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GOING BEYOND STEREOTYPES: PARTICIPATION OF DEVELOPING COUNTRIES IN WTO DISPUTE SETTLEMENT

JAN BOHANES[*] AND FERNANDA GARZA[**]

The WTO dispute settlement system is the most successful and widely-used inter-governmental dispute settlement system. However, it is often alleged that, because of capacity and other constraints, developing country Members of the WTO are either downright unable to use this mechanism or that they do not bring all cases that could be commercially meaningful to them. This article examines the full range of real and alleged constraints on developing country participation in WTO litigation and concludes that, although smaller and developing country Members are at a relative disadvantage in a number of respects, many of the constraints typically identified play a much smaller role than usually alleged. We begin by highlighting two important background issues – first, the great disparity amongst developing countries and, second, the way in which economic size and share of global trade drive participation in the WTO dispute settlement system. We then examine and assess the role of a range of factors commonly identified as constraints on developing country participation in WTO litigation: legal capacity, domestic governance and the lack of a domestic trade policy community, insufficient retaliatory power, the duration and complexity of WTO proceedings, the fact that many developing countries trade under preferential trade arrangements, and the threat of political "retaliation" by a defendant. We conclude that the greatest constraints today on developing country participation in WTO dispute settlement are situated at the domestic, rather than at the multilateral level, and thus requires, first and foremost, action by developing country governments themselves.

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The views of both authors reflect their individual views and do not necessarily reflect the views of their respective employer institutions. The usual disclaimer applies.

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I. INTRODUCTION

The participation of developing countries in the dispute settlement system of the World Trade Organization [WTO] has generated an impressive amount of academic writing. Lawyers, economists, and political scientists have contributed to the debate. Analyses range from sophisticated econometric models, detailed legalistic analysis of individual panel and Appellate Body rulings, empirical case-studies based on interviews with government officials in capitals or in Geneva-based Permanent Missions, to the examination of domestic politico-economic conditions conducive to effective compliance with WTO rulings.

An analysis of developing country participation in WTO litigation entails a fascinating kaleidoscope of factors, offering many distinct lines of enquiry and methodological approaches. Indeed, any inter-governmental dispute resolution system is a topic that provides fertile grounds for multidisciplinary analysis. Governmental behaviour reflects a uniquely complex amalgam of collective motivations and concerns, of a legal, political and economic nature. As such, it differs in important respects from private party litigation behaviour. Moreover, WTO law and dispute settlement directly touch the economic interests of well-defined domestic commercial actors (companies or industry associations) and provide a powerful incentive for these economic stakeholders to lobby their governments, either to erect trade barriers domestically or to challenge foreign trade barriers in the WTO. The influence of these private commercial interests adds another dimension to the analysis of governmental behaviour and has given rise to, *inter alia*, the notion of "public-private networks" as one of the determinants for successful participation in WTO litigation.[1] Given the reach of

[1] We explore these "public-private networks" below in Part II.C.2(i) .

WTO law deep into domestic regulation, other members of civil society also lend their voice to the complex chorus that guides governmental action under the WTO.

The WTO dispute settlement system is undoubtedly the most successful and widely-used inter-governmental dispute settlement system. The important number of cases initiated over the past 16 years – 427 requests for consultations(as of the date of writing), as well as the number of panel and Appellate Body reports – 167 and 103, respectively – dwarfs the output of other comparable tribunals. For instance, the International Court of Justice [ICJ] has, over a period of 65 years (four times as long as the WTO's existence), issued 124 final rulings. The International Tribunal for the Law of the Sea [ITLOS] has issued only 16 rulings over a period of 15 years.[2] The large volume of WTO case law is not just a testimony to the significance of the regime; it also constitutes a sufficiently large set of data on which meaningful statistical and econometric analysis can be performed, thus offering another angle of academic enquiry.

Against this fascinating multidisciplinary backdrop, questions surrounding the participation of developing countries reflect a deep-seated concern about justice for all WTO members and their effective access to it. Without multilateral support, governments of many developing countries would face significant constraints in their legal capacity to effectively participate in WTO litigation, both as complainants and defendants.[3] Large and wealthy WTO Members, with well-funded bureaucracies, possess either sufficient in-house legal capacity or can afford to retain outside legal counsel. In contrast, small and less affluent developing countries often struggle to marshal the expertise necessary to navigate the complex WTO legal regime. Just as any domestic legal regime must guarantee that law does not become a tool accessible only to the rich and powerful, so too an international legal regime must ensure that inequalities between its members do not grow too large. Equal access to justice is a measure of the legitimacy of any legal order.[4]

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[2] For a similar analysis with slightly different figures, *see* H.E. Yonov Frederick Agah, Former Chairman of the WTO DSB and Chairman of the General Council, Speech: *WTO Dispute Settlement Body Developments in 2010* (Mar. 2011), http://www.wto.org/english/tratop_e/dispu_e/speech_agah_4mar10_e.htm.

[3] *See, e.g.,* the terms of the Trust Fund of the International Court of Justice, established to remedy instances "where the parties concerned are prepared to seek settlement of their disputes through the International Court of Justice, but cannot proceed because of the lack of legal expertise or funds". *Terms of the Trust Fund of the International Court of Justice*, ¶ 3, http://www.un.org/law/trustfund/trustfund.htm.

[4] *See* Petina Gappah, *An Evaluation of the Role of Legal Aid in International Dispute Resolution with Emphasis on the Advisory Centre on WTO Law*, *in* AGREEING AND IMPLEMENTING THE DOHA ROUND OF THE WTO 308, 310 (Harald Hohmann ed., 2008) [hereinafter Gappah].

Here, research and analysis of the WTO dispute settlement system also converges with the larger debate on special and differential [S&D] treatment of developing countries in the WTO system at large.

This article examines a number of real or alleged constraints on developing country participation in WTO litigation. We begin by highlighting two important background issues – first, the great disparity amongst developing countries [Part II.A] and, second, how economic size and share of global trade drive participation in the WTO dispute settlement system [Part II.B]. While these points are not novel, they are, in our view, often given short shrift in many legally orientated, qualitative treatises of this topic.

We then examine a range of factors that are commonly identified as constraints on developing country participation in WTO litigation: legal capacity [Part II.C.1], domestic governance and the lack of a domestic trade policy community [Part II.C.2], insufficient retaliatory power [Part II.C.3], the duration and complexity of WTO proceedings [Part II.C.4], the fact that many developing countries trade under preferential trade arrangements [Part II.C.5], the threat of political "retaliation" by a defendant [Part II.C.6] and cultural factors [Part II.C.7]. Our overall conclusion will be, as those of several other scholars in the field, that most challenges for developing countries are situated at the level of domestic governance and not at the multilateral level.

We address these factors in the light of existing literature, with copious references, so as to enable the reader to explore more in depth particular areas of interest. While we typically reach our own conclusions on each of these factors, we have attempted to provide as broad and balanced a picture as possible. We also try to provide a critical assessment of those commonly reflected views that, in our view, are not convincing.

II. DEVELOPING COUNTRIES AND THE WTO DISPUTE SETTLEMENT SYSTEM

A. Introductory Remarks

1. What should be our Policy Concern?

The conventional wisdom for many years has been that developing countries[5] are either downright unable to use the WTO dispute settlement mechanism, due to a lack of legal capacity and other constraints, or do not bring all cases that are

[5] For the sake of simplicity, we use the term "countries" to refer also to those WTO Members that are categorized as a "separate customs territory".

commercially meaningful to them. As a result, the argument goes, these countries cannot challenge foreign trade barriers that impede their trade and their broader economic development. Moreover, developing countries do not get an opportunity to shape the jurisprudence that, in turn, shapes the WTO legal regime.[6]

There is a lot of merit to this conventional wisdom. However, many of the constraints typically identified play a much smaller role (today) than usually alleged. The conclusion of this article, as that of many others, is that the vast majority of existing constraints today is situated at the domestic level and thus requires, first and foremost, action by the governments themselves.

Another important point is that participation in WTO litigation is not a goal in and of itself. Contrary to the impression that many publications give, the objective is not litigation for the sake of litigation or reaching certain statistical targets, e.g. that developing countries account for a certain percentage of all WTO complaints. Rather, the goal must be a system in which a sovereign developing country government is able to understand when its WTO rights are being violated, and is not precluded from initiating a dispute at the WTO for reasons judged objectionable by the legal community. Such objectionable reasons are lack of legal or financial capacity, fear of political retaliation by a politically more powerful respondent, or other reasons linked to the country's economic status. By the same token, when challenged, a defendant member should have a fair opportunity to defend its own measures on a level playing field.

Finally, when a developing country becomes an active "participant" in WTO litigation, this does not imply acting only as a complainant. As we show below, developing countries have been defendants as frequently as complainants, that is, in over 40 percent of all disputes. Close to half of those disputes – almost 20 percent of all disputes filed since 1995 – saw a developing country complain against another developing country. Moreover, being a complainant increases by 55 percent the probability that a country will later find itself in a defensive posture. Hence, equating participation of developing countries in WTO litigation only with complaints by developing against developed countries, as well as critiquing the system and proposing changes on that basis, is a dangerous and ill-informed mistake, in particular when it is used as a basis for policy recommendations, such as reform of the WTO dispute settlement mechanism.

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[6] Gregory Shaffer, *Towards a Development – Supportive Dispute Settlement System in the WTO*, 9 (ICTSD Sustainable Development and Trade Issues Resource Paper No. 5, March 2003), http://ictsd.org/downloads/2008/06/dsu_2003.pdf [hereinafter Shaffer]; Gregory Shaffer & Ricardo Meléndez-Ortiz, *Preface: The ICTSD Dispute Settlement Project*, [hereinafter Shaffer & Meléndez-Ortiz] *in* DISPUTE SETTLEMENT AT THE WTO: THE DEVELOPING COUNTRY EXPERIENCE xi, xiii (Gregory C. Shaffer & Ricardo Meléndez-Ortiz eds., 2010) [hereinafter Shaffer & Meléndez-Ortiz eds. – DISPUTE SETTLEMENT].

2. Which Countries are "Developing Countries"?

Before looking at the litigation statistics of developing countries in the WTO, we must first determine who these "developing countries" are. Among the 153 countries or separate customs territories that were WTO Members (as on December 31, 2011), only 37 members are developed countries.[7] The remaining 116 countries – more than 75 percent of WTO membership – fall under the broad umbrella of "developing countries".[8] As is well-known, the developing country status in the WTO is based on self-declaration, that is, each WTO Member can self-designate itself as a developing country. Unlike in other international bodies, no official WTO criteria exist for determining developing country status. While some WTO Members have expressed reservations about the developing country status of a few members, there is at least *some* relevant degree of recognition for the status of all these 116 members.

The group of 116 developing countries is very diverse. At one end of the spectrum, we find very advanced and relatively wealthy countries that, outside the WTO context, would not be considered developing countries. For instance, four out of the five (and eleven out of the twenty) richest WTO members,[9] as measured by GDP per capita, are classified as "developing countries" for WTO purposes. Four "developing countries" have higher GDP per capita than the United States, and seven "developing countries" exceed the European Union average GDP per capita.[10] There are also three WTO developing country members that are members of the Organization for Economic Co-operation and Development [OECD], a group reserved for high-income economies. Finally, over the past ten years, large developing economies such as Brazil, India and, of course, China, have become powerful actors in the political scene of the WTO. In contrast, at the other end of the spectrum, we find 32 least-developed countries [LDC], as defined by the

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[7] These 37 Members are Australia, Canada, the European Union (and its 27 Member states), Iceland, Japan, Liechtenstein, New Zealand, Norway, Switzerland, and the United States.

[8] For a precise tally of all WTO Members categorized as developing in the WTO, we consulted the following sources: (i) Committee on Trade and Development, *Participation of Developing Economies in the Global Trading System*, WT/COMTD/W/172/Rev.1, Appendix 9, (ii) WTO Secretariat, WORD TRADE REPORT 2011, *The WTO and preferential trade agreements: From co-existence to coherence*, Appendix Table D.1, at 157, as well as (iii) WTO electronic list on LDC countries, http://www.wto.org/english/thewto_e/whatis_e/tif_e/org7_e.htm.

[9] *See infra*, Table 4, at 63. For this statistic, we counted the EU as a WTO member, and did not separately also count EU members.

[10] International Monetary Fund, *World Economic Outlook Database September 2011*, http://www.imf.org/external/pubs/ft/weo/2011/02/. The ranking is based on the gross domestic product based on purchasing-power-parity (PPP) per capita GDP (current international dollars). The information is updated to December 2010.

United Nations.[11] A country is classified as an LDC if, *inter alia*, it has a three year average GDP per capita of 905 USD.[12] This is an amount that is almost 98 times smaller than the per capita income of the most affluent "developing country".[13] Despite these stark differences, all these countries bear the same label "developing country" in the WTO.

To be fair, WTO law and practice is not oblivious to these stark disparities amongst developing countries. WTO law itself recognizes LDCs, as defined by the United Nations, as a distinct category[14] and provides for S&D treatment for LDCs that goes beyond the standard S&D treatment accorded to all developing countries.[15] WTO law also draws distinctions within the group of non-LDC developing countries. For instance, the Agreement on Subsidies and Countervailing Measures [SCM Agreement] provides for an extra layer of S&D

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[11] Namely, Angola, Bangladesh, Benin, Burkina Faso, Burundi, Cambodia, Central African Republic, Chad, Democratic Republic of the Congo, Djibouti, Gambia, Guinea, Guinea Bissau, Haiti, Lesotho, Madagascar, Malawi, Mali, Mauritania, Mozambique, Myanmar, Nepal, Niger, Rwanda, Senegal, Sierra Leone, Solomon Islands, Tanzania, Togo, Uganda, Vanuatu and Zambia.

[12] UN Economic and Social Council, *Committee for Development Policy*: *Report on the sixth session*, E/2004/33 (March 29 – April 2, 2004), http://www.un.org/en/development/desa/policy/cdp/cdp_ecosoc/e_2004_33_en.pdf.

[13] Qatar, with a per capita income of 88,222 USD.

[14] *See* Marrakesh Agreement Establishing the World Trade Organization, Apr. 15, 1994, 1867 U.N.T.S. 154, art. XI: 2 [hereinafter WTO Agreement].

[15] For instance, LDCs were granted special transition periods for the implementation of the TRIPS Agreement, which have subsequently been further extended. (Agreement on Trade Related Aspects of Intellectual Property Rights, Apr. 15, 1994, 1869 U.N.T.S. 299, art. 66 [hereinafter TRIPS Agreement]). LDCs were also granted a longer implementation period (than the one provided for developing countries) under Article 5.2 of the TRIMS Agreement (Agreement on Trade Related Investment Measures, Apr. 15, 1994, 1868 U.N.T.S. 186). Under the DSU, in matters involving an LDC, "particular consideration shall be given to the special situation" of those Members, and "due restraint" shall be exercised in requesting authorization to retaliate against these members (Understanding on Rules and Procedures Governing the Settlement of Disputes, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, 1869 U.N.T.S. 401, art. 24.1 [hereinafter DSU]). Moreover, Article 24.2 envisages good offices of the Director-General or the Chairman of the DSB where consultations involving an LDC as party have failed. Under the GATS, "special priority" shall be given to LDCs in implementing the provisions of Article IV, which aims at increasing the participation of developing countries in world trade (General Agreement on Trade in Services, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1B, 1869 U.N.T.S. 183, art. IV [hereinafter GATS]). Pursuant to Article 15 of the Agreement on Agriculture, LDCs were not required to undertake any subsidy reduction commitments (Agreement on Agriculture, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1867 U.N.T.S. 410, art. 15).

treatment to certain countries, as long as their GNP per capita does not exceed USD 1,000 per year (in 1990 constant USD).[16] Another sub-group set out in WTO law is the so-called net-food importing countries. This group was established by the Committee on Agriculture, so as to operationalise a Ministerial Decision adopted in 1993.[17] In the context of the Doha Round negotiations, WTO Members also identified a group of "small economies" – a term not found in the WTO agreements – and launched a work programme dedicated to these economies.[18] These somewhat half-hearted attempts at differentiating developing countries within the WTO framework can be contrasted with the World Bank system, which uses a comprehensive classification system based on *per capita* numerical thresholds.[19]

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[16] *See* Annex VII(b) of the *SCM Agreement* as well as Honduras, which was added subsequently (Agreement on Subsidies and Countervailing Measures, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1867 U.N.T.S. 14). *See also* Committee on Subsidies and Countervailing Measures, *Note by the Secretariat: Addendum: Annex VII(b) of the Agreement on Subsidies and Countervailing Measures,* G/SCM/110/Add.7 (June 16, 2011).

[17] The full title of this Ministerial Decision is "Ministerial Decision on Measures concerning the Possible Negative Effects of the Reform Programme on Least-Developed and Net Food-Importing Developing Countries". As of July 1999, the list established by the Committee on Agriculture included 19 developing country Members (Barbados, Botswana, Cuba, Côte d'Ivoire, Dominican Republic, Egypt, Honduras, Jamaica, Kenya, Mauritius, Morocco, Pakistan, Peru, Saint Lucia, Senegal, Sri Lanka, Trinidad and Tobago, Tunisia and Venezuela) plus all least-developed countries. *See* Marrakesh Ministerial Decision on Measures Concerning the Possible Negative Effects of the Reform Programme on LDCs and NFIDCs, G/AG/5 (Apr. 8, 1996).

[18] World Trade Organization, Ministerial Declaration [Doha Declaration] ¶ 35, Nov. 14, 2001, WT/MIN(01)/DEC/1.

> We agree to a work programme, under the auspices of the General Council, to examine issues relating to the trade of small economies. The objective of this work is to frame responses to the trade-related issues identified for the fuller integration of small, vulnerable economies into the multilateral trading system, and not to create a sub-category of WTO Members.

There is no precise definition within the WTO system of what constitutes a "small economy".

[19] The World Bank uses a classification system to differentiate between countries based on income. In this classification countries are divided (as of July, 2010) into: (i) low-income economies ($1,005 or less per capita in 2011), (ii) middle- income economies (between $1,006 and $ 12,275 per capita), which in turn is sub-divided in two classifications (lower-middle-income economies, between $1,006 and $3,975 per capita, and upper-middle-income economies, also called "newly industrialized" economies, between $3,976 and $12,275 per capita), and (iii) high-income economies, primarily members of the OECD, with incomes of $12,276 or more per capita. *See* WORLD BANK, Country

Despite these vast differences between WTO Members that are classified as "developing", the developing country status is typically not controversial in the WTO. However, there are a few exceptions. For instance, China's status as a developing country was not expressly determined in its Accession Protocol, and controversy surfaced during the *US – Steel Safeguard* dispute.[20] As another example, at the conclusion of the Uruguay Round, the United States declared that it would no longer consider certain Members to be developing countries for purposes of subsidies or countervailing duty investigations.[21] Upon adoption of the panel and Appellate Body reports in *Korea – Beef*, the European Union stated that it did not consider it appropriate for Korea to be considered a developing country for the purposes of the Agreement on Agriculture.[22] However, because S&D provisions typically do not provide major tangible advantages to developing countries, the system has been able to avoid resolving these controversial questions.

In light of these differences, it is clear that grouping all developing countries into one single category, for purposes of analysing their participation in the dispute settlement system, papers over great differences. Indeed, academic publications increasingly differentiate between subsets of developing countries to make analyses more meaningful. For instance, a recent statistical compilation by Horn, Johannesson and Mavroidis divides the WTO Membership into 5 groups, namely, (1) EU and US (2) Brazil, India, and China (3) "other industrialized countries", including Korea, Mexico, Singapore, and Turkey (traditionally regarded as developing countries in the WTO) (4) "developing countries" and (5) LDCs.[23] Another study proposes a categorization of WTO Members on the basis of the Human Development Index of the United Nations Development Program[24] or an

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Classification (under the Data & Statistics section), http://www.worldbank.org/data/countryclass/countryclass.html.

[20] Working Party Report on the Accession of China to the WTO, WT/ACC/CHN/49 (Oct. 1, 2001) ¶¶ 8-9; and Panel Report, *United States – Definitve Safeguard Measures on Imports of Certain Steel Products,* ¶¶ 7.1878-7.1884, WT/DS252/R (July 11, 2003) [hereinafter Panel Report, *United States – Steel Safeguards*]. The Panel ultimately exercised judicial economy on this question, Panel Report, *United States – Steel Safeguards*, ¶¶ 10.706 & 10.712-10.714.

[21] MITSUO MATSUSHITA, THOMAS J. SCHOENBAUM & PETROS MAVROIDIS, THE WORLD TRADE ORGANIZATION: LAW, PRACTICE, AND POLICY 765 (2006). The countries affected by these declarations appear to have been Singapore, Hong Kong and Korea.

[22] Dispute Settlement Body, *Minutes of the Meeting: 10 January 2001,* ¶ 14, WT/DSB/M/96 (Feb. 22, 2001).

[23] Henrik Horn, Louise Johannesson & Petros C. Mavroidis, *The WTO Dispute Settlement System 1995–2010: Some Descriptive Statistics*, 45(6) J. WORLD TRADE 1107, 1138 (2011). *See also* Bemard Hoekman, Henrik Horn & Petros Mavroidis, *Winners and Loser in the Panel Stage of the WTO Dispute Settlement System*, *in* DEVELOPING COUNTRIES IN THE WTO LEGAL SYSTEM 151, 155 (Trachtman and Thomas eds., 2009) [hereinafter Hoekman et al. – *Winners and Loser*].

[24] Fernanda Garza, *Improvement of the Rules of Developing Countries: Redefining the Model of*

even more nuanced categorization in the context of pharmaceutical patents.[25] Finally, the Agreement establishing the Advisory Centre on WTO Law (ACWL) creates three categories of developing countries, based on their GDP per capita and shares of global trade.[26]

B. What Story do Statistics and Economics tell us about Developing Country Participation in WTO Litigation?

1. Do the Statistics show that the WTO Dispute Settlement Regime does not Work for Developing Countries?

What do dispute settlement statistics tell us about the litigation behaviour of the116 developing WTO Members? On the authors' count, of the 427 disputes[27] brought between 1995 and 2011, 185 (43.3 percent) have been brought by developing WTO Members (acting alone or as co-complainant) and 242 (56.7 percent) by developed countries, acting alone. In other words, developing countries were involved – either on their own or as co-complainants (with developed or developing countries) – in almost half of all WTO disputes. Developing countries have been respondents in virtually an identical number of instances (186 disputes, representing 43.3 percent of the total).

At first glance, these figures do not support the claim that developing countries are second-class citizens in WTO litigation. Rather, these statistics tell us

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Special and Differential Treatment in the World Trade Organization (unpublished Master's thesis, Universitat de Barcelona, 2010) (on file with author).

[25] Bradly J. Condon & Tapen Sinha, *Global Diseases, Global Patents, and Differential Treatment in the WTO: Criteria for Suspending Patent Obligations in developing Countries*, 1, 26, 49 (2005), *available at:* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=664621.

[26] *See* Agreement Establishing the ACWL annex II, http://www.acwl.ch/e/about/basic_documents.html.

[27] We have counted as a "dispute" each instance in which WTO consultations were requested, even if no panel was subsequently established or a panel report issued. For the sake of simplicity, we have also counted each separate WTO Dispute Settlement number as a dispute and have not consolidated multiple complaints on the same measure into one dispute. This method responds to the fact that, even where several Dispute Settlement numbers concern the same set of facts/measures, each complainant must independently decide to pursue a dispute and can also independently settle with the defendant. This method is also used in numerous other studies. *See* Marc L. Busch & Eric Reinhardt, *Developing Countries and General Agreement on Tariffs and Trade/ World Trade Organization Dispute Settlement*, 37(4) J. WORLD TRADE 719, 724 (2003) [hereinafter Busch & Reinhardt]; Andrew T. Guzman & Beth A. Simmons, P*ower Plays and Capacity Constraints: The Selection of Defendants in World Trade Organization Disputes*, 34 J. LEGAL STUD. 557, 573 (2005) [hereinafter Guzman & Simmons]; Hoekman et al. – *Winners and Loser, supra* note 23, at 154.

that developing countries, as a group, are active participants. Moreover, developing countries' participation has increased overtime. In a study of the first 10 years of the WTO system, Prof. Davey noted an increase of the developing countries' share of consultations requests, from 25 percent in the first five-year period to 60 percent in the second five-year period.[28] On the authors' own count, the share of cases initiated by developing countries among the first 100 cases was 31 percent; it subsequently decreased to 23 per cent for the next 100 cases, but then increased to 66 percent for disputes DS 201 to DS 300 and to 51 percent for disputes DS 301 to DS 427. In other words, when looking at the latter half of all disputes filed at the WTO, developing countries filed more than 50 percent of all disputes!

Of course, these figures have to be placed in context. First, the group of developing countries represents 75 percent of the WTO membership. Therefore, their level of participation as either defendant or complainant of 43.3 percent is almost 32 percentage points less than their nominal share in the WTO membership. This is often taken to suggest that developing countries are under-represented as measured against their share of WTO membership.

Second, participation is heavily concentrated in a relatively small group of developing countries. Indeed, the five most frequent developing country complainants – Brazil, Mexico, India, Korea and Argentina – are responsible for more than 50 percent of all developing country complaints. Looking at the ten heaviest developing country complainants, the percentage climbs to 75 percent, and 88 percent for the top 15 users. This heavy concentration also chimes with the fact that 75 developing countries – including all but one LDC WTO member – have never been involved in a WTO dispute, neither as a complainant nor as a defendant. African countries are particularly absent from WTO litigation.[29] Hence, it appears that the jewel in the crown of the WTO – as the WTO dispute settlement was described by a previous WTO Director-General[30] – is a jewel beyond reach of the majority of the membership and the vast majority of developing countries. This fact has often been characterized as a problem in

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[28] William Davey, *The WTO Dispute Settlement System: The First Ten Years*, 8(1) J. INT'L ECON. L. 17, 24 (2005) [hereinafter Davey].

[29] Victor Mosoti, *Africa in the First Decade of WTO Dispute Settlement*, 9(2) J. INT'L ECON. L. 427, 435 (2006).On African countries in WTO dispute settlement, see also Amin Alavi, *African Countries and the WTO's Dispute Settlement Mechanism*, 25(1) DEV. POL'Y REV. 25, (2008).

[30] According to Mary E. Footer, "no one can be certain as to the provenance of the term 'jewel in the crown', which is used in order to describe the WTO dispute settlement system. However, it seems that a former WTO Director-General Mike Moore was keen on reciting it". MARY E. FOOTER, AN INTERNATIONAL AND NORMATIVE ANALYSIS OF THE WORLD TRADE ORGANIZATION 1 (2006).

scholarly writing and by developing country governments.[31]

Finally, developing countries generally do not participate as third parties. Again, a number of developing countries have participated repeatedly, including out of a deliberate strategy to learn and to build capacity. However, 49 of the group of 116 developing countries haves far never participated as a third party in a WTO dispute.

Nevertheless, when the wide disparities in economic size and volumes of trade of WTO members are taken into account, dispute settlement participation is significantly more representative than meets the eye. While this economic perspective has been widely explored in more economically-orientated literature, non-economic and non-quantitative analyses often under-appreciate the powerful impact of economic size and shares of trade. Keeping the economic backdrop in mind is necessary both for a fair assessment of the system and to realistically define the level of developing country participation that legal aid mechanisms can achieve.

2. The Participation of Developing Countries in the WTO Dispute Settlement System must be seen in the light of their Economic Size and Share of Global Trade

Economic size and share of global trade explain, to an important degree, the divergent patterns of participation in WTO litigation across the membership. Indeed, an entire strand of literature explains different levels of participation by commercial interests. Only a few years into the functioning of the WTO dispute settlement system, Horn, Nordström and Mavroidis argued that the distribution of disputes across WTO Members is proportionate to the structure of global trade; that is, larger WTO members trade greater volumes of more diversified trade to a greater number of trading partners, which in turn leads to a greater number of potential trade frictions and greater propensity to bring disputes.[32] Based on data covering a period of 4 years, that study finds that the number of disputes brought

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[31] *See, e.g.*, Hunter Nottage, *Developing Countries in the WTO Dispute Settlement System*, 2 (Global Econ. Governance Program, GEG Working Paper 2009/47, 2009) *available at:* http://www.globaleconomicgovernance.org/wp-content/uploads/nottage-working-paper-final1.pdf [hereinafter Nottage – *Developing Countries*]; Hunter Nottage, *Trade and Development, in* THE OXFORD HANDBOOK ON INTERNATIONAL TRADE LAW 481, 490 (Daniel Bethlehem et al. eds., 2009) [hereinafter Nottage – *Trade and Development*]; H.E. Mr. Ujal Singh Bhatia, Ambassador and Permanent Representative of India to the WTO, *Settling Disputes Among Members, Presentation at the WTO Public Forum 2008*, (Sept. 24, 2008) *available at* http://www.wto.org/english/forums_e/public_forum08_e/ programme_e.htm.

[32] Henrik Horn, Petros C. Mavroidis & Hakan Nordström, *Is the use of the WTO dispute settlement system biased?*, (Centre for Economic Policy Research Paper 2009), *available at:* http://www.econ-law.se/Papers/Disputes000117.PDF [hereinafter Horn et al. – *Biased?*].

by the majority of members falls within a 95 percent confidence interval around the estimated number.[33]A 2005 study by Chad Bown also found a link between the size of exports of a given WTO member and its propensity to launch a dispute.[34] Similarly, a 2008 study by Francois, Horn, and Kaunitz found that volume and composition of trade are among the factors that explain the patterns of dispute initiation.[35]

The authors of this article are not in a position to review or expand on those sophisticated economic studies. However, we have attempted to generate some readily understandable quantitative evidence without, at the same time, entering into sophisticated econometric analysis. The result of this effort are a few readily-understandable tables, as presented below, based on 1995 – 2011 dispute settlement data. These tables juxtapose the ranking of WTO members[36] in terms of their litigation participation, on the one hand, and their ranking in terms of economic size and shares of trade, on the other hand. Correlation is not causation, of course; however, viewed in the light of the evidence from more sophisticated econometric studies, these tables contain powerful indications of how economic size co-determines the extent of participation in WTO litigation.

First, as Table 1 demonstrates, there is considerable overlap between total GDP ranking and the ranking of total participation[37] in WTO dispute settlement (the members in colour appear in both rankings). In other words, members with large economies tend to participate more in the dispute settlement system than members with smaller economies.[38]

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[33] For a critical interpretation of this figure, *see* Guzman & Simmons, *supra* note 27, at 563.

[34] Chad Bown, *Participation in WTO dispute settlement: complainants, interested parties and free riders*, 19 WORLD BANK ECON. REV. 287, 310(2005) [hereinafter Bown – *Complainants, interested parties and free riders*].

[35] Joseph Francois, Henrik Horn & Niklas Kaunitz, *Trading Profiles and Developing Country Participation in the WTO Dispute Settlement System*, (ICTSD Programme on Dispute Settlement, ICTSD Paper No. 6, 2008) *available at:* http://ictsd.org/downloads/2009/02/trading_profiles.pdf [hereinafter Francois et al.].

[36] We have not counted EU Member states separately, except for those current Member states who were not Members for any time period after 1995.

[37] Total participation is obtained by summing up instances in which a WTO member was a complainant or a defendant.

[38] Note that, as Table 4 shows, *the absolute size of the economy* is much better correlated to dispute settlement than *GDP per capita.*

Table 1 – Ranking by total DS participation and GDP

Members participation in the DS[39]			WTO Members GDP (2010)[40]		
RANK	WTO Member	DS Participation	RANK	WTO Member	GDP (Million USD)
1	USA	211	1	EU	16,250,522
2	EU	155	2	USA	14,582,400
3	Canada	50	3	China	5,878,629
4	Brazil	39	4	Japan	5,497,813
5	India	39	5	Brazil	2,087,890
6	Mexico	35	6	India	1,729,010
7	Argentina	32	7	Canada	1,574,052
8	China	31	8	Mexico	1,039,662
9	Japan	29	9	Korea	1,014,483
10	Korea	29	10	Australia	924,843
11	Chile	23	11	Turkey	735,264
12	Australia	17	12	Indonesia	706,558
13	Thailand	16	13	Switzerland	523,772
14	Philippines	11	14	Saudi Arabia	434,666
15	Guatemala	10	15	Chinese Taipei	429,918
16	Turkey	10	16	Norway	414,462
17	Indonesia	9	17	Venezuela	387,852
18	Colombia	8	18	Argentina	368,712
19	Dominican Republic	7	19	South Africa	363,704
20	Honduras	7	20	Thailand	318,847

Table 1 shows that, of the 10 most frequent participants of the WTO dispute settlement systems, 9 also belong to the group of the 10 largest economies (90 percent). If we expand our observation to the 20 most frequent participants, we find that 14 of them belong to the 20 largest economies (70 percent). If we expand again both lists to 30 countries, we find an overlap of 21 countries (70 percent).[41]

A virtually identical story emerges if we break down "participation" into complainant and defendant postures. Table 2 shows that 8 of the top 10

[39] *See* WORLD TRADE ORGANIZATION, *WTO Disputes by country/territory*, http://www.wto.org/english/tratop_e/dispu_e/dispu_by_country_e.htm.

[40] *See* WORLD TRADE ORGANIZATION, *Members, Trade Profiles,* http://stat.wto.org/CountryProfile/WSDBCountryPFReporter.aspx?Language=E.

[41] The relevant top 30 table is Table 1 of Annex 1 to this article.

complainants are also among the 10 largest economies (80 percent) and 13 of the top 20 complainants are among the top 20 largest economies (65 percent). If the list is expanded to include the top 30 countries, we find an overlap of 21 countries (70 percent).[42]

Table 2 – Ranking by participation as complainant and GDP

Members participation as Complainants[43]			WTO Members GDP (2010)[44]		
RANK	WTO Member	Participation as Complainant	RANK	WTO Member	GDP (Million USD)
1	USA	98	1	EU	16,250,522
2	EU	85	2	USA	14,582,400
3	Canada	33	3	China	5,878,629
4	Brazil	25	4	Japan	5,497,813
5	Mexico	21	5	Brazil	2,087,890
6	India	19	6	India	1,729,010
7	Argentina	15	7	Canada	1,574,052
8	Korea	15	8	Mexico	1,039,662
9	Japan	14	9	Korea	1,014,483
10	Thailand	13	10	Australia	924,843
11	Chile	10	11	Turkey	735,264
12	China	8	12	Indonesia	706,558
13	Guatemala	8	13	Switzerland	523,772
14	Australia	7	14	Saudi Arabia, Kingdom of	434,666
15	Honduras	7	15	Chinese Taipei	429,918
16	New Zealand	7	16	Norway	414,462
17	Colombia	5	17	Venezuela	387,852
18	Costa Rica	5	18	Argentina	368,712
19	Indonesia	5	19	South Africa	363,704
20	Panama	5	20	Thailand	318,847

Table 3 shows the corresponding figures for defendants. The results are that 9 of the top 10 defendants are also among the 10 largest economies (90 percent) and 13 of the top 20 defendants are among the top 20 largest economies (65percent). If both lists are expanded to the top 30 defendants, the results show that 20 of the

[42] The relevant top 30 table is Table 2 of Annex 1 to this article.

[43] *See* WORLD TRADE ORGANIZATION, *WTO Disputes by country/territory*, http://www.wto.org/english/tratop_e/dispu_e/dispu_by_country_e.htm.

[44] *See* WORLD TRADE ORGANIZATION WTO Members, *Trade Profiles*, http://stat.wto.org/CountryProfile/WSDBCountryPFReporter.aspx?Language=E.

top 30 complainants are among the top 30 largest economies (66 per cent).[45]

Table 3 - Ranking by participation as defendant and GDP

Members participation as Defendants[46]			Members GDP[47]		
RANK	WTO Member	Participation as Defendant	RANK	Member	GDP (Million USD)
1	USA	113	1	EU	16,250,522
2	EU	70	2	USA	14,582,400
3	China	23	3	China	5,878,629
4	India	20	4	Japan	5,497,813
5	Canada	17	5	Brazil	2,087,890
6	Argentina	17	6	India	1,729,010
7	Japan	15	7	Canada	1,574,052
8	Brazil	14	8	Mexico	1,039,662
9	Mexico	14	9	Korea	1,014,483
10	Korea	14	10	Australia	924,843
11	Chile	13	11	Turkey	735,264
12	Australia	10	12	Indonesia	706,558
13	Turkey	8	13	Switzerland	523,772
14	Dominican Republic	7	14	Saudi Arabia, Kingdom of	434,666
15	Philippines	6	15	Chinese Taipei	429,918
16	Indonesia	4	16	Norway	414,462
17	Peru	4	17	Venezuela	387,852
18	Egypt	4	18	Argentina	368,712
19	Colombia	3	19	South Africa	363,704
20	Ecuador	3	20	Thailand	318,847

Certainly, there is no *perfect* correlation between litigation participation and GDP. In particular, the correlation becomes less pronounced as the number of disputes per member decreases. This is probably because for small members with fewer counts of participation, each additional dispute will push that member's ranking farther out of proportion with that member's economic size. Thus, a number of WTO Members – especially Latin American countries – are "overrepresented" in relation to their economic size, both as complainants and defendants. Indeed, this observation corresponds to the finding of a 2008 study by

[45] The relevant top 30 table is Table 3 of Annex 2 to this article.

[46] *See* WORLD TRADE ORGANIZATION, *WTO Disputes by country/territory*, http://www.wto.org/english/tratop_e/dispu_e/dispu_by_country_e.htm.

[47] *See* WORLD TRADE ORGANIZATION, WTO Members, *Trade Profiles*, http://stat.wto.org/CountryProfile/WSDBCountryPFReporter.aspx?Language=E.

Francois, Horn and Kaunitz, according to which some developing countries (excluding LDCs) have initiated more disputes than a model based on economic indicators (including GDP, shares of trade, and income levels) would predict.[48]

Very importantly, these figures reveal that (economically) large *developing* countries litigate more heavily than (economically) small *developed* countries, even if these developing countries have *lower GDP per capita* than the developed countries. For instance, in at least one of the above tables, we see Brazil, Mexico, India, Argentina, and Thailand rank above Japan and Australia. These developing countries also litigate more than certain developed countries that do not appear at all among the top 20 dispute settlement users.[49] Absolute GDP thus appears to matter more than per capita GDP – again, a phenomenon confirmed in quantitative studies.[50]

Indeed, as Table 4 below shows, only 6 of the top 20 dispute settlement users (30 percent) are also among the top 20 richest WTO members in terms of GDP per capita. Among the top 30 richest WTO members per capita, the figure is only 12 (40 percent).[51] Just as importantly, 8 of the 20 richest WTO members (40 percent), and 14 among the 30 richest WTO members (46.6 percent), have *never participated at all* in the dispute settlement system as a complainant or as a defendant.[52] In short, it is wrong to argue, as a general proposition, that WTO litigation is the preserve of (per capita) wealthy countries.

[48] Francois et al., *supra* note 35.

[49] Switzerland, Norway, New Zealand, and Iceland.

[50] Horn et al. – *Biased?*, *supra* note 32, at 15.

[51] The relevant table is Table 4 of Annex 1 to this article.

[52] Qatar, United Arab Emirates, Iceland, Albania, Kuwait, Brunei Darussalam, Israel, Bahrain, Oman, Saudi Arabia, Barbados, Botswana, Gabon, and St. Kitts and Nevis.

Table 4 – Ranking by total DS participation and GDP/capita

Members participation in the DS[53]			Members GDP/ capita[54]		
RANK	WTO Member	DS Participation	RANK	WTO Member	GDP/capita
1	USA	211	1	Qatar	102,891
2	EU	155	2	Singapore	59,936
3	Canada	50	3	Norway	53,376
4	Brazil	39	4	Brunei	49,517
5	India	39	5	Hong Kong	49,342
6	Mexico	35	6	United Arab Emirates	48,597
7	Argentina	32	7	United States	48,147
8	China	31	8	Switzerland	43,508
9	Japan	29	9	Australia	40,836
10	Korea	29	10	Kuwait	40,740
11	Chile	23	11	Canada	40,457
12	Australia	17	12	Iceland	38,079
13	Thailand	16	13	Chinese Taipei	37,931
14	Philippines	11	14	Japan	34,362
15	Guatemala	10	15	Korea	31,753
16	Turkey	10	16	EU	31,548
17	Indonesia	9	17	Israel	31,004
18	Colombia	8	18	New Zealand	27,966
19	Dominican Republic	7	19	Bahrain	27,368
20	Honduras	7	20	Oman	26,272

Finally, the correlation between dispute settlement participation and share of global trade is significant.[55]

[53] *See* WORLD TRADE ORGANIZATION, *WTO Disputes by country/territory*, http://www.wto.org/english/tratop_e/dispu_e/dispu_by_country_e.htm.

[54] The information is derived from http://en.wikipedia.org/wiki/List_of_countries _by_GDP_(PPP)_per _capita, which is in turn based on 2011 IMF statistics (World Economic Outlook Database-September 2011, International Monetary Fund).

[55] For the sake of simplicity, we correlate all disputes (including those involving trade in services) with data on goods trade. This admittedly introduces a degree of inconsistency into the data set. However, given the very limited number of service disputes, the impact on the results is very limited.

Table 5 – Ranking by participation as complainant and share of global exports

Members participation as Complainants[56]			Share of global exports (goods)[57]		
RANK	WTO Member	Participation as Complainant	RANK	WTO Member	Share in EXP
1	USA	98	1	EU	15.06
2	EU	85	2	China	10.36
3	Canada	33	3	USA	8.39
4	Brazil	25	4	Japan	5.05
5	Mexico	21	5	Korea	3.06
6	India	19	6	Hong Kong	2.63
7	Argentina	15	7	Canada	2.55
8	Korea	15	8	Singapore	2.31
9	Japan	14	9	Mexico	1.96
10	Thailand	13	10	Chinese Taipei	1.80
11	Chile	10	11	Saudi Arabia, Kingdom of	1.64
12	China	8	12	India	1.44
13	Guatemala	8	13	United Arab Emirates	1.44
14	Australia	7	14	Australia	1.40
15	Honduras	7	15	Brazil	1.33
16	New Zealand	7	16	Malaysia	1.30
17	Colombia	5	17	Switzerland	1.28
18	Costa Rica	5	18	Thailand	1.28
19	Indonesia	5	19	Indonesia	1.04
20	Panama	5	20	Norway	0.86

Of the 10 most frequent complainants at the WTO, 6 also belong to the group of the 10 Members with the greatest share in exports in goods (60 percent). Among the 20 most frequent complainants, 12 of them belong to the 20 largest exporters in goods (60 per cent). If we expand both lists to 30 countries, we find

[56] *See* WORLD TRADE ORGANIZATION, *WTO Disputes by country/territory*, http://www.wto.org/english/tratop_e/dispu_e/dispu_by_country_e.htm.

[57] *See* WORLD TRADE ORGANIZATION, WTO Members, *Trade Profiles,*http://stat.wto.org/CountryProfile/ WSDBCountryPFReporter.aspx?Language=E.

an overlap of 18 countries (60 percent).[58]

Table 6 – Ranking by participation as defendant and share of global imports

Members participation as Defendants[59]			Share of global imports (goods)[60]		
RANK	WTO Member	Participation as Defendant	RANK	WTO Member	Share in IMP
1	USA	113	1	EU	16.54
2	EU	70	2	USA	12.78
3	China	23	3	China	9.06
4	India	20	4	Japan	4.51
5	Canada	17	5	Hong Kong, China	2.87
6	Argentina	17	6	Korea, Republic of	2.76
7	Japan	15	7	Canada	2.61
8	Brazil	14	8	India	2.12
9	Mexico	14	9	Mexico	2.02
10	Korea, Republic of	14	10	Singapore	2.02
11	Chile	13	11	Chinese Taipei	1.63
12	Australia	10	12	Australia	1.31
13	Turkey	8	13	Brazil	1.24
14	Dominican Republic	7	14	Turkey	1.20
15	Philippines	6	15	Thailand	1.18
16	Indonesia	4	16	Switzerland	1.14
17	Peru	4	17	Malaysia	1.07
18	Egypt	4	18	United Arab Emirates	1.04
19	Colombia	3	19	Indonesia	0.86
20	Ecuador	3	20	Saudi Arabia, Kingdom of	0.63

Table 6, in turn, shows that, of the 10 most frequent defendants at the WTO, 8 also belong to the group of the 10 Members with the largest share in imports of goods (80 percent). From the 20 most frequent defendants, 12 of them belong to

[58] The relevant top 30 table is Table 5 of Annex 1 to this article.

[59] *See* WORLD TRADE ORGANIZATION, *WTO Disputes by country/territory*, http://www.wto.org/english/tratop_e/dispu_e/dispu_by_country_e.htm.

[60] *See* WORLD TRADE ORGANIZATION, WTO Members, *Trade Profiles*, http://stat.wto.org/CountryProfile/WSDBCountryPFReporter.aspx?Language=E.

the 20 heaviest importers in goods (60 percent). If we expand both lists to 30 countries, we find an overlap of 18 countries (60 percent).

The obvious explanation for all these statistics is, of course, that greater economic size is more likely to give rise to greater volumes of trade across a greater diversity of exports and a greater diversity of export markets. This increases the likelihood that trade frictions will arise and that WTO disputes will be initiated. As Horn, Mavroidis and Nordström have noted, "[l]arger and more diversified exporters would be expected to bring more complaints than smaller and less diversified exporters".[61] The same logic applies on the "defensive" side. A larger national market will likely feature a greater volume and variety of imported goods and services, from a greater variety of trading partners. This, in turn, makes it more likely that such a member will be targeted by its trading partners in WTO dispute settlement.

There are further ways through which greater economic size, greater amounts of trade and greater diversity of exported and imported goods and services can lead to more disputes for a particular member. First, a higher trade volume *per dispute* renders it more likely that a government will find it economically worthwhile to initiate WTO litigation; it is also more likely that the affected private sector will lobby the government and provide funds for private counsel if the government happens to lack in-house capacity or is reluctant to hire outside counsel.

Next, a large domestic market makes complaints by other WTO members more likely, which will in turn force the defendant to organize itself better. Indeed, there is evidence from some countries that defensive postures in the early WTO years lead to experience and reforms that facilitated subsequent offensive cases. For instance, a number of claims were brought against Brazil and Argentina in the early WTO years. In reaction to these experiences, the Brazilian and Argentine governments reorganized governmental structures for handling WTO disputes and invested into building human and institutional resources for WTO dispute settlement.[62] Initially, these resources were required to defend the country's interests in the immediately pending disputes. Subsequently, however, these governments were able to draw precisely on these resources to launch offensive cases and later became two of the top users of the WTO dispute settlement regime. Thus, having a large and commercially attractive domestic market, and

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[61] Horn et al. – *Biased?*, *supra* note 32, at 2.

[62] *See* Gregory C. Shaffer, Michelle Ratton Sanchez Badin & Barbara Rosenberg, *Winning at the WTO: the Development of a Trade Policy Community Within Brazil*, *in* Shaffer & Meléndez-Ortiz eds. – DISPUTE SETTLEMENT, *supra* note 6, at 21-104 [hereinafter Shaffer et al. – *Brazil*]; *and* José L. Pérez Gabilondo, *Argentina's experience with WTO Dispute Settlement: Development of National Capacity and the use of in-house lawyers*, *in* Shaffer & Meléndez-Ortiz eds. – DISPUTE SETTLEMENT, *supra* note 6, at 105 - 134 [hereinafter Gabilondo].

therefore being a target of WTO disputes, paradoxically "helped" these members, by pushing them to create institutional structures that later enhanced participation as complainant. Smaller countries with commercially less attractive markets are less likely to experience such unsolicited "capacity building" lessons.

Finally, larger members may also have an advantage in the enforcement of successful claims, because any retaliatory measures will have a greater economic effect on the defendant. In Part II.C.3, we claim that successful participation in WTO litigation does not depend as much on retaliatory capacity as is often claimed. However, in the limited instances in which retaliation might matter, larger economies are at an advantage.

A focus on economic data also helps us put into perspective the previously-mentioned fact that 75 WTO members have never participated in WTO dispute settlement. By the authors' calculations, the combined GDP of these 75 WTO members– a group that represents more than half of the entire WTO membership – constitutes *less than 4 percent of the combined GDP of all WTO Members*, and a similarly tiny proportion of the total external trade (goods and services) of all WTO members. Admittedly, this figure alone does not say anything about whether these non-participating members may, in a given case, find themselves deterred from bringing individual disputes when they so desire. But the figure clearly suggests that part of the reason why these members are absent from WTO litigation may be because they are economically not sufficiently large to find litigation worthwhile. Specifically, it is well known that WTO members with particularly small trade volumes – for instance, African LDCs – trade little because they face challenges with significant supply side constraints. This of course does not mean that these members are not affected by trade barriers in their large developed export markets. However, even if trade barriers exist, these countries may choose to focus their scarce governmental resources on improving these supply side constraints, rather than to fight, for instance, quarantine measures and technical barriers to trade in their export markets.[63]

3. Beyond Economic Size and Volumes of Trade

The above discussion highlights the significant impact that economic reality has on participation in WTO litigation. However, these statistics paint with a broad brush; there are many aspects of the WTO litigation regime that they do not address. For instance, economic size and share of trade might predict the *ranking* of

[63] Edwini Kessie & Kofi Addo, *African Countries and the WTO Negotiations on the Dispute Settlement Understanding,* ICTSD Paper, at 4, *available at:* http://ictsd.org/downloads/2008/05/african-countries-and-the-wto-negotiations-on-the-dispute-settlement-understanding.pdf [hereinafter Kessie & Addo].

WTO members' participation in WTO litigation; however, there does not appear to be a conceptually sound estimate of the precise *number of disputes* a country can be expected to bring at a given level of economic size, income per capita or legal capacity.[64] This means that the number of cases actually brought by developing countries may not be the number of cases they would have desired to bring.

Interestingly, a 2008 study by Francois, Horn and Kaunitz found the *opposite* effect at least with respect to some developing countries – namely, that some low income developing countries (excluding LDCs) have initiated more disputes than a model based on economic indicators (including GDP, shares of trade, and income levels) would predict.[65] This might suggest that what drives litigation is not only absolute, but also *relative* trade stakes – that is, the volume of trade at stake in a dispute as measured against the size of a member's economy.[66]

Moreover, the likelihood of imposing trade barriers may not be uniform across countries and their trade portfolio.[67] For instance, agricultural import barriers might affect a greater share of developing countries' exports relative to their total export portfolio, thereby providing developing countries with a greater incentive to litigate than their absolute amount of trade would suggest. Furthermore, developing countries could have a greater incentive to litigate when their exports are focused on a few export markets and on a few products; trade barriers in one of these markets represents a greater economic loss than for a developed country that could more easily divert goods to another market.[68] This means that we *should* expect developing countries to bring more disputes than corresponds to their relative economic size and their relative share of trade. Thus, the Francois, Horn and Kaunitz study does not provide all that much comfort that developing countries are doing well.

Indeed, other economic studies appear to confirm that the number of disputes actually brought by developing countries, even if higher than predicted by these

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[64] Guzman & Simmons, *supra* note 27, at 559, remark critically on the methodology used in Horn et al. – *Biased?*, *supra* note 32, at 2.

[65] Francois et al., *supra* note 35.

[66] Gregory Shaffer, *How to Make the WTO Dispute Settlement System Work for Developing Countries: Some Proactive Developing Country Strategies* (ICTSD Resource Paper No. 5, 2003) at 17, *available at:* http://www.isn.ethz.ch/isn/Digital-Library/Publications/Detail/?ots591=0c54e3b3-1e9c-be1e-2c24a6a8c7060233&lng= en&id=92860 [hereinafter Shaffer – *Developing Country Strategies*].

[67] Bernard M. Hoekman & Petros Mavroidis, *Enforcing WTO Commitments: Dispute Settlement and Developing Countries – Something Happened on the Way to Heaven* (Centre for Economic Policy Research, 2000), at 6, *available at:* http://www.cepr.org/meets/wkcn/2/2300/papers/hoekman.pdf [hereinafter Hoekman & Mavroidis – *Enforcing WTO Commitments*].

[68] *Id.*

countries' proportion of GDP and global trade, may be suboptimal. For instance, one study found that, adjusting the results to account for the volume of trade, developing countries with more legal capacity tend to litigate more.[69] Another study concludes that, because of legal capacity constraints, developing countries tend to be more selective in their choice of WTO disputes.[70] This again suggests that small members, due to lack of legal capacity or other constraints, may be unable to file all the disputes that would be commercially meaningful. Moreover, cases with developing country participation as complainant may often reflect "piggy-backing" on developed countries – that is, participation by a developing country as co-complainant in a dispute where the lead is taken by a developed country. While benefitting from the presence of a more experienced co-complainant is not a problem *per se*, it may mean that developing countries could fail to initiate disputes in which only their exclusive commercial interests are concerned – e.g. anti-dumping or countervailing duties imposed only on their exporters.[71]

Thus, even sophisticated economic studies do not reliably tell us whether, in an individual case, an otherwise willing small/developing country complainant may be deterred from using the system for a variety of non-economic reasons that could and should be remedied, both at the multilateral and the domestic level. In the following sections, we turn to consider such other qualitative factors.

C. What Other Factors Affect the Participation of Developing Countries in the Dispute Settlement System?

In this section, we consider the following qualitative factors that potentially affect developing country participation in WTO litigation: (1) legal capacity and (2) domestic governance, where we consider (a) the communication between the public and private sectors (b) intra-governmental organization and (c) organization within the private sector. We then examine (3) the duration and alleged complexity of WTO proceedings, as well as (4) limited retaliatory capacity of most developing countries as a factor, and (5) preferential trade. We close with the (6) political pressure factor and (7) potential cultural factors. In Section (8), we draw some conclusions.

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[69] Horn et al. – *Biased?*, *supra* note 32. That study uses the size of a WTO Member's delegation in Geneva as a proxy for its legal capacity to litigate a WTO dispute.

[70] Guzman and Simmons, *supra* note 27, at 557- 98.

[71] Shaffer – *Developing Country Strategies, supra* note 66.

1. Legal Capacity

(i) Defining "Legal Capacity"

The term "legal capacity" is occasionally used in a double sense. We can label as "legal capacity *in the narrow sense*" the type of legal capacity required for a government to assess the WTO-consistency of an existing trade barrier and to effectively litigate a dispute before the WTO judicial bodies. This includes identifying the applicable WTO law, applying existing WTO precedent to the facts, preparing written submissions and making oral pleadings before WTO panels and the Appellate Body. This type of legal capacity also includes the (financial) capacity of a government to retain private counsel when in-house capacity is insufficient to effectively undertake the above tasks.

In contrast, we shall call "legal capacity in the *broader sense*", the ability of the government to cooperate with private industries so as to identify trade barriers, and to organize government bureaucracy in a manner that fosters the government's ability to effectively take decisions to initiate and to conduct litigation in cooperation with the private industry. We discuss this type of legal capacity more in detail in Part II.C.2 below, under the rubric of domestic governance.

We begin with our discussion of legal capacity in the narrow sense. Abundant literature exists that compellingly describes the challenges that smaller and developing country WTO members face in marshalling the legal capacity effectively to navigate WTO law.[72] Although still relatively unsophisticated in comparison to national legal orders, WTO law has become a very complex system of agreements and an extensive body of case law. Effectively navigating and making use of the WTO legal order requires highly specialized knowledge. Moreover, a layer of complex procedural rules has grown around the seemingly straightforward DSU provisions, requiring extensive previous experience to effectively litigate.[73]

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[72] *See, e.g.*, Shaffer, *supra* note 6, at 17; Shaffer & Melendez-Ortiz, *supra* note 6; GREGORY SHAFFER, DEFENDING INTERESTS: PUBLIC-PRIVATE PARTNERSHIP IN WTO LITIGATION [hereinafter SHAFFER – PUBLIC-PRIVATE PARTNERSHIP]; Nottage – *Trade and Development, supra* note 31; Roderick Abott, *Are developing countries deterred from using the WTO Dispute Settlement System? Participation of Developing Countries in the DSM in the years 1995-2005*, (ECIPE Working Paper No. 01/2007), *available at:* http://www.ecipe.org/publications/ecipe-working-papers/are-developing-countries-deterred-from-using-the-wto-dispute-settlement-system/PDF.

[73] Although procedural concerns (such as requests for preliminary rulings, objections to particular evidence, etc.) are sometimes claimed to unnecessarily complicate the WTO

It makes sense only for repeat players to create and maintain in-house government officials capable of analyzing, preparing and managing a WTO dispute. Only the governments of large WTO Members – the frequent litigators identified in Part II.B.2 – will typically have the required in-house legal capacity to handle a dispute on their own without external assistance (and even those members occasionally rely on external assistance from private law firms). In contrast, for smaller countries that participate only occasionally or rarely in WTO litigation, it is not efficient to maintain such highly specialized experts on their staff when they cannot expect to use them often.[74] Training internal counsel requires a significant allocation of resources that makes little sense if the government is not a repeat player in WTO litigation.[75] Moreover, the availability of developing country government staff often being very limited, assigning an official full time to a particular dispute, away from his or her other responsibilities, could affect the functioning of the entire administrative section. Finally, even if government officials have been successfully trained in WTO matters, developing countries face a particularly pronounced problem of brain drain towards the private sector and other institutions.[76]

Often, the only meaningful option for small and developing countries involved in WTO litigation is to retain external counsel, most typically North American or European law firms. This option is exercised by numerous WTO members, both developed and developing. However, the financial resources necessary to retain outside commercial counsel can be significant. A factually challenging WTO dispute – perhaps with procedural complications such as preliminary objections and procedures to protect business confidential information, as well as an appeal – can quickly result in legal fees of over 1,000,000 USD. This may represent an excessively large financial burden for many developing country governments.

To some extent, especially in a complainant's scenario, these costs could be (and often are) borne by the industry interested in removing a trade barrier. However, relying on industry financing can be problematic for a number of reasons. First, the less developed a country is, the less well organized its domestic industry tends to be. As a result, especially in small and less developed members, it may be very difficult to obtain funding and other resources from the industry.[77]

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dispute settlement process, such "complications" can be expected in any well-functioning judicial system and should be seen as testimony to the importance of the process.

[74] *See, e.g.*, Kessie & Addo, *supra* note 63.

[75] Shaffer – *Developing Country Strategies, supra* note 66.

[76] *See, e.g.*, Gustav Brink, *South Africa's experience with international trade dispute settlement*, *in* Shaffer & Meléndez-Ortiz eds. – DISPUTE SETTLEMENT, *supra* note 6, at 251, 267 [hereinafter Brink]. Kessie & Addo, *supra* note 63; Shaffer – *Developing Country Strategies, supra* note 66.

[77] Nottage – *Trade and Development, supra* note 31, at 492.

Second, dependence on industry financing may render the government too deferential to the industry's litigation strategy. The industry might advocate legal positions that do not necessarily correspond to the government's systemic, long-term interests.

(ii) Legal Capacity in the Narrow Sense has been resolved by the Creation of the ACWL

Although much literature continues to be written about the legal capacity challenges of developing countries, the problem of legal capacity in the narrow sense has arguably been resolved with the creation of the ACWL. The ACWL is the only international organization created with the declared goal to provide legal assistance to developing countries and LDCs on WTO law matters, including WTO dispute settlement. When it was created in 2001, the ACWL was a new form of international legal aid. Previously, international legal aid was provided via two different mechanisms, namely, trust funds and assistance by the Secretariat of an organization (especially at the WTO).[78] However, neither mechanism appears to have been particularly effective.[79] The ACWL was a deliberate attempt to establish a novel, more effective form of international legal aid.

To fully appreciate the significance of the ACWL, it may be useful to recapitulate the services that the ACWL offers. The ACWL provides written or oral legal opinions, as well as comprehensive assistance in WTO dispute settlement proceedings. Such assistance covers all phases of dispute settlement proceedings: right from consultations to implementation and retaliation proceedings. Depending on the wishes of the client country, the ACWL can advise on any aspect of a dispute, prepare submissions as well as participate in oral pleadings before the WTO adjudicatory bodies. The ACWL also provides for training of Geneva – and capital – based delegates on matters of WTO law.[80] As another element of its capacity-building mandate, the ACWL also operates a secondment programme, whereby lawyers from Member countries' governments spend nine months working at the ACWL and then return to their respective governments.

The countries eligible for ACWL membership include all developing country WTO members. So far, 30 developing countries have chosen to become ACWL

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[78] Gappah, *supra* note 4, at 314.

[79] *Id.* at 314; Report by Pieter Bekker, Special Rapporteur, *A Study and Evaluation of the UN Secretary-General's Trust Fund to Assist States in the Settlement of Disputes through International Court of Justice*, CHINESE J. INT'L L. 245; Hoekman & Mavroidis – *Enforcing WTO Commitments, supra* note 67, at 6.

[80] The ACWL organizes an annual training course on WTO law as well as ad hoc seminars and workshops, including at the specific request of a client country. For general information about the ACWL, see www.acwl.ch.

members. All LDCs that are members of the WTO or in the process of acceding to the WTO can use the ACWL's assistance without becoming ACWL members. The ACWL's legal opinions and training are provided free of charge. The fees for dispute settlement assistance are only a fraction of the rates charged by commercial law firms. They are moreover subject to a ceiling, such that any client country can easily calculate the maximum cost of any dispute.

The creation of the ACWL has resolved the issue of legal capacity in the narrow sense. Some commentators, including WTO Director-General Pascal Lamy, acknowledge this fact.[81] However, unfortunately, this fact is not universally recognized by all, including by some WTO member governments. This is regrettable, because this can result in distracting calls for additional legal aid mechanisms that will likely do little to further developing country participation in WTO litigation, all the while spending their resources and political capital that could be more usefully utilized for other purposes.

One frequently voiced complaint is that, although ACWL services are available for concessionary rates, they are not entirely free, and for that reason represent a potential financial barrier for some particularly cash-strapped WTO member governments. Moreover, developing countries (other than LDCs) must pay a one-off fee upon joining the ACWL, which is also occasionally quoted as an obstacle.[82]

Despite these allegations, there is no evidence that these financial requirements constitute a genuine constraint. For one, the ACWL's minimal fees were introduced largely to prevent frivolous disputes.[83] They are not a significant source of financing the ACWL's needs, and they were carefully calibrated to ensure that they would not constitute obstacles to dispute initiation.

Next, there is no financial barrier whatsoever for an ACWL member to obtain an initial assessment of, for instance, the WTO-consistency of a trade barrier

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[81] *See, e.g.*, Chad P. Bown & Rachel McCulloch, *Developing Countries, Dispute Settlement, and the Advisory Centre on WTO Law* (Brookings Institution, Global Econ. & Dev. Working Paper 37, 2009), at 4, *available at:* http://www.brookings.edu/~/media/Files/rc/papers/2009/12_wto_bown/12_wto_bown.pdf [hereinafter Bown & McCulloch – *ACWL*]; *see also* Pascal Lamy, *Remarks at the 10th Anniversary conference of the ACWL*, *in* THE ACWL AT TEN – LOOKING BACK, LOOKING FORWARD 3, 5, *available at:* http://www.acwl.ch/e/documents/reports/ACWL %20AT%20TEN.pdf [hereinafter Lamy – *ACWL*].

[82] One of the authors of this article has frequently heard these complaints at round-tables on the issue of developing country participation in WTO litigation.

[83] Frieder Roessler, *Remarks at the 10th Anniversary conference of the ACWL*, *in* THE ACWL AT TEN – LOOKING BACK, LOOKING FORWARD 16, 19, *available at:* http://www.acwl.ch/e/documents/reports/ACWL%20AT%20 TEN.pdf [hereinafter Roessler –*ACWL*].

maintained by another WTO Member or by the ACWL member itself, since legal opinions are provided by the ACWL for free. The only remaining issue therefore is whether the fees charged by the ACWL for accession to the organization and for dispute settlement assistance act as a barrier and whether developing countries would bring more disputes if ACWL membership and dispute settlement assistance were entirely for free.

LDCs do not have to join the ACWL to be eligible for assistance and hence do not have to pay the one-off fee to benefit from the ACWL's services. Moreover, maximum fees for LDCs for an *entire* dispute, including appellate review – a process that can last for 1-2 years – amount to the tiny amount of 34,160 SFR. Even with the fullest cognizance of the strained public finances of many LDCs, this amount is nowhere near being prohibitive and does not represent a material barrier for an LDC.

Other developing countries, upon joining the ACWL, face maximum amounts from 138,348 SFR to 276,696 SFR depending on their level of development.[84] These amounts are carefully calibrated to these countries' financial situation and are hardly prohibitive. Moreover, according to an analysis by Chad Bown and Rachel McCulloch, the mean annual value at issue (the value of lost exports per year due to the trade barrier) in cases litigated by the ACWL in 2001-2008 was 1.9 million USD, which is appreciably higher than the maximum fees charged by the ACWL. Hence, a cost-benefit analysis suggests that, assuming successful implementation, ACWL client countries can more than justify the expenditure for the ACWL's legal fees by the expected commercial benefits.

Indeed, litigation assistance by the ACWL enables beneficiaries to litigate disputes with low trade values. According to Bown and McCulloch, in the dispute *India – Anti-Dumping Measure on Batteries* in which Bangladesh sought the assistance of the ACWL, the estimated annual value of lost exports to the Bangladeshi economy was 315,430 USD. This is a very small amount – by comparison, during the period 2001 – 2008, the average amount of annual lost exports in anti-dumping disputes involving developing country complainants (whether represented by the ACWL or not), was almost over 11.8 million USD.[85] The amount of exports lost to Bangladesh was thus a mere 2.7 percent of the developing country average. Nevertheless, even this tiny amount was about 10 times higher than the fees charged by the ACWL, and it therefore made commercial sense for Bangladesh to file the complaint.

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[84] Currently, only two members – Hong Kong and Chinese Taipei – are subject to the highest amount. It is useful to consider that, according to IMF 2010 statistics, Hong Kong had a per capita income higher than Switzerland, and Taipei had a higher per capita income that, for instance, the UK, Finland and France.

[85] Calculation based on data in Bown & McCulloch – *ACWL, supra* note 81, at 39.

Another factor is that the fees are not determined by the ACWL Executive Director (and his staff). Rather, it is ultimately up to the ACWL members – acting through the ACWL General Assembly – to determine these fees. During its 10 years of existence, no ACWL member or beneficiary has raised a concern in the General Assembly that, while it was willing to bring a complaint, it was unable to do so for financial reasons. Neither has the ACWL staff experienced such a scenario in practice, nor has any prospective accession candidate stated that the one-off contribution upon accession represented an obstacle. Hence, a decision to not bring a dispute with the help of the ACWL is more likely reflective of a substantive policy choice rather than financial constraints.

WTO Members that are either ACWL Members or are eligible for ACWL services represent a very significant proportion of WTO developing Members. Other eligible developing countries – including very active participants in the WTO dispute settlement system such as Brazil, Mexico, Argentina or China – have chosen not to become ACWL Members, most likely because they consider that they possess sufficient in-house legal capacity and therefore do not need an institution like the ACWL, or because they are in a position to find external legal counsel through other channels. There may also be many other reasons, including domestic political resistance and general lack of interest, for why a developing country would not join the ACWL. However, given the very limited financial implications of ACWL membership, it can be excluded that financial considerations would preclude an otherwise willing and interested developing country WTO Member from joining the ACWL.

(iii) What Empirically Verifiable Difference has the ACWL made for Developing Countries?

How has the ACWL impacted the participation of its members in WTO litigation?[86] A 2009 study by Chad Bown and Rachel McCulloch concluded that the ACWL has had limited effect in terms of introducing *new* countries to the dispute settlement system.[87] The ACWL has of course assisted *some* WTO members that had not previously participated, most notably, Bangladesh in the anti-dumping dispute concerning batteries against India.[88] However, the principal effect of the ACWL, according to Bown and McCulloch, has been: (1) to increase the use of the system by developing countries that had previously used the system (2) to assist developing countries to litigate a case "farther" along the full duration

[86] For a list of the disputes in which the ACWL has been involved since its creation in 2001, *see* http://www.acwl.ch/e/disputes/WTO_disputes.html.

[87] Bown & McCulloch – *ACWL, supra* note 81, at 17-18.

[88] Panel Report, *India – Anti-dumping Measure on Batteries from Bangladesh,* WT/DS306/R (Jan. 28, 2004).

of dispute settlement proceedings, rather than, for instance, accepting a potentially disadvantageous early settlement (3) to enable previous users of the system to act as sole complainant, rather than jointly with other co-complainants and (4) to enable disputes over smaller values of lost trade.[89]

With respect to the commercial value of disputes, according to Bown and McCulloch, the average value of lost exports due to anti-dumping measures, in complaints filed by developing countries not represented by the ACWL, during the period 2001-2008, was approximately 20 million USD. In contrast, the corresponding average value for developing countries benefitting from the assistance of the ACWL was approximately 1.9 million USD. This suggests that, thanks to the ACWL, developing countries are now able to file WTO disputes over smaller values of affected trade than previously.[90]

(iv) Reflections on Proposed Trust Funds to Provide Further Financial Assistance to Developing Countries

Some developing countries have suggested additional legal aid mechanisms, in particular to provide financial resources to developing countries. For instance, Côte d'Ivoire, on behalf of the African Group, has proposed the creation of a "WTO Fund on Dispute Settlement" to pay for litigation costs of developing countries.[91] Another proposal from Cuba, Egypt, India, Malaysia and Pakistan envisages that, in a dispute between a developing country and a developed country, the developed country pay the litigation costs of the developing country, if that dispute does not end with a panel or Appellate Body ruling "against" the developing country.[92]

These proposals raise a number of issues. From an equity standpoint, there is of course a lot to be said on financial support for less affluent developing countries. However, it is also fair to say that not all developing countries are in equal need of financial aid; for instance, providing financial support to Qatar or Bahrain (among the top ten richest WTO Members per capita) or to very large developing countries such as Brazil seems a less pressing concern than with respect

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[89] Bown & McCulloch – *ACWL*, *supra* note 81.

[90] *Id.* at 21; *see also* Chad Bown, *Remarks at the 10th Anniversary conference of the ACWL*, *in* THE ACWL AT TEN – LOOKING BACK, LOOKING FORWARD 52-57, *available at:* http://www.acwl.ch/e/documents/reports/ACWL% 20 AT%20TEN.pdf.

[91] Special Session of the Dispute Settlement Body, *Text for the African Group Proposals on Dispute Settlement Understanding Negotiations: Communication from Côte d'Ivoire,* TN/DS/W/92 (Mar. 5, 2008).

[92] Special Session of the Dispute Settlement Body, *Dispute Settlement Understanding Proposals: Legal Text: Communication from India on behalf of Cuba, Dominican Republic, Egypt, Honduras, Jamaica and Malaysia,* TN/DS/W/47 (Feb. 11, 2003).

to other developing countries. Here, the key to operationalizing the proposal would be to find objective criteria for defining eligible developing countries.

As a second equity-related concern, it is not immediately clear why a winning developing country defendant should have its litigated costs reimbursed only by a losing *developed* country complainant, as proposed by Cuba, Egypt, India, Malaysia and Pakistan. A developing country member sued (unsuccessfully) by another *developing* country is just as deserving of a litigation cost refund. Moreover, disputes amongst developing countries are frequent – by the authors' count, 82 of the 427 disputes were initiated by developing countries against another developing country, which represents almost one half of the cases initiated by the developing country group. The share of developing-to-developing country disputes now stands at 44 percent of all disputes filed by developing countries, and at 19 percent of all disputes. The trend points upward.[93] Of the last ten disputes handled by the ACWL, 8 were against other developing countries.[94] Hence, in a world where developing countries are increasingly litigating against each other, the above mentioned proposal for reimbursement of litigation costs fails to address an entire category of potentially frequent scenarios. This is a good example of how an incomplete appreciation of who sues whom, and how, often leads to imperfect policy proposals.

Finally, to the authors' knowledge, in domestic legal systems, reimbursement of litigation costs is typically proportionate to the number of claims won. Even accepting that litigation cost reimbursement should be introduced into the WTO dispute settlement system, it seems excessive to require the "losing side" to pay the full amount of the "winning" side's litigation costs if the winning side has brought, for instance, ten claims and won only one.[95]

From a practical perspective, it seems unlikely in the present political climate that developed countries would agree to the establishment of such an additional cash-based legal aid regime, especially given the favourable track record of the ACWL. Moreover, experience with the ICJ and ITLOS trust funds suggests that

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[93] For instance, among the first 100 disputes filed under the WTO, developing-to-developing country disputes were only 9 percent of the total, whereas they represented 22 percent of disputes from DS 300 to DS427.

[94] When the ACWL provides legal opinions on measures of members other than the client country, about half of those cases concern measures imposed by another developing country. *See* Roessler – *ACWL, supra* note 83, at 17.

[95] Moreover, if reimbursement of litigation costs occurrs ex-post – which typically happens in national legal regimes – the litigating developing government would still have to make the initial cash lay-out for the duration of the dispute, which may create difficulties for that government.

financing for such funds has not been forthcoming.[96] It might also be difficult for developed countries to finance legal aid for developing countries by direct cash grants that would in turn be used to pay costly private counsel, including against the donor country itself. For this reason, it would seem considerably easier for a developed country to provide funding to an independent legal aid *institution* such as the ACWL, especially if that institution is not exclusively geared towards litigation, but also to broader advisory services and training.

Another practical concern is that the proposed trust fund would probably have to be maintained by the WTO. This could give rise to appearances of conflict of interest – there is an obvious tension between being a neutral Secretariat and dispensing (discretionary) funds to one party to a dispute.[97] Hence, special procedures would have to be put in place to protect the WTO, as well as the Secretariat, from any allegations of partiality. In the ICJ, these procedures entail the creation of a special panel of independent experts who examine individual requests for allocation of funds and render their decisions accordingly. Such procedures have generally proven to be lengthy and cumbersome, and would therefore slow down the dispute settlement process.[98]

All these concerns aside, it is not clear if the proposed funding mechanisms would meaningfully increase developing country participation. Expectations of greater participation (especially as a complainant) are based on the assumption that developing countries are deterred by financial concerns from initiating a WTO dispute. However, we have argued that, with the low-cost services being provided by the ACWL, based on the existing evidence, this assumption is very likely incorrect. Trust funds could conceivably result in more litigation if litigation value, or the prospective commercial benefits resulting from a successful challenge, are below or too close to the litigation costs charged by the ACWL. However, one may wonder whether in circumstances involving such a low volume of trade (e.g. less than 34,160 SFR for an LDC or 138,348 SFR for a category C member), a WTO Member would actually contemplate filing a WTO complaint. Moreover, inability to mobilize such limited amounts is most likely indicative of limited political commitment to bringing the dispute – as a very senior WTO developing country delegate once stated at a public event, "if you want to bring the case, you will find the money".

Finally, providing developing countries with funds to hire any outside counsel

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[96] Gappah, *supra* note 4.

[97] Claudia Orozco, *Remarks at the 10th Anniversary conference of the ACWL*, *in* THE ACWL AT TEN – LOOKING BACK, LOOKING FORWARD 8, 9-11, *available at:* http://www.acwl.ch/e/documents/reports/ACWL% 20AT%20TEN.pdf.

[98] Gappah, *supra* note 4; *See also* Lamy – *ACWL, supra* note 81, at 4.

other than the ACWL results in losing an important benefit – the institutional experience of the ACWL. The ACWL has been involved in 38 dispute settlement proceedings so far. If the ACWL were a WTO Member, it would be one of the most active litigants. For instance, between 2001 and 2008, the ACWL was as often a complainant as the United States, making it the second-most frequent complainant after the EU.[99] This steady accretion of institutional experience is an asset in and of itself (a "treasure of experience")[100] that developing countries will simultaneously add to and benefit from every time they use the ACWL's services.

All in all, additional legal aid mechanisms for developing countries over and above the already existing ACWL benefits are highly unlikely to result in more disputes brought by developing countries.[101] It does not seem efficient for developing countries to spend political capital on extracting concessions from developed countries if these concessions would only replicate already existing legal aid mechanisms. Developing countries are thus probably better advised to make the most of the resources placed at their disposal by the ACWL.[102]

2. Domestic Governance and Trade Policy Community

One of the key constraints for many developing countries, especially LDCs, is inadequate domestic governance, weak institutions, and the lack of a domestic trade policy community that would bring together the government, private companies, academic institutions, and civil society. Developing country governments are frequently unaware of trade barriers affecting their exports because the private sector in their countries does not properly communicate crucial information to the government; the government is unable to take speedy and effective decisions to defend rights in the WTO system; and knowledge of the WTO system remains low in both public and private sectors. We explore the various aspects of these domestic governance challenges below.

(i) Private-public Partnerships – Ability to Identify Trade Barriers and Cooperation with Private Sector

a. The Need for Public-Private Cooperation in Identifying and Challenging Trade Barriers

The lack of domestic capacity to identify trade barriers, to ensure the flow of

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[99] Roessler – *ACWL, supra* note 83, at 16.

[100] *Id.*

[101] Bown & McCulloch – *ACWL, supra* note 81, at 23.

[102] This is also the conclusion of WTO Director-General Pascal Lamy, *in* Lamy – *ACWL, supra* note 81, at 4.

information about these barriers from the private to the public sector, and to effectively coordinate domestic and international responses to these barriers, is arguably *the* main impediment for most developing countries to use the WTO litigation regime more effectively.[103]

Availability of information about foreign trade barriers is a precondition to effectively use the WTO dispute settlement system. There are a number of potential sources for a government to obtain such information. One traditional vehicle for this has been diplomatic personnel stationed in consulates and embassies abroad.[104] However, many developing countries have only a limited number of consulates and embassies, and have limited staff.[105] Moreover, government officials are increasingly poorly placed to spot many important trade barriers in specialized areas, such as technical regulations, quarantine measures or *de facto* discriminatory measures. As a result, the most significant source of information will be commercial stake-holders, such as companies and industry associations.

However, in most developing countries, there is typically no or insufficient communication between the government and the private sector, both at a formal and informal level. Developed countries typically possess established and clearly defined channels of communication, via which the private sector can channel information to the government about foreign trade barriers. The United States, the European Union, and China have even gone a step further and have created legal mechanisms through which commercial stakeholders can attempt to force the executive branch to initiate disputes at the WTO level.[106] In contrast, in developing countries, coordination between the government and the private sector is typically inadequate. Commercial stakeholders either do not trust the government, or do not believe that the government can effectively help them to address their concerns. Alternatively, the private sector believes that it is the government's task to gather and process the relevant information. Extensive literature exists that

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[103] *See*, *e.g*, Shaffer – *Developing Country Strategies, supra* note 66; Shaffer & Melendez-Ortiz, *supra* note 6, at xiii.

[104] Guzman & Simmons, *supra* note 27, at 575.

[105] Hoekman & Mavroidis – *Enforcing WTO Commitments, supra* note 67, at 2.

[106] *See* Section 301(a)(1) of the Trade Act of 1974, 88 STAT. 1978, 19 U.S.C. Ch. 12, § 2411(a)(1), and the Trade Barrier Regulation (Council Regulation (EC) No. 3286/94 amended by Council Regulations Nos. 356/95 and 125/2008). For a detailed description of these two measures, *see* SHAFFER – PUBLIC-PRIVATE PARTNERSHIP, *supra* note 72. The Chinese mechanism is referred to as "Rules on Foreign Trade Barrier Investigation (TBI)". For a description of this mechanism, *see* Han Liyu & Henry Gao, *China's Experience in Utilizing the WTO Dispute Settlement Mechanism*, *in* Shaffer & Meléndez-Ortiz eds. – DISPUTE SETTLEMENT, *supra* note 6, at 137, 161 [hereinafter Liyu & Gao].

describes the shortcomings of these public-private networks.[107]

The suboptimal communication and coordination between the private and public sectors manifest themselves even among those developing countries that do use the system on some occasions. Chad Bown and Rachel McCulloch have argued that developing countries focus their WTO challenges against particularly visible trade barriers, in particular anti-dumping measures. To be sure, this fact may reflect greater usage of anti-dumping measures, especially among developing countries. However, as Bown and McCulloch speculate, this is likely also because detecting less visible trade barriers such as subsidies, sanitary measures and technical regulations is more resource-intensive and requires greater coordination and communication with the private sector.[108]

There is yet another indication that the absence of effective networks between the government and the private sector acts as a constraint on many governments' litigation behaviour. The ACWL has, on the whole, not represented clients without litigation experience prior to the establishment of the ACWL. Rather, as noted previously, the ACWL has overwhelmingly represented clients with pre-2001 experience. The ACWL does not actively approach its members to propose potential litigation, because doing so would necessarily involve a choice between many possible disputes and would therefore compromise the institution's impartiality. Rather, the ACWL is a passive recipient of requests for assistance. To the extent that the absence of private-public communication and networks has been hampering recourse to litigation by some developing countries, this fact continues to constrain the litigation capacity of those developing countries. [109]

What can developing countries do to foster communication and coordination with the private sector?[110] One obvious way is to encourage meetings between industry and the government. This can be done via periodic "round tables" or other forms of meetings, where both broader and specific issues can be discussed. It might be helpful if different parts of the government participate in such meetings, to ensure that a broad range of departments become aware of the private sector's concerns, as well as to communicate the government's concerns to the private sector. Better communication and coordination between the public and

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[107] *See*, *e.g*, Shaffer & Melendez Ortiz eds. – DISPUTE SETTLEMENT, *supra* note 6.

[108] Bown & McCulloch – *ACWL, supra* note 81, at 2.

[109] *See* Gregory Shaffer, *Developing Country Use of the WTO Dispute Settlement System: Why it Matters, The Barriers Posed*, *in* TRADE DISPUTES AND THE DISPUTE SETTLEMENT UNDERSTANDING OF THE WTO: AN INTERDISCIPLINARY ASSESSMENT 167, 184 (James C. Hartigan ed., 2009).

[110] For a comprehensive list of recommendations, *see* David Evans & Gregory C. Shaffer, *Conclusion*, *in* Shaffer & Melendez-Ortiz – DISPUTE SETTLEMENT, *supra* note 6, at 344 [hereinafter Evans & Shaffer – *Conclusion*].

private sectors will foster not only the identification of trade barriers that can be challenged in WTO litigation, it may also help the government to negotiate better bilateral, regional or multilateral trade deals.[111]

Existing literature also recommends that governments create a single authority or department that the private sector can approach when faced with a trade barrier. If the governmental agency with a mandate to receive private sector complaints is inadequately identified, and private companies are obliged to approach different departments with potentially divergent points of view, this will not foster the dialogue necessary to channel information from the business world to government.[112] Another promising mechanism is for the government to produce and publish annual compilations of concerns raised by their national firms on foreign trade barriers. This occurs for instance in the United States and the European Union.[113]

An important task for the government is to foster the private sector's trust as well as the belief that the government is willing and able to pursue justified WTO claims. In many developing countries, the private sector harbours doubts about the political commitment and ability of the government to do so.[114] Practical experience also suggests that confidentiality concerns may also play a role. For instance, a private company may be unwilling to give the government access to confidential information (sales data, identity of customers, internal accounting, etc.) that would be needed to effectively challenge an anti-dumping order in an export market. One of the authors has seen such confidentiality-related concerns arise also in developed countries, but the level of distrust will tend to be a greater problem in developing countries with less pronounced legal safeguards and less trust by the private sector in its own government.

Some scholars have argued for the introduction of a prosecutor entity acting on an *ex officio* basis[115] or an international organization charged with compiling and

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[111] David Ouma Ochieng & David S Majanja, *Sub-Saharan Africa and WTO dispute settlement*, *in* Shaffer & Melendez-Ortiz – DISPUTE SETTLEMENT, *supra* note 6, at 301, 328-341 [hereinafter Ochieng & Majanja].

[112] Mohammad Ali Taslim, *How the DSU Worked for Bangladesh: the first least developed country to bring a WTO Claim*, *in* Shaffer & Melendez-Ortiz – DISPUTE SETTLEMENT, *supra* note 6, at 241 [hereinafter Taslim].

[113] *See, e.g.*, the 2011 National Trade Estimate Report on Foreign Trade Barriers, produced by the USTR (for 2011, *see* http://www.ustr.gov/webfm_send/2751), or the annual Trade and Investment Barriers Report prepared by the European Commission (for 2010, see http://trade.ec.europa.eu/doclib/docs/ 2011/march/tradoc_147629.pdf).

[114] *See, e.g.*, Ochieng & Majanja, *supra* note 111, at 328.

[115] Hoekman & Mavroidis – *Enforcing WTO Commitments, supra* note 67, at 5.

publishing information about trade barriers.[116] The assumption is presumably that this entity would have access to more information than a typical developing country government. However (leaving aside the political controversy surrounding such bodies), such an entity would inevitably face accusations of bias, as it would necessarily have to make choices as to which of the myriad trade restrictions and possible countries to target. Moreover, developing countries, on average, have higher trade barriers than developed countries. Hence, unless the institution's mandate were limited to developed countries' trade barriers – a rather dubious limitation from a policy perspective, given the amount of trade between developing countries and the many trade barriers maintained by them – developing countries might find themselves targeted just as much as developed countries.

b. Lack of Transparency and of Communication by the Government

Another aspect of insufficient government-to-private sector communication is lack of transparency and flow of information from the government to the industry. The private sector may simply not know what the government is doing. For instance, it is reported that, in the *EC – Tariff Preferences* dispute, an Indian textile industry association lobbied the government to take WTO action against the EU's GSP scheme – four months *after* the Indian government had initiated the dispute![117]

c. Better Information and Organization within the Private Sector is also required

Better organization within the private sector is also crucial to enable effective communication and cooperation with the government. This is particularly important when the industry is fragmented and composed of smaller, less sophisticated companies, e.g. in the textile sector. It would make little sense for one individual company to lobby the government to initiate action at the WTO against a trade barrier. Rather, a more rational course of action for that one company would be to adjust to the trade barrier and/or seek other export markets, especially when the company cannot tolerate revenue fluctuations. In these circumstances, collective action through an industry association is needed. Experience also suggests that, within an industry association itself, there should be clearly assigned responsibilities for WTO matters. For instance, after Pakistan's

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[116] *See* CHAD BOWN, SELF-ENFORCING TRADE. DEVELOPING COUNTRIES AND WTO DISPUTE SETTLEMENT 208 (2009) [hereinafter BOWN – SELF-ENFORCING TRADE]. *See also* Claus D. Zimmermann, *Rethinking the Right to Initiate WTO Dispute Settlement Proceedings*, 45 J. WORLD TRADE 1057 (2011).

[117] Biswajit Dhar & Abhik Majumdar, *Learning from the India – EC GSP Dispute*, *in* Shaffer & Melendez-Ortiz – DISPUTE SETTLEMENT, *supra* note 6, at 184.

challenge of United States' import restrictions on cotton yarn, the All Pakistan Textile Mills Association (APTMA) successfully established a WTO section so as to improve communication and coordination with the government and monitor international trade barriers.[118]

Moreover, the same lack of information and the same prejudice that can be found among WTO-inexperienced government officials – lack of knowledge of WTO rules, lack of understanding that WTO compliance does not depend on retaliation, etc. – are also prevalent in the private sector in developing countries.[119] Industry associations should therefore strive to promote and diffuse knowledge of WTO law within the private sector.

(ii) Academia and Broader Civil Society

Domestic institutional structures that are conducive to active participation in WTO litigation also include academic institutions, research institutes and think tanks. However, international trade law is not integrated into the curricula of most law schools in developing countries, and there are generally very few or no academics interested in WTO law. As a result, even cursory knowledge of WTO law is scarce among law practitioners graduating from those academic institutions.[120]

It is telling that in two of the most successful developing country Members that have built up capacity since 1995, Brazil and China, the number of academic and research institutions covering WTO law has increased considerably during that period.[121] Such institutions can be significant in both creating and diffusing trade law, policy and economic knowledge throughout the broader community. They can also contribute to case-specific litigation.

Civil society (national and international NGOs) has also contributed evidence to individual disputes and can thus function as a resource for developing country governments. For instance, in the *EC – Sugar* dispute, Thailand benefitted from studies provided by the non-governmental group Oxfam; data and studies

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[118] Christina L. Davis & Sarah Blodgett Bermeo, *Who Files? Developing Country Participation in GATT/WTO Adjudication*, 71(3) J. POL. 1033, 1037 (2009) [hereinafter Davis & Bermeo].

[119] Ochieng & Majanja, *supra* note 111, at 328.

[120] In response to these shortcomings, in 2010, the WTO launched the WTO Chair Programme in 2010. The programme aims to support and promote trade-related academic activities by universities and research institutions in developing countries and LDCs. *See* http://www.wto.org/english/tratop_e/devel_e/ train_e/chairs_prog_e.htm.

[121] For Brazil, *see* Shaffer et al. – *Brazil*, *supra* note 62, at 46. For China, see Liyu & Gao, *supra* note 106, at 151.

produced by Oxfam were described as "highly valuable" by one of the government officials involved in this dispute.[122]

(iii) Law Firms

Local law firms are also an important part of the domestic trade community. Law firms serve as a conduit of WTO legal expertise; they enable the domestic industry to approach the government and to assist both the government and the private sector in preparing a WTO challenge. It is telling that Brazil, which has transformed itself into perhaps the most successful developing country litigant, has deliberately fostered expertise amongst domestic law firms, by operating an internship program for private lawyers in the Brazilian WTO mission in Geneva.[123] China is another example of a WTO member that has actively pursued a strategy of educating and empowering its private law firms, by systematically including private lawyers as members of its delegations in WTO disputes.[124]

(iv) Governmental Structures and Practices

a. Inadequate Intra-governmental Structures, Coordination, and Cooperation

Developing countries frequently face enormous challenges in governmental structures and intra-governmental policy coordination. These challenges derive largely from, for example, a division of institutional responsibilities that complicates decision-making relating to WTO matters; the absence of established procedures that would enable these governments to overcome institutional divisions; insufficient transparency; lack of communication and other forms of institutional rivalry. This hobbles the ability of developing countries to focus their (already limited) resources so as to use the WTO system offensively or to effectively defend themselves. Lack of resources dedicated to WTO matters, due to overall resource constraints, is certainly part of the problem. However, these resource constraints are considerably exacerbated by the above-mentioned organizational shortcomings.

By way of example, responsibilities for WTO matters can fall into the competence of the Ministry of External Relations, because they concern an international organization; in contrast, operational trade-related matters (including

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[122] Pornchai Danvivathana, *Thailand's Experience in the WTO Dispute Settlement System: Challenging the EC Sugar Regime*, *in* Shaffer & Melendez-Ortiz – DISPUTE SETTLEMENT, *supra* note 6, at 218 [hereinafter Danvivathana].

[123] For a very comprehensive study on Brazil's successful building of trade legal capacity, *see* Shaffer et al. – *Brazil, supra* note 6, at 21 – 104.

[124] Liyu & Gao, *supra* note 106, at 148.

customs matters, trade remedies, etc.) fall under the Ministry of Trade. Even when all trade matters are handled by the same ministry, they might fall under different departments whose cooperation may be inadequate. In addition, institutional responsibility for international *litigation* may fall under yet another separate government entity, for instance, the Ministry of Justice or the Office of the Solicitor-General or the Attorney-General. Without pre-established and routinely observed intra-departmental coordination and communication structures, such institutional division renders decision-making and information-sharing slow, and sometimes impedes it altogether.

By way of illustration, an essay by Gustav Brink highlights significant failures within the South African Department of Trade and Industry (DTI) to process information and to coordinate required multilateral action.[125] Brink reports that in six formal or informal WTO disputes in which South Africa acted as a defendant, the division within the DTI formally responsible for conducting WTO litigation – ITEDD[126] – was never involved(!). All disputes were handled by a different department, namely, ITAC,[127] the domestic trade remedy authority. This reallocation of institutional responsibilities occurred without any formal decision; the subject matter involved trade remedies, which fall under the supervision of ITAC, and thus, via institutional inertia, the matters naturally gravitated towards ITAC, even if multilateral aspects of domestic trade remedies formally fall within the purview of ITEDD. Additional reasons for the lack of cooperation between these two departments include policy disagreements as well as apparent disillusionment within ITAC about inadequate functioning of ITEDD. For instance, the South African WTO mission in Geneva failed to spot and report back to capital the fact that a dispute had been initiated against South Africa, relating to an anti-dumping determination. According to Brink, ITAC subsequently learnt of this dispute from a Brussels-based private practitioner, only two weeks after the formal request for consultations had been filed and registered at the WTO. This story is particularly telling and problematic, because South Africa is the largest and most developed economy on the African continent, a regional hegemon in Southern Africa, boasts a GDP that is more than three times bigger than that of second-ranked Nigeria and has relatively sophisticated governmental structures. It is likely that many other African governments would face similar institutional problems.

Another example is governments in which responsibility for any form of international litigation, including third-party participation, is vested in the Ministry of Justice or the Attorney-General. These departments typically have no expertise

[125] Brink, *supra* note 76, at 251-74.
[126] ITEDD stands for International Trade and Economic Development Division.
[127] ITAC stands for International Trade Administration Commission.

in WTO law; rather, such expertise is concentrated in the Ministry of Trade or Ministry of Foreign Affairs. Because no pre-established channels of cooperation and coordination exist between these departments, and because those responsible for international litigation lack expertise, the decision-making process for filing a WTO dispute is extremely slow and likely to lead nowhere. A cumbersome intra-governmental decision-making process prevents not only participation as a full party to a WTO dispute, it all but ensures that even decisions to become a third party are impeded or delayed, which in turn means that the government will miss the short deadlines under WTO practice for becoming a third party.[128] Thus, such Members lose the opportunity to become acquainted with the WTO dispute settlement process through an entirely non-controversial method that does not even require a significant investment of resources.

In a recently published, edited volume based on several case-studies of individual developing country Members of the WTO, Prof. Gregory Shaffer and David Evans propose a set of solutions to these problems. They highlight the significance of establishing a dedicated international trade law unit within the government bureaucracy, separate from the divisions that deal with general WTO affairs.[129] They also highlight the importance of an interdepartmental process to identify and assess possible WTO disputes. Successful users of the WTO litigation regime (including the US, EU, Canada, as well as successful developing countries such as Brazil) operate such procedures, which bring together government officials from foreign, agricultural, and commerce ministries, in addition to legal experts from areas such as customs and trade remedies.[130] This interdepartmental process should also exist at the higher political (ministerial) level to take the final decision to initiate the dispute. Two case-studies of Brazil and Argentina argue that reorganization of governmental structures to establish such interdepartmental procedures was crucial in enabling the subsequent rise of these two countries to become two of the most frequent WTO complainants.[131]

Why is interdepartmental coordination so important? First, it mobilizes expertise, thus providing greater accuracy for the assessment of viability of a WTO complaint. This effect will arise especially if the government makes a deliberate effort to foster and diffuse trade knowledge within Ministries other than trade and external affairs. For instance, as part of its internal capacity building efforts, the Brazilian government created dedicated career tracks for external trade specialists (*analistas de comércio exterior*) within various ministries.[132]

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[128] *See, e.g.*, Ochieng & Majanja, *supra* note 111, at 325.
[129] Evans & Shaffer – *Conclusion, supra* note 110, at 344.
[130] *Id.*
[131] *See* Shaffer et al. – *Brazil, supra* note 62, *and* Gabilondo, *supra* note 62.
[132] Shaffer et al. – *Brazil*, *supra* note 62, at 44.

Second, an established interdepartmental decision-making process ensures greater legitimacy of the final decision, because many other parts of the governmental machinery are involved. It also helps to overcome allocation of legal responsibilities that otherwise hobble the government's actions.

Third, collective decision-making, via pre-established interdepartmental committees, reduces pressure upon individual senior government officials. In countries where no such procedures exist, the intermediate and final decisions to go ahead with the dispute may lie with one single senior government official, including a minister or even the head of government. Concerns about the uncertain outcome of litigation will weigh more heavily on an individual decision-maker, especially at the non-political level, for fear of staining his or her personal career by authorizing an unsuccessful dispute. Such risk-aversion will often be compounded by lack of experience with the WTO litigation regime and the perception that initiating a WTO dispute is an unfriendly diplomatic act towards the respondent WTO member.

Fourth, if an interdepartmental decision-making process is coupled with regular budget allocations, this also increases the likelihood that a positive decision will be taken to initiate a dispute.[133] Some financial expenditure will be required of the government in a WTO dispute, even if that government benefits from legal and financial aid from the private sector or at the multilateral level. Having a dedicated rubric for such expenditures greatly decreases bureaucratic resistance to initiating a dispute, in comparison to a scenario in which financial resources would have to be re-allocated from a different pre-existing budgetary allocation.

b. Loss of Experienced and Knowledgeable Staff

Another problem frequently faced by developing countries is the loss of experienced staff. While all governments occasionally lose their expert and/or senior officials, typically to more lucrative private-sector positions, this problem is particularly pronounced in developing country governments. Smaller staff levels and low public sector salaries, especially in comparison to salaries in the private sector, mean that a critical number of knowledgeable officials may be lost on a more frequent basis. This will be a problem particularly when more experienced, senior staff leave, often leaving governmental departments without much needed institutional expertise and memory.[134] There is obviously no immediate solution to this problem, other than increasing the total pool of WTO experts available in the broader community. Part of the solution may also be an institutional culture that facilitates and encourages career moves from the private sector into government at

[133] Davis & Bermeo, *supra* note 118, at 1036.

[134] *See, e.g.*, Brink, *supra* note 76, at 276; Kessie & Addo, *supra* note 63.

senior levels, comparable to the "revolving door" culture in the United States.[135] However, the particularly low salaries in developing country government employment will likely mean that the door revolves primarily from the government to the private sector.

c. Prior Experience with WTO Litigation

Previous experience in WTO litigation is often an important catalyst to creating the governmental structures described above. First-hand experience with the process fosters understanding on what is required domestically, within the government. It also facilitates information gathering, information sharing, and effective decision-making. There are examples of WTO members who, during or after their first experience in WTO litigation, have deliberately reorganized decision-making procedures and structures, towards the inter-departmental process described above. For instance, prior to its first WTO complaint as a sole complainant, in the *US – Cotton Yarn* dispute, Pakistan had no functioning institutional framework within its Ministry of Commerce. However, in the course of the dispute, Pakistan established WTO sections both in the Ministry of Commerce and in its Geneva mission. Moreover, a high-level WTO Council was created, chaired by the Ministry of Commerce. These bodies provide intergovernmental and interprovincial coordination for WTO matters. Finally, a cost-sharing formula was developed, to split expenses between the government and the private sector for offensive cases.[136]

Brazil and Argentina provide further examples, albeit slightly different. These countries experienced disputes as defendants in the early days of the WTO, and reorganized their governmental structures in response to these complaints. For instance, the Brazilian government created a specialized unit for WTO dispute settlement, to develop and retain legal and technical expertise. Already previously, Brazil had created CAMEX, the Chamber of Foreign Trade, which is an inter-ministerial body that enables multiple agencies to formulate, adopt, coordinate and implement foreign trade policy.[137] Similarly, Argentina responded to certain defensive cases in the early WTO days by creating a dispute settlement division under the Ministry of Foreign Affairs and International Trade. The litigation process also reportedly fostered the government's understanding of the private sector's priorities and of the need to mediate between different domestic

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[135] Shaffer – *Developing Country Strategies*, *supra* note 66, at 17.

[136] Davis & Bermeo, *supra* note 118, at 1036. Turab Hussain, *Victory in Principle: Pakistan's Dispute Settlement Case on Combed Cotton Yarn Exports to the United States*, *in* MANAGING THE CHALLENGES OF WTO PARTICIPATION: 45 CASE STUDIES 459, 462 (Patrick Gallagher, Patrick Low & Andrew Stoler eds., 2006).

[137] Shaffer et al. – *Brazil*, *supra* note 62, at 41.

stakeholders.[138]

Experience is also useful in fostering appropriate understanding of the nature of WTO litigation. Government officials without knowledge of or experience in the WTO regime will tend to consider inter-governmental litigation at the WTO as a diplomatically hostile act, likely to lead to an overall deterioration of relations with the target country. As experience with the system increases, this perception dissipates and is replaced by the more accurate insight that WTO litigation is more in the nature of a technical exercise bereft of negative political connotations.[139] A Costa Rican government official has been quoted as stating, in regard to the *US – Underwear* dispute brought by Costa Rica in 1995:"If we were to bring the case today, it would be much easier because we no longer perceive adjudication as a political conflict".[140]

This anecdotal evidence is confirmed by an econometric study by Davis and Bermeo based on data from 30 years of GATT and WTO litigation. Their study finds strong quantitative evidence for the hypothesis that past experience with WTO adjudication (whether as a complainant or as a defendant) significantly increases the likelihood that a developing country will initiate (further) disputes.[141]

The lesson is, therefore, that countries learn by doing and that there is considerable value in, to put it simply, "doing it once". The unsolicited lesson of a defensive case is a "privilege" that will most likely be provided to countries whose markets are commercially sufficiently attractive. Other developing country members therefore need to take action as a complainant to acquire such experience.

3. Lack of retaliatory power

(i) Nature and purpose of retaliation

Another frequently alleged constraint on developing countries' participation in

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[138] Gabilondo, *supra* note 62, at 119. For a similar capacity-building effect in Costa Rica, *see* Davis & Bermeo, *supra* note 118, at 1037.

[139] *See, e.g.*, Magda Shahin, *WTO Dispute Settlement for a Middle-Income Developing Country: the Situation of Egypt*, *in* Shaffer & Melendez-Ortiz – DISPUTE SETTLEMENT, *supra* note 6, at 290 [hereinafter Shahin], who speaks of a "misconception of the impact of initiating a dispute on bilateral relations" and mentions the *EC – Bed Linen* case, in which Egypt chose to become only a third party, notwithstanding its direct commercial interest in the dispute; Davis & Bermeo, *supra* note 118, at 1036.

[140] Quoted in Davis & Bermeo, *supra* note 118, at 1037.

[141] *Id.*

WTO litigation is their limited retaliatory power.[142] The argument is that limited retaliatory power of a developing country complainant diminishes the likelihood that the respondent will comply with an adverse WTO judgment, which in turn discourages developing countries from bringing complaints. This alleged systemic disadvantage has been sometimes been described as "institutional bias".[143]

To recall, under WTO law, retaliation becomes relevant when the losing party to a dispute fails to bring its WTO-inconsistent measure into conformity within the reasonable period of time. In these circumstances, the complainant Member may request authorization from the DSB to "suspend concessions and other obligations" or, in short, to "retaliate". Retaliation is thus the enforcement mechanism for WTO judicial rulings. WTO law, like all international law, is "self-enforcing".[144]

Trade retaliation under the GATT and the WTO has typically taken on the form of withdrawing tariff concessions by raising tariffs for specific imports from the non-complying Member. Economists generally do not consider retaliation a sound policy, because of the economic costs that it imposes on the retaliating member.[145] However, in the traditional mercantilist thinking of trade relations, the

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[142] *See, e.g.*, Special Session of the Dispute Settlement Body, *Negotiations on Improvements and Clarifications of the Dispute Settlement Understanding: Proposal by Ecuador,* TN/DS/W/33 (Jan. 23, 2003); Special Session of the Dispute Settlement Body, *Negotiations on the Dispute Settlement Understanding: Proposal by the LDC Group,* TN/DS/W/17 (Oct. 9, 2002); Special Session of the Dispute Settlement Body, *Text for the African Group Proposals on Dispute Settlement Understanding Negotiations: Communication from Kenya,* TN/DS/W/42 (Jan. 24, 2003); Special Session of the Dispute Settlement Body, *Negotiations on the Dispute Settlement Understanding: Proposal by the African Group,* TN/DS/W/15 (Sep. 25, 2002); Special Session of the Dispute Settlement Body, *Text for the LDC Proposal on Dispute Settlement Understanding Negotiations: Communication from Haiti,* TN/DS/W/37 (Jan 22., 2003); Special Session of the Dispute Settlement Body, *Dispute Settlement Understanding Proposals: Legal Text: Communication from India on behalf of Cuba, Dominican Republic, Egypt, Honduras, Jamaica and Malaysia,* TN/DS/W/47 (Feb. 11, 2003); Special Session of the Dispute Settlement Body, *Negotiations on Improvements and Clarifications of the Dispute Settlement Understanding: Proposal by Mexico,* TN/DS/W/23 (Nov. 4, 2002). Hoekman & Mavroidis – *Enforcing WTO Commitments, supra* note 67, at 5.

[143] Bown – *Complainants, interested parties and free riders, supra* note 34, at 287 - 88.

[144] This term appears to have been coined by Chad Bown. *See* Chad Bown, *Developing Countries as Plaintiffs and Defendants in GATT/WTO Trade Disputes*, 27(1) THE WORLD ECONOMY 59 (2003) [hereinafter Bown – *Plaintiffs and Defendants*], as well as his book BOWN – SELF-ENFORCING TRADE, *supra* note 116.

[145] Hoekman & Mavroidis – *Enforcing WTO Commitments, supra* note 67, at 4; *see also* Award of the Arbitrator, *European Communities — Regime for the Importation, Sale and Distribution of Bananas — Recourse to Arbitration by the European Communities under Article 22.6 of*

idea that increasing tariffs amounts to take away an advantage from the exporting member is deeply rooted.

It is useful to recall that, historically, ever since the original ITO negotiations, the principal purpose of "suspension of concessions and other obligations" was to rebalance trade interests, that is, to re-establish the balance that the defendant party had disturbed by imposing the offending measure.[146] This re-balancing purpose is reflected in DSU Article 22.7, which requires arbitrators acting under DSU Article 22.6 to "determine whether the level of [the] suspension [proposed by the complainant] is *equivalent to the level of nullification or impairment*"(emphasis added). Overtime, however, retaliation has increasingly been understood to also encompass an enforcement purpose, that is, to compel the non-complying Member to rectify the offending measure.[147] Case-law today accepts both purposes.

(ii) Retaliation and Small Economies

How does the twin purpose of retaliation play out for small economies?[148] The *trade rebalancing objective* can, at least in principle, be fulfilled as originally intended – low levels of trade of developing countries do not prevent a rebalancing of concessions. At the same time, small and less developed economies will tend to suffer relatively more harm in their own national economy than larger countries when they impose additional punitive duties that raise their import prices. This is

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the DSU, ¶ 86, WT/DS27/ARB/ECU (Mar. 24, 2000) [hereinafter Award of the Arbitrator – *EC – Bananas III*].

[146] Panel Report, *United States – Import Measures on Certain Products from the European Communities*, ¶ 6.82, WT/DS165/R (July 17, 2000); ROBERT E. HUDEC, DEVELOPING COUNTRIES IN THE GATT LEGAL SYSTEM 105 (Unpublished draft new edition of the original 1987 book, edited and with a foreword by Joel Trachtman), *available at:* http://www-temp.law.umn.edu/uploads/hy/Jz/hyJzgIiHRF7Q3VUx-XRBZQ/wto-trachtman.pdf [hereinafter HUDEC – GATT].

[147] *See, e.g.*, Award of the Arbitrator-*EC – Bananas III, supra* note 145, ¶ 6.3; Award of the Arbitrator, *United States – Continued Dumping and Subsidy Offset Act of 2000, Original Complaint by Mexico – Recourse to Arbitration by the United States under Article 22.6 of the DSU*, ¶ 3.74, WT/DS234/ARB/MEX (Aug. 31, 2004); Award of the Arbitrator, *United States – Subsidies on Upland Cotton – Recourse to Arbitration by the United States under Article 22.6 of the DSU*, ¶ 4.109, WT/DS267/ARB/2 (Aug. 31, 2009) [hereinafter Award of the Arbitrator – *US – Cotton*].

[148] The relative disadvantage occurs in the relationship between small economies and large economies, not between developing and developed economies. Small *developed* countries are at a disadvantage as well, even vis-à-vis some large developing countries. For instance, Iceland or New Zealand will be at a disadvantage vis-à-vis large developing countries such as Brazil, Mexico and China. However, the majority of countries negatively affected by this asymmetry will of course be developing countries.

because the inability of many small developing countries to affect world prices implies that any trade retaliation by such countries imposes substantial welfare costs on themselves.[149]

With respect to the *compliance-inducing effect*, the WTO retaliation system places small economies at even greater systematic disadvantage vis-à-vis larger economies. Any compliance-inducing effect of developing country retaliation will likely be quite small, because the volume of trade affected will not generate sufficient political pressure in the non-complying developed/large Member to ensure compliance. As Antigua and Barbuda stated in its retaliation request in the *US – Gambling* dispute, even if it ceased all trade with the United States, this would affect less than 0.02 percent of total US exports.[150] The *Gambling* dispute is of course an extreme case of asymmetry of economic power, between a small island nation with 80,000 inhabitants and one of the world's largest economies – however, it does illustrate a systemic problem that confronts small economies, which are in turn, overwhelmingly, developing countries. Moreover, developing country markets are typically small and commercially less attractive than the markets of developed countries; hence, the prospect of suffering impediments in a developing country market is less of a concern for a developed country exporter than vice versa.[151] Finally, developing countries' exports are diversified over a smaller number of export markets than is the case for developed country exports. Being shut out or handicapped in one of a few export markets causes more economic hardship.[152]

The relative disadvantage of small economies in WTO retaliation has been highlighted in the three arbitral awards that so far have authorized so-called cross-retaliation.[153] The arbitrators in the three disputes in which cross-retaliation was authorized relied on the above-mentioned adverse consequences of developing country retaliation in order to find that retaliation in the same sector would not be

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[149] Bown – *Complainants, interested parties and free riders, supra* note 34, at 293.

[150] Recourse by Antigua and Barbuda to Article 22.2 of the DSU, *United Sates – Measures Affecting the Cross Border Supply of Gambling and Betting Services*, ¶ 3, WT/DS285/22 (June 22, 2007) [hereinafter Retaliation Request – *US – Gambling*].

[151] Hoekman & Mavroidis – *Enforcing WTO Commitments, supra* note 67, at 4.

[152] *Id.*

[153] "Cross-retaliation" refers to the suspension of concessions in a sector of trade different than the one in which the trade injury is suffered, including under a different WTO covered agreement. *See* Frederick M. Abott, *Cross-Retaliation in TRIPS: Options for Developing Countries* (ICTSD Issues Paper No. 8), at 2. Incidentally, this is a remarkable shift from the original purpose of cross-retaliation. Cross-retaliation was originally inserted into the DSU for the benefit of developed country members, who wanted to preserve their ability to retaliate against TRIPS violations by developing countries by retaliating in the goods sector. Today, the concept of cross-retaliation is almost universally associated as testimony to the challenges of developing countries in ensuring effective compliance by developed countries.

"practicable" or "effective".[154] The disadvantage has been universally acknowledged by scholars,[155] and also by the WTO Secretariat.[156]

Because of the near-universal acknowledgement that the economic and political effects of retaliation by developing countries are limited, many proposals exist for reforming this aspect of the WTO regime. Indeed, demands for changes to the retaliation rules go back to the 1960s.[157] Already at that time, smaller GATT members demanded familiar-sounding reforms such as collective retaliation and monetary compensation, so as to create enforcement mechanisms more attuned to the situation of small economies/developing countries. These complaints still arise today. A number of developing country proposals for DSU reform – proposed by Ecuador,[158] the LDC Group,[159] the African Group[160] and India, Cuba, the Dominican Republic, Egypt, Honduras, Jamaica and Malaysia[161] – relate to improving the system of remedies, reviving the 1960s calls for collective retaliation and monetary compensation. A novel proposal has been the tradable retaliation rights by Mexico.[162] Academic commentators have also called for a reform of the

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[154] *See* Award of the Arbitrator - *EC – Bananas III, supra* note 145, ¶¶ 70-73, 79; Retaliation request - *US – Gambling, supra* note 150, ¶¶ 4.55-4.60; Award of the Arbitrator - *US – Cotton, supra* note 147, ¶¶ 5.74-5.81.

[155] KENNETH DAM, THE GATT: LAW AND INTERNATIONAL ORGANIZATION 368 (1970); Henning Grosse Ruse-Kahn, *A Pirate of the Caribbean? The Attractions of Suspending TRIPS Obligations*, 11(2) J. INT'L ECON. L. 313, 332 (2008); Steve Charnovitz, *Should the Teeth Be Pulled? An Analysis of WTO Sanctions*, *in* POLITICAL ECONOMY OF INTERNATIONAL TRADE LAW: ESSAYS IN HONOR OF ROBERT E. HUDEC 602, 625 (Daniel L.M. Kennedy & James D. Southwick eds., 2002); Y. Renouf, *A Brief Introduction to Countermeasures in the WTO Dispute Settlement System*, *in* KEY ISSUES IN WTO DISPUTE SETTLEMENT 118 (Rufus Yerxa & Bruce Wilson eds., 2005).

[156] WTO Secretariat, WORD TRADE REPORT 2007, at 284.

[157] HUDEC – GATT, *supra* note 146, at 104.

[158] Special Session of the Dispute Settlement Body, *Negotiations on Improvements and Clarifications of the Dispute Settlement Understanding: Proposal by Ecuador,* TN/DS/W/33 (Jan. 23, 2003).

[159] Special Session of the Dispute Settlement Body, *Negotiations on the Dispute Settlement Understanding: Proposal by the LDC Group,* TN/DS/W/17 (Oct. 9, 2002); Special Session of the Dispute Settlement Body, *Text for the LDC Proposal on Dispute Settlement Understanding Negotiations: Communication from Haiti,* TN/DS/W/37 (Jan 22., 2003).

[160] Special Session of the Dispute Settlement Body, *Negotiations on the Dispute Settlement Understanding: Proposal by the African Group,* TN/DS/W/15 (Sep. 25, 2002); Special Session of the Dispute Settlement Body, *Text for the African Group Proposals on Dispute Settlement Understanding Negotiations: Communication from Kenya,* TN/DS/W/42 (Jan 24., 2003).

[161] Special Session of the Dispute Settlement Body, *Dispute Settlement Understanding Proposals: Legal Text: Communication from India on behalf of Cuba, Dominican Republic, Egypt, Honduras, Jamaica and Malaysia,* TN/DS/W/47 (Feb. 11, 2003).

[162] Special Session of the Dispute Settlement Body, *Negotiations on Improvements and*

WTO remedies system.[163]

(iii) Does Retaliation Matter for Ensuring Compliance with WTO Rulings?

The key question is not whether small/developing countries are at a disadvantage in terms of retaliatory capacity – they are. Rather, the question is how much retaliation actually matters for enforcement of WTO rulings, whether WTO members possibly comply with adverse rulings even if their opponent cannot effectively retaliate and, therefore, whether limited retaliatory capacity is a genuine constraint on effective developing country participation in WTO litigation.

What does empirical evidence tell us about the true significance of retaliation for effective functioning and participation in WTO litigation? The quantitative evidence is contradictory. A number of quantitative studies conclude that retaliation matters, and that participation in WTO disputes, achievement of trade liberalizing resolutions and retaliatory power are interlinked. For instance, a 2003 study by Chad Bown, based on dispute settlement data from 1995 to 2001, found that greater retaliatory power of a potential complainant vis-à-vis a potential defendant makes it more likely that the complainant will file a dispute.[164] Another study by Chad Bown has also concluded that compliance is more pronounced when developed countries complain against developing countries, rather than vice versa.[165]

In 2003, Busch and Reinhardt identified another aspect of the relative disadvantage of developing countries in the dispute settlement regime. They concluded that cases that settle "early" – prior to an actual panel process – are more likely to result in full concession by the defendant. They also found that developing countries appear to have been less successful in achieving such early settlement. One possible explanation, according to these authors, is that this is due to the limited retaliatory power of these developing countries.[166]

Clarifications of the Dispute Settlement Understanding: Proposal by Mexico, TN/DS/W/23 (Nov. 4, 2002).

[163] Hoekman & Mavroidis – *Enforcing WTO Commitments, supra* note 67, at 5.

[164] Bown – *Complainants, interested parties and free riders, supra* note 34, at 306.

[165] Chad Bown, *On the Economic Success of GATT/WTO Dispute Settlement*, 86(3) REV. ECO. & STAT. 811-823 (2004); Kyle Bagwell, Petros C. Mavroidis & Robert W. Staiger, *The Case for Tradable Remedies in WTO Dispute Settlement* (World Bank Policy Research Paper No. 3314, 2004), at 14-15,.

[166] Busch & Reinhardt, *supra* note 27.; Marc Busch & Eric Reinhardt, *With a Little Help from Our Friends? Developing Country Complaints and Third-Party Participation*, *in* DEVELOPING COUNTRIES IN THE WTO LEGAL SYSTEM 247, 248 (Trachtman & Thomas eds., 2009) [hereinafter Busch & Reinhardt – *Little Help*].

According to Chad Bown, additional evidence that retaliation matters is also the fact that developing countries have over the years increasingly targeted other developing countries. He argues that this trend reflects the fact that developing countries have adjusted their dispute initiation pattern to targets where they can expect better results, that is, where their relative retaliatory power is greater.[167] (Of course, the motivation for this shift in initiation patterns could also reflect increased trade and a greater number of disputes between developing countries, or the fact that developing countries, in many areas, maintain greater trade barriers than developed countries.) Another strand of research has looked at the significance of retaliatory power further "upstream". A study by Blonigen and Bown, as well as a study by Busch, Reinhardt and Shaffer, found that anti-dumping duties are more likely to be imposed when the target is smaller, possesses lesser legal capacity and is less of a threat in terms of WTO retaliation potential.[168]

On the other hand, other empirical studies come to the contrary conclusion that retaliation is not a significant determinant of success and participation in WTO litigation. A study by Busch and Reinhardt concludes that, on the whole, retaliation is not as significant to induce compliance as many authors have argued. These authors argue that a key ingredient for successful dispute resolution is early settlement, and that developing countries have achieved relatively less early settlement than developed countries. However, their study concludes that a more important factor in convincing the defendant to settle early is the likelihood of an adverse ruling, rather than retaliatory capacity.[169] Similarly, a 1999 study by Horn, Mavroidis and Nordström concluded that there is no bias in the initiation of trade disputes under the WTO regime. Large members initiate more disputes because they are involved in a larger share of trade with a wider variety of trading partners compared to other WTO members.[170] A study by Reto Malacrida of the WTO Secretariat concluded that there is no evidence that developed countries comply less with adverse WTO judgments in cases involving a developing country complainant than a developed country complainant.[171] The same conclusion was reached by Don Moon in 2006.[172]

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[167] Bown – *Complainants, interested parties and free riders, supra* note 34.

[168] Bruce A. Blonigen & Chad P. Bown, *Anti-Dumping and Retaliation Threats*, 60(2) J. INT'L ECON. 249 (2003); Marc L. Busch, Eric Reinhardt & Gregory Shaffer, *Does Legal Capacity Matter? A Survey of WTO Members*, 8(4) WORLD TRADE REV. 559 (2009).

[169] Marc L. Busch & Eric Reinhardt, *Bargaining in the Shadow of the Law: Early Settlement in GATT/ WTO Disputes*, 24(1) FORDHAM INT'L L. J. 158, 164-65 (2001).

[170] Horn et al. – *Biased?*, *supra* note 32.

[171] Reto Malacrida, *Towards Sounder and Fairer WTO Retaliation: Suggestions for Possible Additional Procedural Rules Governing Members' Preparation and Adoption of Retaliatory Measures*, 42(1) J. WORLD TRADE 3 (2008).

[172] Don Moon, *Equality and Inequality in the WTO Dispute Settlement System: Analysis of the GATT/WTO Dispute Data*, 32(3) INT'L INTERACTIONS 201 (2006).

Further evidence that retaliation typically does not matter much is the fact that the actual number of requests for retaliation, and imposition of retaliatory measures, has been very limited in relation to the number of litigated disputes. In a study of the WTO dispute settlement system up to 2005, Prof. Davey identified a successful implementation rate of 83%. Only 10 of the 181 initiated disputes initiated by that date had seen some form of disagreement over implementation.[173] To date, there have only been 19 decisions establishing the level of suspension of concessions, 17 of which have resulted in an authorization to retaliate by the DSB.[174] Admittedly, threat of retaliation can influence the outcome of a dispute even when no authorization to retaliate is eventually sought (something that is sometimes referred to as "bargaining in the shadow of the law"). However, the small number of authorizations and actual instances of retaliation *does* suggest that retaliation is not as important a feature of WTO dispute settlement as is often claimed.[175] Finally, it is remarkable that the instances in which retaliation was actually imposed involved mostly *developed* countries on both sides. In *US – FSC*, the EU retaliated against the US. In *EC – Hormones*, the US and Canada retaliated against the EU. In *US– Byrd Amendment*, Canada, the European Union, Japan and Mexico retaliated against the United States. In *EC – Bananas*, the United States retaliated against the European Union. These cases suggest that reluctance of the defendant to implement a WTO ruling is often more closely linked to the specific measure at issue, rather than to the identity of the complainant or the defendant's perception that it can "get away" with non-compliance because a small complainant will be unable to retaliate.[176]

What are we to make of this contradictory evidence? One possible reason for why some of the quantitative studies come to different conclusions is the methodological difficulty of quantifying legal outcomes and "compliance". By way of example, in determining which complainants have been successful in achieving

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[173] Davey, *supra* note 28, at 47.

[174] *See also* Hunter Nottage, *Evaluating Criticism That WTO Retaliation Rules Undermine the Utility of WTO Dispute Settlement*, *in* THE LAW, ECONOMICS AND POLITICS OF RETALIATION IN WTO DISPUTE SETTLEMENT 319, 329(Chad P. Bown & Joost Pauwelyn eds., 2010).

[175] *See* Raúl Torres, *La utilización del Mecanismo de Solución de Diferencias Comerciales de la OMC por parte de los países latinoamericanos – Despejando mitos y rompiendo barreras*, 20, *in* ESTADO Y FUTURO DEL DERECHO INTERNACIONAL ECONÓMICO EN AMÉRICA LATINA (*forthcoming* manuscript) (on file with the authors) [hereinafter Torres]. *See also* Nottage – *Developing Countries, supra* note 31, at 10-11.

[176] Of course, the argument can be made that, in all those cases, retaliation ultimately pushed the reluctant defendant into compliance, which is something that (smaller) developing countries would not have been able to achieve. This may of course be true for the specific cases at issue. However, given the otherwise very high rates of compliance in the majority of disputes, the evidence suggests that, in most cases, retaliatory power is not a significant part of the compliance calculus.

an economically favourable outcome, a 2003 study defined such an outcome, *inter alia*, as the *withdrawal* of a contested safeguard measure and fully "liberalizing" trade in the product at issue.[177] However, many adverse WTO rulings on trade remedies may be implemented by merely *modifying* the measure, rather than *withdrawing it completely*. Even if less satisfactory than a complete elimination, this "modification" outcome can still be both WTO-consistent and commercially significant, for instance, when dumping or subsidization margins are reduced. This fact, however, will not be captured if a quantitative study considers as "success" only a complete *removal* of a trade remedy measure.

Another methodological difficulty in quantitative studies consists in capturing the obviousness of WTO-inconsistency of a measure. For instance, the fact that compliance and early settlement is more pronounced when developed countries complain against developing countries, rather than vice versa, need not necessarily reflect the power of a developed complainant's retaliatory threat. It could also reflect the more benign fact that the measure at issue was a particularly blatant WTO-violation and that the developing country government acknowledged that fact, either before litigation or upon receiving an adverse ruling. Perhaps early settlement or ultimate compliance is more likely with respect to such clearly WTO-inconsistent measures. Moreover, according to some authors, early settlement may also depend partly on factors other than the measure itself or retaliatory power, such as presence or absence of third parties.[178] In short, there are many reasons to be sceptical about how clearly quantitative studies capture the complex psychology of intergovernmental litigation and compliance with international judgments.

(iv) Even Assuming Retaliation Matters, its Impact is Likely Limited

Even assuming that, in principle, retaliatory power has *some* significance for successful WTO litigation, there are several conceptual reasons for why this significance is likely to remain limited.

First, a very convincing strand of literature – best represented by Prof. Hudec's writing – claims that the decisive issue for compliance is whether sufficient domestic political forces can be generated, so as to make the government change its previous decision. These domestic forces will be interested in compliance because they consider the removal of the measure to be good policy and because it is in the interest of the country to preserve the long-term functioning of the WTO and of the dispute settlement regime.[179] The enforcement

[177] Bown – *Complainants, interested parties and free riders, supra* note 34, at 290.

[178] Busch & Reinhardt – *Little Help, supra* note 166, at 248.

[179] Robert Hudec, *The Adequacy of WTO Dispute Settlement Remedies: A Developing Country Perspective*, *in* DEVELOPMENT, TRADE AND THE WTO 81, 82 (Bernard M. Hoekman,

of WTO legal rulings is therefore a political process involving the cultivation of a government's domestic decision to change a previous one.[180] Retaliation or threat of retaliation can play a role in this exercise, but it will seldom be the decisive factor.

Indeed, as noted above, anecdotal evidence suggests that reluctance of WTO respondents to implement adverse WTO rulings is just as related to the sensitivity of the underlying legislation as to the retaliatory power of the complainant. The cases that since 1995 have seen greatest delay and controversy concerning compliance involved developed complainants with significant retaliatory power. These are: *US – FSC*, *US – Byrd Amendment*, *US – 1916 Act*, *EC – Hormones* and *EC – Bananas*. This is evidence for Prof. Hudec's argument that the constellation of domestic political forces will be the primary determinant of compliance, rather than external pressure by an individual complainant's retaliatory power. Of course, large retaliatory power may be highly useful in these cases to change that constellation of domestic political forces, such that small developing countries may not have been able to enforce the rulings in those particularly sensitive cases. However, it appears that such controversial cases are not numerous.

Another reason as to why retaliation challenges for developing countries may be less of a problem is that, as mentioned previously, many developing countries *litigate against each other*. Here, the asymmetry argument – a small developing country against a large (developed) country – would seem to matter much less. Antigua and Barbuda may be powerless in terms of retaliation vis-à-vis the United States or Brazil, but Honduras will not be powerless vis-à-vis the Dominican Republic,[181] nor will Peru be powerless against Argentina.[182] Indeed, as previously noted, 82 of the 427 disputes were initiated by developing countries against another developing country, which represents almost one half of the cases initiated by the developing country group. Thus, the travails of Antigua and Barbuda against the United States, often quoted as epitomizing the plight of developing countries in WTO litigation, seem to be an exception and not representative of the situation that developing countries face.

One can of course argue – as Chad Bown has done – that the increase of litigation between developing countries is a consequence of developing countries' realizing that their chances of success are limited against developed countries.

Aaditya Mattoo & Philip English, eds., 2002).

[180] HUDEC – GATT, *supra* note 146, at 106.

[181] *See* Panel Report, *Dominican Republic – Safeguard Measures on Imports of Polypropylene Bags and Tubular Fabric,* WT/DS418R (Jan. 31, 2012).

[182] *See* Request for Consultations by Peru, *Argentina – Anti-dumping Duties on Fasteners and Chains from Peru,* WT/DS/410/1 (May 31, 2010).

However, even assuming that this is the true causal relationship,[183] it shows that challenges concerning retaliation do not render the system useless for developing countries – developing countries still patently see benefits of WTO litigation, even if vis-à-vis a slightly different mix of targets.

Third, retaliation may also have limited impact on certain WTO Members due to their internal governance structure. A salient example is the European Union. Many implementation decisions (other than those that can be taken by the Commission) are taken by the Council in which all European Union governments are represented. The weight of sanctions may often be spread over a number of governments, possibly resulting in a limited amount of harm per nation that is not sufficient to trigger action. Even if a complainant tailors retaliation so as to harm only one or a few European Union members, so as to incentivize those particular countries to demand action, a minority of European Union governments can still veto the decision-making required for compliance. It was precisely this problem that the United States' "carousel retaliation" in the *EC – Bananas III* dispute was designed to address, by causing economic pain to as many European Union members as possible.[184] Thus, the European Union's compliance with adverse WTO rulings does not appear to be strongly linked to retaliation.

Finally, one of the authors' experience as legal counsel has been that retaliatory power plays a very limited role when a potential complainant is deliberating whether to file a complaint. A complainant typically assumes that the defendant will comply *somehow* and worries instead more about *how* the defendant will comply. Complainants weigh pros and cons of initiating cases without a detailed roadmap in their minds about subsequent Article 21.5 proceedings and possible retaliation. A complainant may decide not to bring a complaint because it is concerned that WTO-consistent compliance will not result in meaningful commercial improvements (for instance, only small modifications in, rather than a complete withdrawal of, an anti-dumping measure) or, alternatively, for political reasons. However, retaliation is typically not part of that calculus.

All in all, the most sensible conclusion appears to be that retaliation does, at the margins, matter *to some extent* in WTO litigation and that, *ceteris paribus*, large and powerful WTO Members enjoy an advantage. This advantage, however, will come into play in only a small number of politically particularly sensitive cases, with

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[183] However, as argued above, increased litigation between developing countries may also be due to increased volumes of trade, or changed patterns of trade, between those countries or due to the fact that developing countries, on average, have higher trade barriers than developed countries.

[184] Christina Davis, *A Conflict of Institutions? The EU and GATT/WTO Dispute Adjudication* (2007), *available at:* http://www.princeton.edu/~cldavis/files/euwto.pdf.

particularly strong domestic opposition against compliance. In those cases, greater retaliatory threat may be helpful in overcoming the threat of that domestic opposition. However, in a typical WTO case, retaliatory power of the complainant will not be an important prerequisite for compliance.

Thus, even if the much touted "institutional bias" exists, it does not diminish the utility of the overall system for smaller and developing country Members. Hudec and Trachtman also conclude that, even if retaliation or the threat to retaliate matter to a degree, the fact that they are unable to retaliate effectively does not render WTO litigation useless for them.[185]

(v) Solutions for the Remaining Retaliation Problem

However, even if a biased WTO dispute settlement regime is of value for developing countries, this does not mean that nothing should be done to address this bias and to fully level the playing field for small and developing countries.

Chad Bown has argued that increased participation in global trade would enable smaller economies to retaliate on a greater volume of trade.[186] That is certainly true, but that would only mitigate, not remove the inherent disadvantage of smaller economies. Thus, the main question is whether it is meaningful to reform the WTO retaliation regime.

The first point to note is that the many developing country proposals for collective retaliation, monetary compensation (including retrospective compensation), and tradable retaliation rights are politically extremely difficult to implement. Developed countries prefer the *status quo* and will not agree to this reform. Therefore, as interesting as many of these reform proposals are, they remain exclusively academic in the current political climate. The possibility of material reform of WTO remedies in the near or medium run seems very remote.

Even leaving aside the question of politically feasibility, other questions remain. As is well known, WTO litigation is typically dependent on powerful private commercial interests pushing a government to litigate on its behalf. This is particularly true for litigation filed by smaller and developing country members, and, as we have shown above, it is also the absence of such public-private cooperation that explains the absence of developing countries in WTO litigation.[187]

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[185] HUDEC – GATT, *supra* note 146, at 106.

[186] Bown – *Plaintiffs and Defendants*, *supra* note 144, at 78.

[187] Large WTO Members with significant in-house capacity may occasionally initiate disputes not for immediate significant commercial reasons, but rather for political or systemic reasons. For instance, the *EC – Customs* dispute was filed by the United States

For instance, in a case study on the *Batteries* dispute filed by Bangladesh against India, which is the only dispute filed by an LDC to date, Mohammad Ali Taslim reports that one of the crucial circumstances in pushing the government to file the complaint was the "dogged pursuit of this case by the exporter".[188] Thus, in order to induce greater developing country litigation, these reforms would (also) have to have the effect of encouraging private companies to push their governments into bringing more complaints to the WTO.

However, it is not clear how collective retaliation or tradable retaliation rights would make WTO litigation more appealing for private companies to engage in a more "dogged pursuit" of their case. Similarly, monetary compensation, whether retroactive or prospective, would not motivate private companies if the compensation went into state coffers, as it most likely would.[189] Of course, it cannot be excluded that the prospect of monetary compensation could potentially act as a motivating factor for developing countries' *governments*' (rather than private companies') willingness to bring cases against developed countries – although, other than in exceptional cases, it is not clear why the willingness of a *losing* WTO Member to pay monetary compensation should be any greater than the same Member's willingness to comply by changing its laws and regulations, as the current regime requires it to do. However, given the continued existence of the many domestic constraining factors, the positive effect of introducing monetary compensation into the dispute settlement system – if any – is likely to remain small. Hence, it is quite possible that the benefits, if any, of a reform of the retaliation regime will not be worth the political capital invested by developing countries.

Finally, the design of remedies in a legal system would appear to be a question of principle that should apply to all Members equally. If retrospective remedies were introduced, it would be difficult to argue why these remedies should not also apply to developing country defendants. If that were the case, developing countries should probably think twice about their enthusiasm for more effective remedies, given how frequently they participate in WTO litigation and how frequently their own measures are declared WTO-inconsistent.

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without approval from the various exporting industries. Indeed, some exporting industries were reportedly opposed to the filing of this dispute and refused to cooperate by providing USTR with relevant evidence. A number of the US claims failed because of insufficient evidence. Such litigation is unlikely to be filed by smaller developing country complainants.

[188] Taslim, *supra* note 112, at 241.

[189] While proposals for monetary compensation typically do not specify how the monies would, upon receipt, be used internally within the recipient member, the unspoken assumption appears to be that the money would be retained by the government, rather than be distributed to the interested commercial stakeholders.

4. Duration and Complexity of WTO Proceedings

(i) Do Duration and Procedural Complexity of DSU Procedures deter Developing Countries?

A frequently expressed criticism is that the WTO dispute settlement system takes too long to resolve disputes.[190] Some WTO Members have even expressed this view in the context of DSU review.[191] Moreover, WTO proceedings are often characterized as procedurally complicated, providing an incentive to the defendant to delay every stage of the procedure.

Whether WTO dispute settlement proceedings are "too" long and "too" complicated depends, of course, on one's benchmark. As for duration, the average duration of standard panel procedures from 1995 – 2009 is just under 14 months after composition.[192] Any appellate process adds another 4 months to the process.[193] There is no doubt that the panel process could be accelerated and made more efficient, including by using the panels' discretion over their working procedures, assuming the parties cooperate and show a degree of discipline. However, from a systemic perspective, a period of 18 months compares very favourably with the duration of domestic judicial proceedings, including in the most developed WTO Members. As for the complexity of the proceedings, a strong legal regime will inevitably have to accept a degree of procedural formalism to be taken seriously, which will in turn invite procedural skirmishing. There is of course a powerful incentive for the defendant to delay, given the absence of retrospective remedies in WTO law. However, for all its shortcomings, on the whole, the WTO process does not appear seriously flawed either in terms of its duration or procedural complexity.

Nevertheless, there are several ways in which duration and complexity of panel proceedings could deter potential complainants from using the dispute settlement regime. First, duration and complexity can result in high legal fees that exceed a

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[190] *See* Nottage – *Trade and Development, supra* note 31, at 491. *See also* Hakan Nordstorm & Greg Shaffer, *Access to Justice in the World Trade Organization: A case for a Small Claims Procedure* (ICTSD Dispute Settlement and Legal Aspects of International Trade Issue Paper No. 2, June 2007), *available at:* http://ictsd.org/i/publications/11306/ [hereinafter Nordstorm & Shaffer – *Small Claims*]; Davey, *supra* note 28, at 50.

[191] *See, e.g.*, a Revised Australian Proposal, as reported in Nottage – *Trade and Development, supra* note 31, at n. 111

[192] Excluding certain disputes of exceptional character and length. *See* Matthew Kennedy, *Why Are WTO Panels Taking Longer? And What Can Be Done About It?*, 45(1) J. WORLD TRADE 221, 223 (2011).

[193] We assume that appellate proceedings take 90 days, and that it takes another month for the Appellate Body report to be adopted.

complainant's maximum budget.[194] Second, the commercial stakeholders behind the government could decide, rather than wait for a resolution of the dispute, to adjust to the trade barrier (e.g. by adapting its products or procedures to new regulation or seem new export markets altogether). This could be the case especially if the potential dispute involves smaller trade volumes, or if the commercial stakeholder is a small and revenue-dependent company, which will be more typical of companies in smaller and developing countries.

With respect to the financial aspect of the WTO dispute settlement procedure, we have argued above that this constraint has been addressed by the creation of the ACWL.[195] The maximum rates charged by the ACWL were intended precisely to provide certainty about the maximum possible legal expenses, and to protect the client country against the financial consequences of a protracted dispute settlement procedure.

With respect to the companies' choice to adjust to trade barriers, rather than challenging them, no reliable evidence in either direction exists to our knowledge. Clearly, there will be companies and governments that, in any given case, might prefer to invest into a longer-term strategy of removing trade barriers and achieving market access via WTO litigation. On the other hand, companies and governments that will not consider WTO litigation the best strategy and will instead seek to adapt to the foreign regulatory reality.

Because the private sector in many developing countries will tend to be less sophisticated, smaller, and less well-organized, a higher proportion of companies may decide to live with the foreign trade barrier rather than challenge it. At the same time, it would be surprising if an industry's and government's choice between litigation and adaption depended crucially on the fact that WTO litigation in practice lasts 8 months longer than set out in the DSU. It seems much more plausible to assume that the real deterrent, especially for private commercial stakeholders, is the absence of retrospective remedies whose benefits would accrue to them.[196]

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[194] *See, e.g.*, Nottage – *Trade and Development, supra* note 31, at 491. Chad Bown & Bernard Hoekman, *WTO Dispute Settlement and the Missing Developing Country Cases: Engaging the Private Sector*, 8(4) J. INT'L ECON. L. 861, 870 (2005). Commentators mention estimates of legal fees payable to private commercial law firms as prohibitively expensive for developing country governments, amounts which in one of the author's experience tend to be on the lower end of potential expenses, in particular where large and fact-intensive cases are concerned.

[195] *See supra*, Part II.C.1(b).

[196] Nottage – *Developing Countries, supra* note 31, at 14.

(ii) Use of Procedural Alternatives to the Standard Dispute Settlement Process

Strong evidence that developing countries consider DSU procedures too protracted or too complex could be the recourse of those countries to alternative procedures. The WTO regime offers expedited litigation procedures, or alternative methods of dispute resolution. Specifically, pursuant to Article 3.12 of the DSU, a developing country WTO member can invoke the so-called 1966 Procedures.[197] Under these 1966 Procedures, good offices of the WTO Director General can be utilized and the panel process is to take only two months, rather than nine months as set out in Article 20 of the DSU. Another alternative procedure is arbitration under Article 25 of the DSU. Finally, Article 5 of the DSU envisages good offices, conciliation and mediation.

These procedures have not been invoked in practice. This may be taken to suggest that developing countries are not too unhappy with the standard WTO litigation process. At the very least, this fact suggests that developing countries do not believe that these alternative options are better. There are probably several explanations for why the alternatives are not very attractive. One explanation is that good offices, conciliation and mediation are no practical alternatives to a legally binding process, because they ultimately require the consent of both parties.[198] The one instance in which these procedures were used – the *Sardines* dispute between the European Union and Thailand – the European Union consented to the proceedings essentially as part of the price for obtaining the 2001 Doha Lomé/bananas waiver. Although that dispute is deemed to have been satisfactorily resolved, the non-use of the Article 5 procedures before and after this single instance is telling. Second, the 1966 Procedures are not uniformly advantageous to a developing country complainant – accelerated time-frames in a factually complex dispute are not necessarily a blessing for the complainant. Third, and probably most importantly, developing countries are likely wary of obtaining a WTO ruling, especially against a large developed member, through a non-standard procedure that might be perceived as "second rate" or biased in favour of developing countries. They (rightly) harbour the fear that rulings generated by such procedures would be regarded as tainted and, as Frieder Roessler has put it, would lose their "normative force".[199]

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[197] GATT Secretariat, *Decision of 5th April1966 on Procedures under Article XIII,* GATT B.I.S.D. 14S/18 (1966).

[198] Article 5 of the DSU provides that "[g]ood offices, conciliation and mediation are procedures that are undertaken voluntarily if the parties to the dispute so agree".

[199] Frieder Roessler, *Special and Differential Treatment of Developing Countries under the WTO Dispute Settlement System*, *in* THE WTO DISPUTE SETTLEMENT SYSTEM 1995 – 2003 89 (Federico Ortino & Ernst-Ulrich Petersmann eds., 2004). *See also* Amin Alavi's

This is also one of the reasons why the interesting proposal by Håkan Nordström and Gregory Shaffer to establish a "small claims procedure" in the WTO system would likely not help. These two scholars – prolific and perspicacious commentators on developing country participation in WTO dispute settlement– in 2007 proposed the establishment of a separate procedure that would address claims of a lesser monetary value, on matters with clearly established precedent, possibly available only for developing countries.[200] Leaving aside the daunting practical difficulties in defining, establishing and operating such a procedure, it is doubtful that developing WTO members would see benefit in rulings from a procedure that would run the risk of being branded, by interest groups within the respondent member, a "second-class" process, thereby undermining its political persuasiveness.

Overall, it seems doubtful that reducing the duration and procedural complexity of WTO proceedings would raise developing country participation. This does not mean that procedural reforms – either at the DSU level or within panel working procedures – would not be useful, especially if they reduce the duration of proceedings without affecting the quality of the legal and factual analysis. However, any such improvement, in and of itself, is unlikely to make a difference between a developing country government's decision to litigate or seek alternative ways of addressing a problem.

4. Preferential Trade

Another constraint occasionally identified in the literature is the fact that a large proportion of developing countries' exports enter developed country markets under preferential trade regimes. Because these preferences are not enforceable under WTO law, as is often claimed, there is less scope for developing countries to bring WTO disputes with respect to these exports, which further reduces the number of WTO complaints by developing countries.[201]

To critically assess this argument, it is first useful to distinguish between (i) unilateral (non-reciprocal) preferences and (ii) reciprocal preferences under regional/preferential trade agreements (FTAs).

(unexplained and unconvincing) disagreement with Frieder Roessler's view in Amin Alavi, *African Countries and the WTO's Dispute Settlement Mechanism*, 25(1) DEV. POL'Y REV. 25, 32 (2008).

[200] Nordstorm & Shaffer – *Small Claims, supra* note 190.

[201] *See, e.g.*, Nottage – *Developing Countries, supra* note 31, at 12. Nottage – *Trade and Development, supra* note 31, at 498; Shahin, *supra* note 139, at 290; Torres, *supra* note 175.

(i) Unilateral Preferences

Unilateral (non-reciprocal) preferences are typically granted by developed countries through Generalized System of Preferences (GSP) schemes, authorized by the so-called Enabling Clause.[202] The authorization via the Enabling Clause is, of course, necessary because preferential treatment of developing countries, but not other WTO Members, violates the most-favoured nation principle. A number of other smaller non-reciprocal preferential schemes exist, often for a regional subset of developing countries. Because these preferential schemes do not qualify under the Enabling Clause, they require a WTO waiver. Examples of such waiver-based preferential schemes include the US African Growth and Opportunity Act (AGOA) and the Caribbean Basic Economic Recovery Act (CBERA), as well as preferences previously granted by the EU to ACP countries. Finally, certain WTO Members also provide extra-special treatment for LDCs ("duty-free, quota-free"), which is justified by the Enabling Clause.[203]

The economic, legal and political benefits of such unilateral trade preferences for developing countries are controversial.[204] Notwithstanding this criticism, a very significant volume of developing country exports are currently traded under such unilateral preferences. According to a 2005 OECD study, between one third and one half of all imports from eligible developing countries enter the Australian, Canadian, European Union, Japanese and United States markets under such preferential terms.[205]

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[202] For general information on GSP, *see* UNCTAD, *About GSP*, http://www.unctad.org/templates/Page. asp?intItemID=2309&lang=1; JOHN H. JACKSON, THE WORLD TRADING SYSTEM: LAW AND POLICY OF INTERNATIONAL ECONOMIC RELATIONS 1187 (2nd ed., 1997); ROBERT E. HUDEC, DEVELOPING COUNTRIES AND THE GATT 69 (photo. reprint 2011) (1987).

[203] An example of such duty-free, quota-free scheme for LDC is the EU's "Everything But Arms" operated by the EU.

[204] For critical economic analysis, *see* John Whalley, *Non-discriminatory Discrimination: Special and Differential Treatment Under the GATT for Developing Countries*, 100 ECON J. 1323-24 (1990), *and* Bernard Herz & Marco Wagner, *The Dark Side of the Generalized System of Preferences*, 19(4) REV. INT'L ECON. 763-765 (2011); *see also* WTO Secretariat, WORD TRADE REPORT 2011, which states that "the reduction of tariff rates over time through multilateral, preferential and bilateral process has reduced the scope for securing meaningful trade preferences". (WTO Secretariat, WORD TRADE REPORT (2011), at 63, *available at:* http://www.wto.org/english/res_e/booksp_e/anrep_e/world_trade_report11_e.pdf. For criticism from a legal and policy perspective, *see* HUDEC – GATT, *supra* note, at 174.

[205] Douglas Lippoldt & Przemyslaw Kowalski, *Trade Preference Erosion: Potential Economic Impacts* (OECD Trade Policy Working Paper No. 17, TD/TC/WP(2004)/30/FINAL), *available at:* http://www.oecd-ilibrary.org/trade/trade-preference-erosion_217558400455.

As commentators point out, these preferences are granted by more affluent nations on a voluntary basis. This means that a developing country beneficiary cannot, in principle, rely on WTO law to compel the grantor country to grant or not to withdraw a particular preferential tariff. The WTO legal basis for unilateral preferences is an *authorization* to grant these preferences, not an *obligation*. However, it is not correct to argue that grantor countries are at *full* liberty, under WTO law, to structure these unilateral preferences as they wish. The Enabling Clause requires preferences to be, among other things, non-discriminatory. Moreover, the Appellate Body has left open the question whether the Enabling Clause permits "*ab initio* exclusions from GSP schemes of countries claiming developing country status, or the partial or total withdrawal of GSP benefits from certain developing countries under certain conditions".[206] Even so, certain aspects of GSP schemes will normally not be challengeable in the WTO, including overly restrictive preferential rules of origin.

The assumption reflected in the literature on developing country litigation – at least as far as some authors are concerned – appears to be, that the legal unenforceability of these preferences bars otherwise willing and able complainants from bringing a complaint in the WTO.[207] Indeed, some commentators suggest that at least some preferential treatment be rendered WTO-enforceable to increase developing country participation in WTO dispute settlement,[208] perhaps along the lines of the 2008 Hong Kong Ministerial Declaration. This Declaration envisages a legally binding obligation on developed-country Members to provide duty-free and quota-free treatment of LDC imports.

There is reason for nuanced distinctions in this context. Unilaterally granted tariff preferences are indeed non-enforceable. Thus, a developing country member will face an uphill battle to protest at the WTO a denial of a tariff preference, for instance, by virtue of an *a priori* exclusion, due to graduation or withdrawal for political reasons (although, it bears repeating, case-law has not given the preference-granting members a "carte blanche" in this regard and a number of legal issues remain unresolved).[209] However, any non-tariff trade barriers imposed

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[206] Appellate Body Report, *European Communities — Conditions for the Granting of Tariff Preferences to Developing Countries,* ¶ 129, WT/DS246/AB/R (Apr. 20, 2004) [hereinafter *EC – Tariff Preferences*].

[207] Nottage – *Developing Countries, supra* note 31, at 15; Torres, *supra* note 175.

[208] Nottage – *Developing Countries, supra* note 31, at 15.

[209] As noted above, WTO law disciplines at least some aspects of a national GSP scheme. Thus, a developed country Member that avails itself of the Enabling Clause may not, if it wishes to continue to benefit from the legal authority of the Enabling Clause, differentiate at will between beneficiaries and individual products. Importantly, the preferences granted must be, *inter alia*, non-discriminatory. *See*, *EC – Tariff Preferences*, *supra* note 206, ¶ 173.

by the importing grantor country – barriers such as SPS quarantine measure, TBT measures, quantitative restrictions, rules on customs valuations or discriminatory fiscal measures, to name just a few – remain fully subject to WTO law, even if the affected goods enter the export market under a preferential tariff rate. This matters, because, for instance, according to Edwini Kessie, "African countries … often complain about their exports being subject routinely to arbitrary non-tariff measures such as sanitary and phytosanitary measures, technical regulations and standards […]".[210] As far as these non-tariff trade barriers are concerned, developing countries continue to be protected under WTO rules, even if the goods traded fall under preferential *tariffs*.

The existence of unilateral trade benefits most likely does discourage litigation, but arguably more due to *political* rather than legal considerations. Beneficiaries of unilateral tariff preferences will typically find themselves in an asymmetrical power relationship with the grantor countries. They will be recipients not just of unilateral trade preferences, but also of other forms of development aid, and will likely be strongly dependent on such aid. They will therefore be politically more reluctant to file complaints for fear of losing these benefits.[211] Indeed, a quantitative study by Chad Bown has indeed concluded that the larger an exporter's reliance on a respondent for bilateral aid, the less likely this exporter is to file a complaint at the WTO.[212] This suggests that at least some developing countries take the view that any benefit in challenging and removing a trade barrier is outweighed by the resulting irritations in the bilateral relationship and jeopardizes existing development cooperation.[213]

Finally, as previously noted, very small developing countries and LDCs trading under unilateral trade preferences are often confronted with supply side constraints. These countries are therefore unable to benefit from existing trade preferences because they do not produce and trade sufficiently.[214] The trade-limiting effect of these domestic supply-side constraints will often be significantly more important than the effect of any trade barriers in the destination markets. As a result, the relevant countries may (quite reasonably) choose to focus their scarce internal resources on fostering domestic production, rather than embarking on an uncertain challenge against non-tariff measures such as SPS or TBT barriers.

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[210] Kessie & Addo, *supra* note 63.

[211] *See, e.g.*, Shahin, *supra* note 139, at 291. Ochieng & Majanja, *supra* note 111, at 328-29.

[212] Bown – *Complainants, interested parties and free riders, supra* note 34, at 306-07.

[213] Ochieng & Majanja, *supra* note 111, at 328-29.

[214] Kessie & Addo, *supra* note 63.

(ii) Preferences under FTAs

The litigation-limiting effect of reciprocal preferences under FTAs may limit WTO litigation via several mechanisms.

First, obligations under an FTA such as elimination of tariffs and other restrictive regulations of commerce are not enforceable under WTO law.[215] However, there is a difference here in comparison to unilateral preferences. Reciprocal FTA preferences are governed by the FTA itself. If the FTA has a dispute settlement mechanism, as the vast majority of today's FTAs do, then the FTA preferences will be enforceable in that forum. However, there is little evidence that disputes have shifted from the WTO to regional dispute settlement fora. Leaving aside the special case of the European Union, the only FTAs to have generated any government-to-government dispute settlement activity are NAFTA and MERCOSUR. However, in the recent years, these two dispute settlement mechanisms have shown limitations and their usage has plummeted towards zero. There appears to have been close to no dispute settlement activity in other FTA fora. Thus, there is little evidence that dispute settlement activity has shifted from the WTO to regional fora.

Indeed, many FTA partners continue to litigate against each other in the WTO, despite the existence of an alternative regional forum. The 2011 WTO World Trade Report concludes that "WTO members that are partners in a PTA continue to have frequent recourse to the WTO dispute settlement system to resolve trade disputes".[216] This holds true for both developed and developing country WTO Members. Evidence from NAFTA also suggests that litigation has not shifted from the WTO to the regional forum. Disputes between Canada and the United States, and Mexico and the United States, continue to be resolved before the WTO.[217] In this vein, Jorge Huerta has argued that Mexico's preferred forum for trade disputes has so far been the WTO, even though most of its disputes are with the United States and could have potentially been adjudicated by NAFTA.[218] The recent safeguard dispute involving a group of Central American countries, all of which are members of the CAFTA-DR-FTA, is yet another example. Needless to say, FTA partners cannot use the WTO to enforce non-WTO commitments amongst themselves, for instance, greater services

[215] Of course, if an insufficient volume of trade has been liberalized, this may mean that the FTA does not conform to the requirements of GATT Article XXIV.

[216] WTO Secretariat, WORD TRADE REPORT 2011, at 174, 176, http://www.wto.org/english/res_e/ booksp_e/anrep_e/world_trade_report11_e.pdf.

[217] A specific problem in the NAFTA context is, of course, that the so-called Chapter 20 forum has been paralysed due to a non-operational panelist selection mechanism.

[218] Jorge Huerta Goldman, *Mexico in the WTO and NAFTA in a Nutshell*, 44(1) J. WORLD TRADE 173, 201 (2010). *Contra* Torres, *supra* note 175.

commitments or stricter [WTO-plus] intellectual property protection provisions. However, WTO commitments between FTA partners remain fully enforceable.

A second causal mechanism whereby FTA partners would reduce their WTO litigation is the following. FTA partners could potentially decide, because of their greater economic and possibly political integration within the FTA, to keep any disputes "at home" in the FTA, rather than litigating at the WTO. However, the 2011 World Trade Report appears to suggest that no such litigation-reducing effect has occurred. Up to 2010, disputes between PTA partners have represented 10 percent of all disputes, and the share of WTO disputes between PTA partners has steadily increased since 1995 with a peak of 50 percent in 2005. Since then, the share has remained around 30 percent (although with a significant lower value in 2009).[219]

However, the above figures are only percentages and therefore not conclusive. Indeed, evidence exists that FTAs do limit their members' litigation activity in the WTO. A 2005 study by Chad Bown has concluded that partners to preferential trade agreements are less likely to sue each other at the WTO and that the estimated marginal effect of this variable is large.[220] The reluctance of FTA Members to sue each other could be because of a legitimate political commitment to, and consideration for, the FTA partner; however, it could also be the result of one-sided political pressure by a larger FTA partner against a smaller one. It is next to impossible to distinguish between these situations.

5. Fear of Political Consequences and Pressure

(i) Nature of the Alleged Constraint

Another frequently-cited constraint on dispute initiation by developing countries is fear of political pressure or retaliation from a larger and wealthier defendant. A developing country may shy away from initiating a valid complaint against a larger (developed) trading partner because it is concerned that this trading partner might impose on it some form of political costs. The defendant could react in ways outside the WTO legal framework, for instance, by withdrawing development aid (including trade preferences), interrupting FTA negotiations and

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[219] WTO Secretariat, WORLD TRADE REPORT 2011, at 176. The information in the pertinent section of the WORLD TRADE REPORT is based on a specialized dataset that was developed from databases maintained by the Legal Affairs Division and the Regional Trade Agreements unit of the WTO. The dataset includes a total of 419 requests for consultations submitted under the WT/DS document series as of 31st December 2010. *See* WTO Secretariat, WORLD TRADE REPORT 2011, at 179.

[220] Bown – *Complainants, interested parties and free riders, supra* note 34, at 307.

suspending other forms of economic and non-economic cooperation.[221] The defendant could also react *within* the WTO framework – e.g. by filing a related or unrelated dispute against the complainant. Indeed, one study has concluded that a WTO complaint increases by 55 percent the probability that the defendant will subsequently bring a complaint against the complainant.[222]

The fear of such extra-legal "retaliation" is the assumption that WTO litigation is, or could be perceived as, a hostile diplomatic act. Even though the DSU expressly states that use of the dispute settlement procedures "should not be intended or considered as contentious acts" and that "complaints and counter-complaints in regard to distinct matters should not be linked",[223] this perception nevertheless remains particularly wide-spread among smaller WTO Members without WTO litigation experience and is linked to power asymmetries. This fear might be augmented by a cultural preference for conflict resolution by non-litigious means.[224]

(ii) All WTO Disputes are Embedded in a Political Context

To permit a more nuanced discussion, it is important to keep in mind that political considerations shape not only the attitude of developing country governments to WTO litigation, but also that of developed country governments. Despite its technical character, WTO litigation is and remains government-to-government litigation. As such, it can never be free of a political dimension.[225] Developed countries will also occasionally shy away for political reasons from filing a dispute against a developing country. For instance, anecdotal oral evidence suggests that the United States' State Department has in the past, for political/military reasons, vetoed a recommendation by USTR to initiate WTO proceedings against Turkey. As another example, in 2000, the United States challenged a Brazilian patent law provision permitting compulsory licensing. During this period, public discussion about the need for low-cost anti-HIV drugs was particularly strong. Brazilian, United States and international NGOs criticized the United States complaint. The United States ultimately withdrew the

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[221] Brink, *supra* note 76, at 262-63; Guzman & Simmons, *supra* note 27, at 575.

[222] Eric Reinhardt, *Aggressive Multilateralism: The Determinants of GATT/WTO Dispute Initiation, 1948 – 1998* 1, 19 (Emory Univ. Dept of Pol. Sci. Working Paper, 2000) *available at* http://userwww.service.emory.edu/~erein/research/initiation.pdf.

[223] *See* DSU art. 3.10.

[224] This may apply even to countries that have fewer reasons than the average developing WTO Member to be concerned about political pressures. Han Liyu and Henry Gao argue that a traditional Confucianist aversion to litigation still influences the thinking of Chinese government officials, but they also believe that this attitude is changing in the context of the WTO. Liyu & Gao, *supra* note 106, at 169.

[225] Ochieng & Majanja, *supra* note 111, at 329.

complaint.[226] In fact, one of the most prolific scholars in the field of developing country litigation at the WTO, Prof. Shaffer, actively recommends developing countries to create "North-South NGO-Government Alliances", so as to put political pressure on developed country governments and counteract any extra-legal pressures.[227] Hence, the sensitivity to political pressure is not a one-way street and in some instances may work in favour of (smaller) developing countries.

Finally, political concerns for countries other than the defendant can also influence initiation decisions. For instance, Thailand is reported to have initially hesitated to initiate the *EC – Sugar* dispute because it did not want to be seen as challenging the aid given by the European Union to the ACP countries.[228]

(iii) Evidence for or against the "Political Pressure" Factor

It is very difficult to systematically examine or quantify the importance of the "political consequence" constraint. Many reported instances of political pressure and threats of extra-legal retaliation are anecdotal. There is no reliable method to identify and compare situations in which undue political pressure was exercised. There is no doubt that, as in all human affairs, extra-legal pressure will be made, especially in asymmetrical power relationships. Furthermore, decision-makers' concerns about potential political complications can prevent them from filing disputes even when these concerns do not reflect reality (for instance, because the decision-makers are inexperienced with WTO dispute settlement).

There are numerous indications that the significance of the "political pressure" or "power" factor is overestimated. For instance, the authors have calculated that 24.36 percent of all disputes initiated by developing countries were brought either against a defendant whose GDP was either smaller than or not more than twice as large as the complainant's GDP. If we accept for a moment that the ratio of complainant's to defendant's GDP is indicative of political and/or economic power, then this statistic is remarkable for two reasons: First, it shows that a significant proportion of all developing country complaints take place in a context with a low likelihood that the defendant will be able to deploy significant political or economic dissuasive pressure against the complainant. Second, conversely, it also shows that the majority of developing country complaints (more than 75 percent) are directed against significantly larger targets – not exactly something we would expect in a world of allegedly unfettered political and economic pressure by the big against the small.

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[226] *See* Shaffer et al. – *Brazil, supra* note 62, at 36.

[227] Shaffer – *Developing Country Strategies, supra* note 66. Moreover, concerns about political criticism may also mean that developed WTO members will refrain from filing complaints against LDCs or small non-LDC developing members.

[228] *See* Danvivathana, *supra* note 122, at 225.

Indeed, there are numerous WTO cases in which a small country has successfully challenged a measure of a much larger country. The much-quoted case of Antigua and Barbuda against the United States is a particularly striking example, but other cases can be quoted as well, such as Costa Rica against the United States,[229] New Zealand against the United States,[230] Peru against the European Communities,[231] and Norway against the European Communities.[232]

Comprehensive quantitative studies find only very limited evidence of a power bias in dispute initiation patterns. Already in 1999, Horn, Mavroidis and Nordström found no evidence that small countries initiate fewer disputes against large countries.[233] A more recent and comprehensive study by Guzman and Simmons in 2005 also concludes that, on the whole, small countries are *not* deterred by power-related concerns to initiate disputes against large countries. Quite to the contrary, the authors find that, while rich states sue a broad range of defendants, poorer complainants, in contrast, need to prioritize where they will focus their scarce litigation resources; the evidence is that these poorer countries target countries that have larger markets, thereby offering larger potential commercial gains.[234] In other words, because poorer countries have to pick their battles carefully, they tend to choose the defendants whose markets are large enough to provide the greatest commercial benefit from one given dispute. The authors find no evidence for the hypothesis that poor or weak countries are particularly reluctant to file against rich or powerful countries, for fear of the political consequences of a complaint.[235] The authors also refer to a 2003 study by Chad Bown, to argue that capacity and power influence a country's decision to become a *third party*, but not the decision to become a *complainant*.[236]

This is an encouraging result, although these studies by no means logically exclude the existence of power politics. For instance, it may very well be that small states bring a smaller number of cases (for political reasons); while they may overcome fears of political repercussions in *some* instances, they may not overcome that fear in many other instances. There is simply no reliable benchmark of how

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[229] Panel Report, *United States – Restrictions on Imports of Cotton and Man-Made Fibre Underwear,* WT/DS24/R (Nov. 8, 1996).

[230] Panel Report, *United States – Safeguard Measure on Imports of Fresh, Chilled or Frozen Lamb from New Zealand,* WT/DS177/R (Dec. 21, 2000).

[231] Panel Report, *European Communities – Trade Description of Sardines,* WT/DS231/R (May 29, 2002).

[232] Panel Report, *European Communities – Anti-Dumping Measure on Farmed Salmon from Norway,* WT/DS337/R (Nov. 16, 2007).

[233] Horn et al. – *Biased?*, *supra* note 32, at 2.

[234] Guzman & Simmons, *supra* note 27, at 583.

[235] *Id.* at 571.

[236] *Id.* at 564.

many cases developing countries "ought to" have initiated. Indeed, a 2005 quantitative study by Chad Bown concluded that the larger an exporter's reliance on a respondent for bilateral aid, the less likely this exporter is to file a complaint.[237] Hence, political pressure, or fears of political pressure, may be at work in at least *some* developing-developed country relationships.

At the same time, it is likely that concerns in developing country governments about potential political consequences of a WTO complaint are often exaggerated. As previously noted, government officials without knowledge of or experience in the WTO regime will tend to regard WTO litigation as a hostile act inviting an overall deterioration of relations with the target country. As experience with the system increases, this perception decreases and is replaced by the more accurate insight that WTO litigation is typically more in the nature of a technical exercise bereft of negative political connotations.[238] To recall, a Costa Rican government official has been quoted as stating, in regard to the *US – Underwear* dispute brought by Costa Rica in 1995: "If we were to bring the case today, it would be much easier because we no longer perceive adjudication as political conflict".[239]

Indeed ACWL experience indicates that concerns about political pressure are more pronounced among (potential) first-time users. More experienced users have recognized that WTO litigation is a relatively technical exercise that does not typically lead to political discomforts. These impressions are confirmed by an econometric study by Davis and Bermeo– previously noted in Part II.C.2(d)(iii) – based on data from 30 years of GATT and WTO litigation.[240] To recall, their study finds strong evidence for the hypothesis that past experience with WTO adjudication (whether as complainant or defendant) significantly increases the likelihood that a developing country will initiate disputes.[241]

Moreover, political "retaliation" or pressure will tend to reflect the political sensitivity underlying a particular subject matter. For instance, challenging the European Union's new GSP scheme or its GMO regulation might create political irritations within the European Union and may result in political pressure on the complainant to withdraw that complaint. In contrast, challenging the most recent European Union anti-dumping determination on a chemical product or steel

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[237] Bown – *Complainants, interested parties and free riders, supra* note 34, at 306-7.

[238] *See, e.g.*, Shahin, *supra* note 139, at 290 , who speaks of a "misconception of the impact of initiating a dispute on bilateral relations" and mentions the *EC – Bed Linen* case, in which Egypt chose to become only a third party, notwithstanding its direct commercial interest in the dispute. Davis & Bermeo, *supra* note 118, at 1036

[239] Quoted in Davis & Bermeo, *supra* note 118, at 1037.

[240] *Id.*

[241] Davis & Bermeo, *supra* note 118.

fasteners is rather unlikely to generate a similar political response, all the more so as many trade remedy measures tend to be domestically controversial.

In sum, the political pressure factor may be relevant in particular individual disputes and can never be entirely removed from intergovernmental relations. However, there is little evidence that, systemically speaking, developing countries do not use the system for fear of political retaliation by rich countries. Moreover, there is also evidence that developing government officials' fears of political consequences may be exaggerated, and that such fears tend to decline as experience with WTO litigation increases.

6. Cultural Factors

Some authors have argued that, in some Asian countries, deeply held convictions about and preference for non-litigious forms of dispute resolution may also render government officials more hesitant to initiate disputes.[242] It is not clear how much such cultural patterns actually matter in any given case. Such traditions might certainly feed into the reluctance to use WTO litigation when no previous experience exists, reinforcing the belief that WTO litigation is a hostile diplomatic act. However, once a government acquires experience with the regime, such preferences will – certainly over time – change, especially if the underlying commercial interests are significant enough.[243]

III. FINAL THOUGHTS

The conclusions that emerge from our analysis are as follows. First, *participation of developing countries in the WTO dispute settlement system is a reflection of a broad range of factors*. It is difficult to generalize, given the vast differences between those WTO members that are labelled as "developing". Moreover, many factors influence a government's decision to litigate, and these factors play out somewhat differently in each and every country.

Second, *participation in WTO litigation is not a goal in itself*. Being an active participant in WTO disputes is of course a healthy expression of being a participant in the global economy. Total absence of such participation can signal a problem that may warrant a multilateral response, so as to ensure sound functioning and legitimacy of the entire system. However, participation can only be (roughly) commensurate with a country's economic position in the system and the

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[242] Liyu & Gao, *supra* note 106, at 165; Danvivathana, *supra* note 122, at 221.

[243] Krisda Piampongsant, *Remarks at the 10th Anniversary conference of the ACWL*, *in* THE ACWL AT TEN – LOOKING BACK, LOOKING FORWARD 24, *available at* http://www.acwl.ch/e/documents/reports/ACWL%20 AT%20TEN.pdf.

economic stakes at issue. The mere fact that the United States has brought 98 complaints to date, in comparison to Guatemala's 8 complaints and Malawi's zero complaints, does not per se indicate that the system is biased and skewed against Guatemala's and Malawi's interests. The goal cannot be that Guatemala or Malawi bring as many cases as the United States - or that they actually bring any cases, for that matter. Rather, what is crucial is that a system exists in which, when Guatemala or Malawi find it in their interest to commence litigation at the WTO, they are not prevented from doing so for reasons that the international community finds objectionable and inequitable.

Third, *active complainants are also frequent defendants*. "Participation" of developing countries in WTO dispute settlement is by far not only about developing countries acting as complainant against developed countries. Equating "participation" of developing countries in WTO litigation with suing developed countries is wrong and not helpful. Disputes brought against developing countries are frequent, and disputes between developing countries are on the rise. Developing countries conduct extensive trade amongst themselves and enhancing their litigation capacity means making it more likely that other developing countries will end up on the defendant side. This, too, is a healthy expression of being an active, trading nation. Moreover, it will also typically be good for the defendant country. Rectifying WTO-inconsistent legislation will virtually always enhance good governance (even if this point is frequently lost in the debate.)

Fourth, the major challenges for developing countries to effectively use WTO litigation appear overwhelmingly linked to their *domestic governance*. Developing countries should therefore strengthen their bureaucracies, streamline their internal decision-making mechanisms, and reorganize institutions to create conditions favourable for coordination and communication both within the government, and between the government and the private sector. Some of the large developing countries' experience (for instance, Brazil) offer successful examples on which other countries can draw. Some multilateral assistance is possible in this context (for instance, via a recently launched ICTSD-sponsored programme), but such reforms and institutional change are first and foremost an internal matter for each country.

Fifth, governments *should actively seek to participate as third parties in WTO disputes*. This will provide them with first-hand experience of WTO litigation, which has been shown to be very significant for active participation, because it provides valuable experience and de-dramatizes perceptions of international litigation within the domestic bureaucracy. Moreover, third party participation can be an effective capacity building tool for both government officials and private lawyers, as demonstrated by Brazil, China and several other developing countries. Finally, third party participation enables developing countries to provide their points of

view to panels and the Appellate Body and help to shape case law.

Sixth, developing countries *should take advantage of the services offered by the ACWL*. The ACWL has proven to be a uniquely successful international legal aid organization, but many WTO developing countries do not take advantage of its services, largely because they lack the internal capacity to capitalize on what the ACWL can offer them. Proposals for additional legal aid mechanisms may provide some additional benefits to developing countries, but these benefits will likely be very marginal. Also, these proposals will unlikely make a difference to countries that do not already use the ACWL.

Finally, there is no doubt that the WTO dispute settlement process could be improved in many ways. However, it is unlikely that a reform of the DSU process will lead to significantly improved developing country participation and greater capacity. Especially the much-touted need to improve WTO remedies is oversold, as the evidence indicates that developing countries can participate very successfully within the system even despite their limited retaliatory power. In addition, many of the proposed solutions would very likely not be as effective in practice as is often claimed, because they would not provide additional incentives to the private sector, which is often the driving force for filing a dispute. To be sure, some reforms could be helpful and may be worth pursuing; however, given the political resistance against DSU reform – especially in areas such as remedies – developing countries should probably not spend excessive amounts of political capital and energy on this front.

IV. ANNEX

Table 1 – Ranking by total DS participation and GDP (Top 30).
WTO Members in colour appear in both rankings.
Source: WTO

Members participation in the DS			Members GDP		
RANK	WTO Member	DS Participation	RANK	Member	GDP (Million USD)
1	USA	211	1	EU	16,250,522
2	EU	155	2	USA	14,582,400
3	Canada	50	3	China	5,878,629
4	Brazil	39	4	Japan	5,497,813
5	India	39	5	Brazil	2,087,890
6	Mexico	35	6	India	1,729,010
7	Argentina	32	7	Canada	1,574,052
8	China	31	8	Mexico	1,039,662
9	Japan	29	9	Korea	1,014,483
10	Korea	29	10	Australia	924,843
11	Chile	23	11	Turkey	735,264
12	Australia	17	12	Indonesia	706,558
13	Thailand	16	13	Switzerland	523,772
14	Philippines	11	14	Saudi Arabia	434,666
15	Guatemala	10	15	Chinese Taipei	429,918
16	Turkey	10	16	Norway	414,462
17	Indonesia	9	17	Venezuela	387,852
18	Colombia	8	18	Argentina	368,712
19	Dominican Republic	7	19	South Africa	363,704
20	Honduras	7	20	Thailand	318,847
21	New Zealand	7	21	Colombia	288,189
22	Peru	7	22	Malaysia	237,804
23	Ecuador	6	23	United Arab Emirates	230,252
24	Panama	6	24	Hong Kong, China	224,458
25	Costa Rica	5	25	Singapore	222,699
26	Pakistan	5	26	Egypt	218,912
27	Egypt	4	27	Israel	217,333
28	Norway	4	28	Chile	203,443
29	Switzerland	4	29	Philippines	199,589
30	Chinese Taipei	3	30	Nigeria	193,669

Table 2 –Ranking by participation as complainant and GDP (Top 30). WTO Members in colour appear in both rankings.
Source: WTO

Members participation as Complainants			Members GDP		
RANK	WTO Member	Participation as Complainant	RANK	Member	GDP (Million USD)
1	USA	98	1	EU	16,250,522
2	EU	85	2	USA	14,582,400
3	Canada	33	3	China	5,878,629
4	Brazil	25	4	Japan	5,497,813
5	Mexico	21	5	Brazil	2,087,890
6	India	19	6	India	1,729,010
7	Argentina	15	7	Canada	1,574,052
8	Korea	15	8	Mexico	1,039,662
9	Japan	14	9	Korea	1,014,483
10	Thailand	13	10	Australia	924,843
11	Chile	10	11	Turkey	735,264
12	China	8	12	Indonesia	706,558
13	Guatemala	8	13	Switzerland	523,772
14	Australia	7	14	Saudi Arabia, Kingdom of	434,666
15	Honduras	7	15	Chinese Taipei	429,918
16	New Zealand	7	16	Norway	414,462
17	Colombia	5	17	Venezuela	387,852
18	Costa Rica	5	18	Argentina	368,712
19	Indonesia	5	19	South Africa	363,704
20	Panama	5	20	Thailand	318,847
21	Philippines	5	21	Colombia	288,189
22	Norway	4	22	Malaysia	237,804
23	Switzerland	4	23	United Arab Emirates	230,252
24	Peru	3	24	Hong Kong, China	224,458
25	Ecuador	3	25	Singapore	222,699
26	Pakistan	3	26	Egypt	218,912
27	Chinese Taipei	3	27	Israel	217,333
28	Turkey	2	28	Chile	203,443
29	Ukraine	2	29	Philippines	199,589
30	Venezuela	1	30	Nigeria	193,669

Table 3 – Ranking by participation as complainant and GDP (Top 30). WTO Members in colour appear in both rankings.

Members participation as Defendants			Members GDP		
RANK	WTO Member	Participation as Defendant	RANK	WTO Member	GDP (Million USD)
1	USA	113	1	EU	16,250,522
2	EU	70	2	USA	14,582,400
3	China	23	3	China	5,878,629
4	India	20	4	Japan	5,497,813
5	Canada	17	5	Brazil	2,087,890
6	Argentina	17	6	India	1,729,010
7	Japan	15	7	Canada	1,574,052
8	Brazil	14	8	Mexico	1,039,662
9	Mexico	14	9	Korea	1,014,483
10	Korea	14	10	Australia	924,843
11	Chile	13	11	Turkey	735,264
12	Australia	10	12	Indonesia	706,558
13	Turkey	8	13	Switzerland	523,772
14	Dominican Republic	7	14	Saudi Arabia, Kingdom of	434,666
15	Philippines	6	15	Chinese Taipei	429,918
16	Indonesia	4	16	Norway	414,462
17	Peru	4	17	Venezuela	387,852
18	Egypt	4	18	Argentina	368,712
19	Colombia	3	19	South Africa	363,704
20	Ecuador	3	20	Thailand	318,847
21	South Africa	3	21	Colombia	288,189
22	Thailand	3	22	Malaysia	237,804
23	Guatemala	2	23	United Arab Emirates	230,252
24	Pakistan	2	24	Hong Kong, China	224,458
25	Nicaragua	2	25	Singapore	222,699
26	Venezuela	2	26	Egypt	218,912
27	Trinidad and Tobago	2	27	Israel	217,333
28	Armenia	1	28	Chile	203,443
29	Croatia	1	29	Philippines	199,589
30	Malaysia	1	30	Nigeria	193,669

Table 4 – Ranking by total DS participation and GDP/ capita (Top 30). WTO Members in colour appear in both rankings.
Sources: For dispute activity: WTO; for GDP per capita: IMF, Indexmundi

Members participation in the DS			Members GDP/ capita		
RANK	WTO Member	DS Participation	RANK	WTO Member	GDP/capita
1	USA	211	1	Qatar	102,891
2	EU	155	2	Singapore	59,936
3	Canada	50	3	Norway	53,376
4	Brazil	39	4	Brunei	49,517
5	India	39	5	Hong Kong	49,342
6	Mexico	35	6	United Arab Emirates	48,597
7	Argentina	32	7	United States	48,147
8	China	31	8	Switzerland	43,508
9	Japan	29	9	Australia	40,836
10	Korea	29	10	Kuwait	40,740
11	Chile	23	11	Canada	40,457
12	Australia	17	12	Iceland	38,079
13	Thailand	16	13	Chinese Taipei	37,931
14	Philippines	11	14	Japan	34,362
15	Guatemala	10	15	Korea	31,753
16	Turkey	10	16	EU	31,548
17	Indonesia	9	17	Israel	31,004
18	Colombia	8	18	New Zealand	27,966
19	Dominican Republic	7	19	Bahrain	27,368
20	Honduras	7	20	Oman	26,272
21	New Zealand	7	21	Saudi Arabia	24,056
22	Peru	7	22	Barbados	23,624
23	Ecuador	6	23	Antigua and Barbuda	22,119
24	Panama	6	24	Trinidad and Tobago	20,301
25	Costa Rica	5	25	Croatia	18,338
26	Pakistan	5	26	Argentina	17,376
27	Egypt	4	27	Saint Kitts and Nevis	16,457
28	Norway	4	28	Botswana	16,279
29	Switzerland	4	29	Chile	16,171
30	Chinese Taipei	3	30	Gabon	16,021

Table 5 – Ranking by participation as complainants and share of global exports (Top 30). WTO Members in colour appear in both rankings.
Source: WTO

Members participation as Complainants			Share of global exports (goods)		
RANK	WTO Member	Participation as Complainant	RANK	WTO Member	Share in EXP
1	USA	98	1	EU	15.06
2	EU	85	2	China	10.36
3	Canada	33	3	USA	8.39
4	Brazil	25	4	Japan	5.05
5	Mexico	21	5	Korea	3.06
6	India	19	6	Hong Kong	2.63
7	Argentina	15	7	Canada	2.55
8	Korea	15	8	Singapore	2.31
9	Japan	14	9	Mexico	1.96
10	Thailand	13	10	Chinese Taipei	1.80
11	Chile	10	11	Saudi Arabia, Kingdom of	1.64
12	China	8	12	India	1.44
13	Guatemala	8	13	United Arab Emirates	1.44
14	Australia	7	14	Australia	1.40
15	Honduras	7	15	Brazil	1.33
16	New Zealand	7	16	Malaysia	1.30
17	Colombia	5	17	Switzerland	1.28
18	Costa Rica	5	18	Thailand	1.28
19	Indonesia	5	19	Indonesia	1.04
20	Panama	5	20	Norway	0.86
21	Philippines	5	21	Turkey	0.75
22	Norway	4	22	Nigeria	0.54
23	Switzerland	4	23	South Africa	0.54
24	Peru	3	24	Chile	0.47
25	Ecuador	3	25	Viet Nam	0.47
26	Pakistan	3	26	Argentina	0.45
27	Chinese Taipei	3	27	Kuwait	0.44
28	Turkey	2	28	Venezuela	0.43
29	Ukraine	2	29	Qatar	0.41
30	Venezuela	1	30	Israel	0.38

Table 6 – Ranking by participation as defendants and share of global imports (Top 30). WTO Members in colour appear in both rankings.
Source: WTO

Members participation as Defendants			Share of global imports (goods)		
RANK	WTO Member	Participation as Defendant	RANK	WTO Member	Share in IMP
1	USA	113	1	EU	16.54
2	EU	70	2	USA	12.78
3	China	23	3	China	9.06
4	India	20	4	Japan	4.51
5	Canada	17	5	Hong Kong, China	2.87
6	Argentina	17	6	Korea, Republic of	2.76
7	Japan	15	7	Canada	2.61
8	Brazil	14	8	India	2.12
9	Mexico	14	9	Mexico	2.02
10	Korea, Republic of	14	10	Singapore	2.02
11	Chile	13	11	Chinese Taipei	1.63
12	Australia	10	12	Australia	1.31
13	Turkey	8	13	Brazil	1.24
14	Dominican Republic	7	14	Turkey	1.20
15	Philippines	6	15	Thailand	1.18
16	Indonesia	4	16	Switzerland	1.14
17	Peru	4	17	Malaysia	1.07
18	Egypt	4	18	United Arab Emirates	1.04
19	Colombia	3	19	Indonesia	0.86
20	Ecuador	3	20	Saudi Arabia, Kingdom of	0.63
21	South Africa	3	21	South Africa	0.61
22	Thailand	3	22	Viet Nam	0.55
23	Guatemala	2	23	Norway	0.50
24	Pakistan	2	24	Israel	0.40
25	Nicaragua	2	25	Chile	0.38
26	Venezuela	2	26	Philippines	0.38
27	Trinidad and Tobago	2	27	Argentina	0.37
28	Armenia	1	28	Egypt	0.34
29	Croatia	1	29	Nigeria	0.29
30	Malaysia	1	30	Colombia	0.26