, The Israeli Association for the Study of European Integration.

36 *Thailand – Customs and Fiscal Measures on Cigarettes from the Philippines* (DS371).

37 For further recommendations with regard to the different dispute see, ICTSD Issue Paper, "Forum Selection in Trade Litigation" by Arthur Appleton.

38 *European Communities – Measures Affecting Trade in Large Civil Aircraft* and the following disputes (DS316, DS317, DS347, DS353) *supra* note 15.

39 For a further discussion on alternatives to formal WTO dispute settlement, see ICTSD Issue Paper, "How to Successfully Manage Conflicts and prevent Dispute Adjudication in International Trade" by Robert Echandi.

40 Email from official of the Directorate General for Trade of the European Commission.

41 *European Communities – Measures Affecting Trade in Large Civil Aircraft, supra note 15; Brazil – Export Financing Programme for Aircraft,* (DS46); the counterclaims were *United States – Measures Affecting Trade in Large Civil Aircraft* (DS317) and C*anada – Measures Affecting the Export of Civilian Aircraft* (DS70, DS71).

42 *Canada – Provisional Anti-Dumping and Countervailing Duties on Grain Corning from the United States* (DS338); *Mexico – Anti-Dumping Investigation of High-Fructose Corn Syrup (HFCS) from the United States, supra* note 4.

43 *Mexico – Definitive Anti-Dumping Measures on Beef and Rice* (DS295).

44 *Japan – Measures Affecting Consumer Photographic Film and Paper* (DS44).

45 Shaffer, G., *Defending Interests: Public-Private Partnerships in WTO Litigation* (2003) p. 34; Durling, J. P., Anatomy of Trade Dispute- A Documentary History of the Kodak – Fujifilm Dispute, (2000) p. 674.

46 Panel Report, *Japan – Measures Affecting Consumer Photographic Film and Paper,* WT/DS44/R.

47 Email from official of Directorate General for Trade of the European Commission.

48 The cost-benefit-analysis will be described in more detail in section 2.3.

49 The role of evidence the WTO dispute settlement has already filled chapters and books – this study will only give a very brief overview of possible documents usually used as evidence in WTO disputes. (See Andersen, S., "Administration of evidence in WTO dispute settlement proceedings," in Yerxa, R. H. and Wilson, S. B. (eds). *Key Issues of WTO Dispute Settlement: the first 10 years* (2005) World Trade Organization (focusing on fact intensive cases).

50 *Philippines – Taxes on Distilled Spirit, supra* note 5.

51 *European Communities — Measures Affecting the Approval and Marketing of Biotech Products* (DS291, DS292, DS293).

52 Panel report, *European Communities – Measures Affecting the Approval and Marketing of Biotech Products,* WT/DS/ 291/R, WT/DS292/R, WT/DS293/R, 7.527 (the entire examination ranges 7.438- 7.1285).

53 *See European Communities – Hormones, supra* note 18.

54 Appellate Body Report, *European Communities – Measures Concerning Meat and Meat Products (Hormones),* WT/DS26/AB/R, WT/DS48/AB/R, 207-109.

55 *Brazil – Aircraft, supra* note 42.

56 Bown, C. *Self-Enforcing Trade, Developing Countries and WTO Dispute Settlement,* pp. 68-69, 81-85, presenting a study on third-party involvement in WTO disputes from 1995-2008.

57 *United States – Subsidies on Upland Cotton, supra* note 14.

58 The US is now offering USD16 million, in an apparent bidding war with China, which is offering USD 20 million.

59 *United States – Definitive Safeguard Measures on Imports of Certain Steel products* (DS252).

60 *United States – Definitive Anti-Dumping and Countervailing Duties on Certain Products from China* (DS379).

61 *India – Anti-Dumping Measure on Batteries from Bangladesh* (DS306).

62 Including China. (*See* the chronological list of disputes cases on the WTO website, available at http://www.wto.org/english/tratop_e/dispu_e/dispu_status_e.htm (Last visited: 17/04/13)).

63 Section 5.1 describes the inter-agency cooperation in the US and the EU.

64 Further details about the cost will be discussed in the following section 2.3.

65 This chapter does not deal with the economic assessment in trade remedy cases. WTO challenges to trade remedies often involve a great deal of economic analysis, such as the amount of dumping or subsidies, the determination of injury or causation, but according to the Anti-Dumping Agreement (ADA) Art. 17.6 (i), WTO reviews are limited to the record of the cases, so the WTO member government considering (or defending) a case can only rely on analyses done in the underlying national cases and so does not conduct any additional economic assessment of the case.

66 *See, e.g.*, Chile – Price Band System and Safeguard Measures Relating to Certain Agricultural Products (DS207).

67 Appellate Body Report, *Japan – Taxes on Alcoholic Beverages,* WT/DS8/10/11/AB, p. 25.

68 Appellate Body Report, *Korea – Taxes on Alcoholic Beverages*, WT/DS75/84/R. 109, 133.

69 *Philippines – Distilled Spirits, supra* note 5.

70 Pornchai Danvivathana notes that even a large fairly advanced developing country, such as Thailand, was only involved in 13 cases from 1995 to 2004 and that includes several cases as third party. (Danvivathana, P., "Thailand's experience in the WTO dispute settlement system: challenging the EC Sugar regime" in Shaffer, G. and Meléndez-Ortiz, R., *supra* note 27, p 214.)

71 Shaffer and Trachtman suggest that the Appellate Body's balancing test, such as in *Brazil – Retreaded Tyres* (DS332), favours "Large and wealthy states who are repeat players in WTO litigation" over "smaller and poorer ones." Shaffer, G. and Trachtman, J., "Interpretation and Institutional Choice at the WTO", 52 *Va. J. of Int'l Law* 103, 144 (Fall 2011). They also suggest that market-based competition between allegedly "like" products with voluntary labelling and advertising, rather than the Appellate Body's deference to (large) national authorities' process and production method (PPM) distinctions (Id. at 152).

72 *See* section 1.1 above.

73 *See, e.g.,* Appellate Body Report, *EC – Bananas, supra* note 4.

74 Article 3.7 of the DSU reads, "Before bringing a case, a Member shall exercise its judgement as to whether action under these procedures would be fruitful."

75 Appellate Body Report *EC – Bananas* WT/DS27/R, 136- 138.

76 *Id.* 136.

77 Panel Report, *Korea – Diary*, WT/DS98/R, 7.13.

78 *Id.*

79 *Id.* 7.14.

80 GATS Article XXXIII.1 reads, "If any Member should consider that any other Member fails to carry out its obligations or specific commitments under this Agreement, it may with a view to reaching a mutually satisfactory resolution of the matter have recourse to the DSU."

81 The panel assessed the studies in 7.489- 506, 7.512-544. Finally it considered the Canadian study more robust for five reasons, see 7.540-541.

82 Appellate Body Report, *United States – Certain Country of Origin Labelling (COOL) Requirements* (DS384), 324.

83 Interview with experienced trade lawyer.

84 *European Communities –Export Subsidies on Sugar* (DS266).

85 Danvivathana, P., *supra* note 71, pp. 218-19.

86 Panel Report, *United States – Certain Country of Origin Labelling (COOL) Requirements (DS384), WT/DS384/R,* 7.489 et subs.

87 Article 62 (1) of Convention on the Settlement of Investment Disputes between States and Nationals of other States (the tribunal decides how to allocate the expenses).

88 For Developing country members falling under category A with the ACWL. The total maximum cost for least developed countries is CHF 34,100. (*See* "ACWL Fees," available at http://www.acwl.ch/e/disputes/Fees.html (Last visited: 17/04/13)).

89 If the member seeks private counsel on its own, the cost of a case has been estimated by Hakan Nordström at up to several hundred thousand dollars, even in less complex cases, when top notch law firms are involved. He also points out that these numbers might well be exaggerated and provides a detailed chart. (See "The cost of WTO litigation, legal aid and small claim procedures," p. 3). Although, in exceptionally fact-intensive and long-enduring cases, such as the *US/EC Aircraft* cases, the cost could be some large multiple of that, though not always borne by the member government. Shaffer estimated that the costs of the dispute for each company assisting the US and EC trade authorities might exceed USD 20,000,000 if not settled; (*See* Shaffer, G., "Developing Country Use of the WTO Dispute Settlement System: Why it Matters, the Barriers Posed, and its Impact on Bargaining", available at http://ictsd.org/downloads/2008/05/shaffer_1.pdf (Last visited: 17/04/13)).

90 United States – Section 110(5) of US Copyright Act (DS160), *supra* note 28.

91 *See* section 4 for further discussion.

92 Telephone interview with EU Commission Directorate trade official.

93 Most recently, *United States - Certain Country of Origin Labelling (COOL) Requirements* (DS384).

94 Abbot, F. M., "Cross-Retaliation in TRIPS: Options for Developing Countries, ICTSD Issue Paper No. 8, April 2009, p. 20 (Arguing that the value of IP assets is reasonably predictable. Abbot posits that stock market analysts know how to value the transition to a generic product, film royalties and sales of a copyright).

95 *US - COOL, supra* note 83.

96 *Philippines - Distilled Spirits, supra* note 5.

97 *See* the recommendations in Bown, C. P., "The WTO Secretariat and the role of economists on panels and arbitrations," ICTSD Ch. 19, at pp. 419, 426 which according to a WTO source have become reality.

98 *See, e.g., EC – Definitive Anti-Dumping Measures on Certain Iron or Steel Fasteners from China* (DS397) and *China - Provisional Anti-Dumping Measures on Certain Iron or Steel Fasteners from the European Union* (DS407).

99 As noted in the introduction, WTO dispute settlement involves costs that might not be seen as necessary for minor disputes between WTO members.

100 *United States - Measures Affecting Trade in Large Civil Aircraft; European Communities - Measures Affecting Trade in Large Civil Aircraft, supra* note 13.

101 *Canada - Measures Affecting the Export of Civilian Aircraft; Brazil - Export Financing Programme for Aircraft, supra* note 42.

102 *United States - Tax Treatment for "Foreign Sales Corporations," supra* note 24.

103 *EC - Bananas (DS27), supra* note 4.

104 *United States - Tax Treatment for "Foreign Sales Corporations," supra* note 24.

105 Horlick, G. N. and Fennell, K., "WTO Dispute Settlement from the Perspective of Developing Countries," in *Law and Development Perspective on International Trade* (Cambridge, 2011) at 12. *See also, Australia - Quarantine Regime on Imports* (DS287) and *EC - Protection of Trademarks and Geographical Indications for Agricultural Products* (DS174).

106 *EC - Fasteners and China - Fasteners, supra* note 99.

107 *United States – Imposition of Import Duties on automobiles from Japan under Section 301 and 304 of the Trade Act of 1974* (DS6).

108 Durling, J. P., supra note 40, p. 674.

109 *United States – Definitive Safeguard Measures on Imports of Certain Steel Product* (DS249).

110 DS89, DS99, DS179, DS202, DS217, DS251, DS296, DS402 and DS420.

111 For the proposition that small nations may fear that developed countries would retaliate by decreasing development aid, see Collins, D., "Efficient Breach, Reliance and Contract Remedies at the WTO," 43 *Journal of World Trade* (2009) p. 228; and Guzman, A. T. and Simmons, B. A., "Power Plays and Capacity Constraints: The Selection of Defendants in World Trade Organization Disputes," 35 *Journal of Legal Studies* 557 (discussing the influence of political power on dispute settlement).

112 Generally confirmed as one factor in a number of different motivations to file a complaint by an EU Commission official.

113 *United States – AD/CVD* (China), *supra* note 61.

114 *European Communities – Hormones, supra* note 18.

115 Reportedly, some ASEAN officials say they do not pursue cases for political reasons and only take a trading partner to the WTO for purely economic considerations.

116 The authors want to emphasize that political considerations are not solely a Canadian phenomenon, which is underlined by the further two cases being brought by India and Brazil.

117 *European Communities – Measures Affecting Asbestos and Products Containing Asbestos* (DS135).

118 *European Communities – Seal Products, supra* note 23.

119 *European Communities – Seal Products* (DS369), *supra* note 23.

120 Article 13 of the Treaty of Lisbon introduced animal welfare as one of the community objectives.

121 *European Union and a Member State – Seizure of Generic Drugs in Transit* (DS408, DS409).

122 Telephone Interview with official of Directorate General for Trade of the European Commission.

123 See Article 207 of the Lisbon Treaty.

124 Email by official of the Directorate General for Trade of the European Commission.

125 As concluded by Evans and Shaffer in Shaffer, G. and Meléndez-Ortiz, R., *supra* note 32, p. 345; effective trade litigation depends on the effective flow of information and cooperation between the state and private actors involved.

126 Pub.L. 93-618, 19 USC § 2411.

127 *Japan – Film, supra* note 47.

128 *China – Measures concerning wind power equipment, supra* note 15.

129 USTR Declines To Investigate Section 301 Claims Under CAFTA, Israel FTA, *Inside US Trade*, July 14, 2011.

130 *Supra* note 127.

131 *Japan - Film, supra* note 47.

132 The TBR was adopted by the EU, in light of the successful US Section 301 mechanism, for a comparison and detailed evaluation (See Bronckers, M. and McNelis, N., "The EU Trade Barrier Regulations Comes of Age," in von Bogdandy, A., Mavroidis, P. C. and Mény, Y. (eds). *European Integration and International Co-ordination, Studies in Transnational Economic Law in Honour of Claus-Dieter Ehlermann* (2002) Kluwer, pp. 57-99.

133 However, the TBR is less often used than the traditional immediate dialogue between the EU commission and the industry, Bronckers and McNelis, *Id*. pp. 89-90.

134 With effect of January 1, 2005; the TBI are based on the November 1, 2002 Provisional Rules on Trade Barrier Investigation.

135 *See* Liyu, H. and Gao, H. "China's Experience in utilizing the WTO Dispute Settlement Mechanism" in Shaffer, G. and Meléndez-Ortiz, R., *supra* note 32, pp. 137-173, at 161.

136 *Id*. at 162.

137 Canada, just to name an example, has never adopted such an instrument.

138 For many examples, see Statement of Joost Pauwelyn, Testimony before the Subcommittee on Trade on the House Committee on Ways and Means, 24 March 2009, available at http://waysandmeans.house.gov/media/pdf/111/pauw.pdf (Last visited: 17/04/13) - (although so far the measure has not been adopted).

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