WHERE DO WTO CASES COME FROM?
The pre-litigation assessment of trade barriers
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**DRAFT**

Managing WTO Dispute Settlement at Home
A Guide for Developing Countries

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1. INTRODUCTION

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

- Anatole France, Les Lys Rouges

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

1.1. The WTO Dispute Resolution Process

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

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

1 This is the most important factor in determining whether cases are brought to the dispute mechanism and for assessing whether to bring them. Private individuals can “complain” in certain other international fora like, for example, the Inter-American Commission of Human Rights, by potentially submitting the case to the Inter-American Court of Human Rights (See Article 44 and 66 of the American Convention on Human Rights, 22 November 1969, available at http://www.cidh.oas.org/Basicos/English/Basic3.American%20Convention.htm); the European Court of Human Rights (See Article 34 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, 4 November 1950, available at http://www.echr.coe.int/NR/rdonlyres/D5CC24A7-DC13-4318-B457-5C9014916D7A/0/ENG_CONV.pdf); and the hundreds of bilateral investment treaties (BITs) with investor-state dispute mechanisms which allow private investors to sue governments for damages (See, e.g., Section B of the US 2004 Model BIT; Treaty Between the Government of the United States of America and the Government of [Country] Concerning the Encouragement and Reciprocal Protection of Investment, available at http://www.state.gov/documents/organization/117601.pdf). While a full discussion of the pros and cons of this limitation are beyond this Chapter, its importance as a factor “conditioning” the entire WTO dispute mechanism cannot be overstated.
While the respondent can “block” the complainant’s first post-consultations request for a Panel (this is a vestige of former GATT practice), the complainant can file a second request a month or two later, which cannot be blocked. Once the Panel is formally established, the two parties and the WTO Secretariat, according to DSU Article 8, discuss possible Panel members. However, the complainant, at any time 20 days after the establishment of the Panel, can have the Director-General name the panellists if no agreement has been reached per DSU Article 8.7. Once the panellists are named, activity moves very fast. Most panels have two hearings and at least two major briefs. Parties are required to give long written replies to literally hundreds of questions from the Panel, all within the short panel proceeding period of 6-9 months – as set out in Article 12.8 of the DSU. It is a very intense process, which explains why even countries with significant WTO expertise often hire outside counsel to help. In many countries, officials with WTO expertise cannot devote themselves entirely to the work at the panel stage, yet the speed of the proceedings and the increasing length of the written submissions require the dedication of much time.

Normally, after 6-12 months, the Panel, according to Article 15 of the DSU, issues an Interim Decision to the two parties who then review and comment on the findings (these comments rarely change the outcome). The final Panel report is then circulated among all Members and released publicly, and both parties have the right to appeal before the Dispute Settlement Body adopts the Panel report. No clear deadline is specified in the DSU for filing an appeal, but the adoption of a Panel report should happen between day 20 and 60 after the circulation of the Panel report, so this period becomes the appeal deadline. ²

The Appellate Body – according to DSU Article 17.5 – is expected to rule within a maximum of 90 days. However, some cases cannot be finished in that short time period, due to the high complexity of the case and or simply backlogs of translation. After the circulation of the Appellate Body report, the case is far from being finalized. A victorious complainant must expect further work during the compliance stage, either through informal negotiations regarding the compliance with the ruling or in a series of arbitrations under Articles 21.5 and 22.6 of the DSU.

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

² In practice, there is some flexibility. For example, recently, the DSB granted a grace period to the US and Mexico (after a mutual agreement) to decide on the appeal of the report in US—Tuna II (See DS381, available at http://www.wto.org/english/news_e/news11_e/dsb_11nov11_e.htm).
1.2. **What Pre-litigation Assessment is Legally Required?**

Nothing in the DSU requires a legal or economic assessment before bringing a dispute. The DSU limits standing to Members and, accordingly, asks a complaining Member, in DSU Article 3.7, to “exercise its judgment as to whether action under these procedures would be fruitful.” In WTO jurisprudence, this has been understood as conferring a broad discretion to the WTO Member as to whether to bring a dispute or not. The Appellate Body in EC – Bananas III and Mexico – HFCS DSU 21.5 Recourse affirmed the “self-regulatory decision” a Member makes according to DSU Article 3.7.3. Thus, there is no requirement to legally or economically prepare the case before initiating a dispute. Moreover, the very low threshold the Appellate Body has set for standing in a WTO dispute might suggest that no economic assessment is necessary before a claim is brought. For standing in a dispute, even in highly economic matters such as differences in tax treatment – e.g. in the liquor tax cases4 – actual economic loss need not to be proven. In EC – Bananas, the Appellate Body referred to a “potential export interest” as sufficient for bringing a complaint.5 The WTO DSU leaves it up to the Members to what extent they want to assess trade barriers before bringing a complaint. In practice though, the Members usually conduct a thorough analysis before bringing a trade measure to dispute settlement in Geneva. No government wants to lose face in the international trade community and gain a reputation for using the dispute settlement system without grounds.

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

1.3. **The Complaints**

In the 427 complaints that have been filed with the WTO Dispute Settlement Body as of November 12, 2011, several different categories of complaints can be discerned. This chapter will determine categories according to the place where the complainant’s industry suffers loss because of the trade barrier.

1.4. **What Harm is Needed?**

The vast majority of WTO complaints are the result of private economic actors asking their governments to deal with problems in export markets – Brazilian cotton producers complaining of US cotton subsidies, Bangladeshi battery makers complaining about India’s antidumping duty, Chiquita banana (and many other banana producers in banana-exporting countries) complaining about the EU banana regime, Boeing complaining about Airbus and Airbus complaining about

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

Boeing (involving third country markets), and so on. This is unsurprising. While there are cases without such direct, pressing economic loss in export markets (as described in further detail in section 3 below), the cases of direct economic loss are the most likely to be given priority by governments. Given the effort and costs related to litigating a WTO case, it is logical that a case must be worth being fought.6

The most frequent complaint is about economic loss in the market of the complained-of Member. Thus, the first completed WTO case was a complaint by Brazil and Venezuela against denial of access of their exports to the US market7 and one of the first GATT cases was by Chile complaining about the nullification and impairment of market access for Chilean fertilizer in Australia.8

Increased globalization has resulted in an increasing number of cases complaining about loss of exports to third countries (i.e., other than the respondent), such as the Brazil/Canada Aircraft and US/Europe Aircraft cases.9 In theory, Brazil’s complaint about US cotton subsidies would have applied to US exports of cotton to Brazil, and to Brazilian cotton exports to the US, but the focus was on Brazil’s exports to third countries.10 There are rumours of a possible complaint against China’s export credit subsidies, which might cause (adverse) effects both to sales into the complainants’ home market and into third country export markets.

Finally, there are the much rarer cases with complaints about loss of market in the complaining Member’s market. In EC – Aircraft (DS316), the Appellate Body – reversing a panel’s interpretation – found that several EU Member states’ contracts conveyed subsidies but not export subsidies, thus potentially affecting the complaining Member’s (i.e., the US) market as well as the respondent’s market.11 On the other hand, issues involving exports of goods from the respondent to the complainant may well be handled through national trade remedies, such as antidumping duties, countervailing duties or safeguards.

Even where there are only small economic interests at stake, the WTO dispute mechanism has nonetheless served as a mechanism for clearing out long-standing disputes. Peru’s dispute with the EU over the nomenclature for scallops involved an economically small barrier (though important to one industry), and is a good example of an issue that could have stayed on the bilateral agenda for a very long time, because it was not big enough to rise to the top of the agenda and require a solution by heads of government, nor small enough to drop off the agenda. As a result, it was discussed for years by Peruvian and EC officials, but with no resolution, until Peru brought a complaint and won a panel. The Panel Report was so scathing that the EU settled

6 The costs and especially efforts are still high for those Members with in-house WTO experts (See section 2). As this chapter will show, there might be other than purely economic reasons for pursuing a case or defense (See section 3).
7 United States – Standards for Reformulated and Conventional Gasoline (DS2, DS4).
8 Australia – Subsidy on ammonium sulphate (BISD II/188).
9 Brazil – Export Financing Programme for Aircraft (DS46); European Communities – Measures Affecting Trade in Large Civil Aircraft (DS316, DS347)/ United States – Measures Affecting Trade in Large Civil Aircraft (DS317, DS353).
10 United States – Subsidies on Upland Cotton (DS267).
11 Appellate Body Report, European Communities – Measures Affecting Trade in Large Civil Aircraft, WT/DS316/AB/R.
the case with a proviso that the report never be published. What has been published is a four-page report with no substantial content that only refers to a mutually agreed solution, with which the parties settled the dispute after the interim report was circulated and notified the Panel according to Article 12.7 DSU.\(^\text{12}\)

### 1.5. Other Reasons for Filing a Complaint

Few, if any, cases seem to have been filed purely in anticipation of future economic harm.\(^\text{13}\) There is nothing in the DSU discussing the possibility of bringing a case on the basis of anticipated economic harm. Even if it is technically possible to bring cases about future harm, WTO Member governments—the only entities able to bring cases—may focus on cases of actual harm. This must be the result, at least in part, of a pre-filing process of review of possible cases within each WTO Member government.

A more subtle issue is cases designed to send signals, even where the economic impact is small. The *EU–Beef Hormones* case was brought by the US and Canada even though the maximum amount of beef they could sell in Europe, because of a Uruguay Round quota negotiation, was 11,500 tons—well under half of one percent of the EU market at the time. Thus, even when the US and Canada won, they could not increase sales very much.\(^\text{14}\) However, the case was brought more to send the signal to much larger markets such as Japan and Mexico, and neither of those markets followed the EU path of growth hormones regulation.

With states as the only permitted WTO claimants, it would seem inevitable that WTO dispute settlement would see “political cases.” Although some cases seem to have been brought for reasons mainly of domestic politics—the US brought *China – Windmills* at the behest of the United Steelworkers’ Union which was an early supporter of President Obama—it would seem that no purely political case lacking economic stakes involved has been filed.\(^\text{15}\) At the domestic level, the US so far has decided against an investigation of the exchange rate of the renminbi in either a WTO subsidy or a countervailing duty case (that CVD decision has been challenged in court). While cases normally have economic goals, they can have political ones at the same time. For example, the *U.S – Cotton* case was brought by Brazil at the behest of its cotton industry as well as it’s the country’s general agricultural association. A successful public relations campaign by civil society, Oxfam in particular, about the negative effects of US cotton subsidies on poor West African cotton farmers played a large role (those countries joined as third parties to Brazil’s complaint).\(^\text{16}\)

In *EU – Seizure of Drugs in Transit*, both India and Brazil had generic producers with Brazil also being a purchaser, yet both also had political reasons to embarrass a developed country on

\(^{12}\) Panel Report, European Communities – Trade Description of Scallops, WT/DS12/R. WT/DS14/R, p. 3, the Mutually Agreed Solution is published as well, WT/DS12/12, WT/DS14/11.

\(^{13}\) It is worth noting that WTO Agreements permit national trade remedy cases based on “threat of injury” – GATT Article VI:1, ADA Article 3.7 and ASCM Article 15.7.

\(^{14}\) European Communities – Measures Concerning Meat and Meat Products (Hormones) (DS26, DS48).

\(^{15}\) China – Measures concerning wind power equipment (DS419).

\(^{16}\) United States – Subsidies on Upland Cotton, supra note 10.
Another example falling in this category is EU–Seals. Canada’s direct economic loss in this case was quite small, but it had political capital to gain from standing up for traditional fishing villages in Newfoundland and for Native American First Nations, which have traditionally hunted seals because they eat large amounts of fish.

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

Notably, non-Chinese multinationals – including those from developing countries – are known to be reluctant to publicly attack China. China is or will be the world’s largest single market for many of the goods and services offered by those companies, and being a top supplier in China may well be viewed as essential to corporate survival. Thus, a Chinese denial of market access for imports may be irritating, but not enough to provoke an open fight. As a result, many cases are never filed by the US and EU, even though they could win them. In 2010, USTR reports Chinese trade barriers to US industry in almost 60 categories ranging from trade in goods, services, investment and IPR protection but only 8 of those listed have been subject of WTO cases against China.

Regardless of the impetus for a bringing a dispute, one can identify three major pillars that pre-litigation assessment should be built on, and each will be discussed in the following sections. In the authors’ experience, which has been confirmed in a number of interviews with expert officials of the most active WTO dispute litigants, the extent and importance of each pillar vary from case to case. While almost all cases are based on economic loss, some cases are brought where the economic loss is quite small but the domestic political sensitivity or systemic importance high. This study will start with the legal assessment of a complaint, continue with

17 European Union – Seizure of Drugs in Transit (DS408, DS409).
18 European Communities – Certain Measures Prohibiting the Importation and Marketing of Seal Products (DS369, DS400, DS401).
19 United States – Tax Treatment for “Foreign Sales Corporations” (DS108).
20 European Communities – Selected Customs Matters (DS315).
23 See, e.g., European Communities – Seals, supra note 18; European Communities – Measures Affecting Asbestos and Products Containing Asbestos (DS135); US – United States – Section 110(5) of US Copyright Act (DS160),
an economic assessment and finish with the possible strategic assessment before bringing a dispute. It will also describe certain Members’ national codified administrative procedures for the private sector to bring cases to the attention and assessment of the WTO Member government and finally frame recommendations for WTO litigants to improve their internal pre-litigation assessment of trade barriers in order to gain a stronger position in the litigation.

2. LEGAL ASSESSMENT

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

2.1. Who Prepares the Legal Assessment?

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

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

An example of a mechanism in a developing country that is in part similar to USTR’s

“Irish Music”; European Communities – Selected Customs Matters, supra note 20.
24 Colombia – Indicative Prices and Restrictions on Ports of Entry (DS366).
cooperation with outside counsel but very different with respect to the funding and accessibility of WTO litigation is Brazil. A small office of highly sophisticated WTO experts in the Foreign Ministry, many with experience in Brazil’s mission to the WTO in Geneva, manages the cases. However, cases are usually brought only if the local industry agrees to pay for outside counsel to help.\(^{26}\) The outside counsel may provide research and submission drafting support but the office in Itamaraty remains in charge.\(^{27}\) The difference between both models of litigation management became clearly visible in the Brazilian Cotton Case, where unlike the Brazilian counterpart, the US cotton industry did not pay for a large legal support effort. Consequently, USTR was outnumbered by the Brazilian officials as well as US lawyers and US academics all working on the side of Brazil.\(^{28}\) The US might have lost the case even with more resources, the example underlines the ability of some developing countries to use the WTO dispute settlement process on an equal (or better) footing with larger WTO Members.\(^{29}\)

With these examples, it becomes apparent that for poorer developing countries, WTO litigation involves at least two challenges of legal expertise and funding. Because of these factors, WTO Members established the Advisory Center on WTO Law (ACWL), which advises developing countries in WTO disputes from the consultations to the Appellate stage. The role of the ACWL will be discussed in section 2.3.

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

### 2.2. The Nature of the Legal Assessment

Typically, the pre-filing legal assessment will discuss the likelihood of winning the Panel and the Appellate Body proceedings. The assessment usually encompasses a detailed legal analysis, examining all relevant WTO obligations. Moreover, a Member might also consider various strategic and tactical questions of how to handle the case. For example, a memorandum might embrace considerations of which line of argumentation appears to be the most successful, and whether some arguments should better be used as a “last resort” strategy.

A further important consideration, where appropriate, might be the question of the choice of forum. In some circumstances it might be worth contemplating a claim under a different bilateral or regional trade agreement. For example anti-dumping or countervailing duty cases might be brought under Chapter 19 of NAFTA.\(^{30}\) It is also noteworthy that not all Members include this

\(^{26}\) The government has paid for participation in defensive cases, and there are rumors that someone (the Government perhaps) had to make up for a shortfall in one industry-funded complaint.


\(^{29}\) Nevertheless, in this context it should be stressed that the ability depends on the financial strength and willingness of the local industry funding the cases and cannot be applied by all industries in Brazil and all developing countries. This view has been confirmed by a number of experienced trade lawyers in interviews.

\(^{30}\) North American Free Trade Agreement, 32 I.L.M. 289 and 605 (1993), available at http://www.nafta-sec-
question in their legal assessment of a potential trade barrier. For example, the EU reportedly
does not usually consider its Free Trade Agreements as forum for bringing a trade dispute. This
is different for trade in other regions. One of the most recent examples for a country to
contemplate a regional forum might be the WTO case *Thailand – Cigarettes*. The Philippines
had thought about bringing the complaint under the ASEAN Free Trade Area agreement (AFTA)
but then rejected the idea since AFTA’s dispute settlement mechanism is not considered
efficient.

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

The legal assessment may also address the question of how the Member will “win” compliance.
Some practitioners involved in trade disputes disagree. In their view, such an analysis already
anticipates a failure of the losing respondent to comply with the decision of the Dispute
Settlement Body, although also in their experience most of the Members comply and this
consideration should not be part of the legal analysis. The EU Commission only takes the
compliance stage into its pre-litigation considerations if a negative record of compliance or other
signals prompt it. In most cases, it assumes good faith and expects the respondents to comply.
Typically, the legal assessment will also include an analysis of the areas of vulnerability for the
complaining Member. Some countries are clearly willing to proceed in the presence of risks as
demonstrated by the US in *EC – Aircraft* and Canada in *Brazil – Aircraft*, given the reality of
likely counter-cases. Noteworthy in this context was the US failure to protect its exporters in

__References__

31 Telephone interview with an EU official. One possible reason is that the EU has not made use of its FTA Dispute
Settlement Mechanism, which it has introduced relatively late.
32 *Thailand – Customs and Fiscal Measures on Cigarettes from the Philippines (DS371).*
33 For further recommendations with regard to the different dispute for a, see “Forum Selection in Trade Litigation”
by Arthur Appleton in this guide.
34 *European Communities – Measures Affecting Trade in Large Civil Aircraft and the following disputes (DS316,
DS317, DS347, DS353) supra note 9.*
35 For a further discussion on alternatives to formal WTO Dispute Settlement, see “How to Successfully Manage
Conflicts and prevent Dispute Adjudication in International Trade” by Robert Echandi in this guide.
36 Email from EU Commission Directorate General trade official.
37 *European Communities – Measures Affecting Trade in Large Civil Aircraft, supra note 9; Brazil – Export
antidumping and countervailing duty cases overseas until quite recently, with only three cases (out of 228 cases against US exports) filed prior to 2010 in Canada – Grain Corn, Mexico – HFCS \(^{38}\) and Mexico – Anti-Dumping Measures on Rice.\(^{39}\) In light of the long history of the US defending its own trade remedy practices, those cases were only brought as a result of strong political pressure. For example, Mexico – HFCS was demanded by a 96 to 0 vote in the US Senate. However, a complainant might be well advised to consider its own domestic trade regime with respect to the complaint barrier. Being vulnerable to the same or a similar complaint considerably weakens the argumentation and easily prompts a counter-complaint.

Finally, countries vary in the degree of certainty of “victory” which is necessary to initiate a case. The US, for example, will not file a case unless it is virtually certain of winning. In the experience of the authors, consultations according to Article 4 of the DSU will not be requested unless the US is at least 90 percent confident to win. The painful exception is the complaint in Japan – Photofilm,\(^{40}\) widely viewed as filed as a result of Kodak’s heavy lobbying campaign in Washington since USTR had reservations about the chances of success.\(^{41}\) Doubts about a successful litigation later materialized as the Panel ruled in favour of the Japanese practice regarding imported photo film and paper, but with very useful language for the US on nullification and impairment.\(^{42}\)

Other WTO Members seem willing to file cases with slightly less chances of success. According to an official in the EU Commission’s Directorate General Trade, the EU brings a case before the Dispute Settlement Body when it is convinced that the chance of winning is higher than 75 percent, such as 80 or 85 percent.\(^{43}\)

The exact degree of certainty of a victory to file a complaint depends on what objective the Member pursues with litigating cases. If the only goal is abolishing the trade barrier, a high chance of winning seems inevitable. If the Member pursues the broader goal of litigating issues that are systemically important, it may well venture a dispute it is less certain to win. A Member thinking about going to formal WTO dispute settlement will clearly factor its chances of a successful outcome into the legal assessment and general cost-and-benefit analysis of initiating the case.\(^{44}\)

Evidence is another important prong for the preparation of a WTO case. The question of whether a potential Panel will be convinced by the evidence presented plays an important role in the

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\(^{38}\) Financing Programme for Aircraft, (DS46); the counterclaims were United States – Measures Affecting Trade in Large Civil Aircraft (DS317) and Canada – Measures Affecting the Export of Civilian Aircraft (DS70, DS71).

\(^{39}\) Mexico – Provisional Anti-Dumping and Countervailing Duties on Grain Corning from the United States (DS338); Mexico – Anti-Dumping Investigation of High-Fructose Corn Syrup (HFCS) from the United States, supra note 3.

\(^{40}\) Mexico – Definitive Anti-Dumping Measures on Beef and Rice (DS295).


\(^{42}\) Panel Report, Japan – Measures Affecting Consumer Photographic Film and Paper, WT/DS44/R.

\(^{43}\) Email from EU Commission Directorate General Trade official.

\(^{44}\) The cost-benefit-analysis will be described in more detail in section 2.3.
assessment of the trade barrier or chance of winning the case.\footnote{The role of evidence the WTO dispute settlement has already filled chapters and books – this study will only give a very brief overview of possible documents usually used as evidence in WTO disputes. (See Andersen, S., “Administration of evidence in WTO dispute settlement proceedings,” in Yerxa, R. H. & Wilson, S. B. (eds). \textit{Key Issues of WTO Dispute Settlement: the first 10 years} (2005) World Trade Organization (focusing on fact intensive cases).} One can think of numerous pieces of evidence, but their usefulness or necessity depends on the circumstances of the given case and its underlying legal argumentation. Generally, a complaining Member will present all useful and accessible evidence. Usually, it has collected parts of it already throughout the trade barrier investigation, either by itself or through cooperation with the private sector. The respondent likewise will present all evidence that is necessary in its view to defend the WTO consistency of its measure. Generally, Members involved in disputes use all information obtained during consultations (formal as well as informal) and in WTO committees. These are reflected either in documents – such as questionnaires or protocols – or official WTO documents – such as the TPRM reports, reports of the various committees like TBT or SPS committee reports, domestic reports such as the “National Trade Estimate Report on Foreign Trade Barriers” in the US or the EU equivalent “Trade and Investment Barrier Reports” in the EU. For example, in the recent dispute Philippines – Distilled Spirits, the complainants presented official statistics regarding the market share of the different distilled spirits that were initially prepared and published by the Philippine Department of Agriculture with regard to its GATT Article III:2 claim. They also relied on reports regarding consumer tastes and behaviour as well as a study on cross-price elasticity in the Philippines liquor market.\footnote{Philippines – Taxes on Distilled Spirit, \textit{supra} note 4.}

In addition, a complainant Member will ideally present all relevant official and unofficial declarations and announcements of the responding Member’s officials, official statistics and, of course, any relevant drafting history regarding the measure. Most striking with respect to public announcements and the assessment of evidence by a Panel is probably the report in \textit{EC – Approval and Marketing of Biotech Products}.\footnote{European Communities – Measures Affecting the Approval and Marketing of Biotech Products (DS291, DS292, DS293).} To determine whether the EC applied a “de facto moratorium” to suspend the approval of GMO and GMO-containing products, the Panel examined numerous documents and public announcements of EC officials, including an official speech by the then EU-Commissioners for Trade, in which he referred to such a “moratorium.”\footnote{Panel report, \textit{European Communities – Measures Affecting the Approval and Marketing of Biotech Products}, WT/DS/ 291/R, WT/DS292/R, WT/DS293/R, ¶ 7.527 (the entire examination ranges ¶¶ 7.438- 7.1285).}

What are probably the most complex issues regarding evidence in WTO disputes occur in the context of complaints against SPS measures based on scientific evidence. A prominent example is the \textit{EC – Beef Hormones} dispute. The EC contended that the ban of growth hormones was based on a sufficient risk assessment and risk management as set out in SPS Article 5 through different scientific reports, public scientific conferences and symposia as well as studies, articles and opinions by scientific experts.\footnote{See \textit{European Communities – Hormones, \textit{supra} note 14.}} The complainant US had similarly copious evidence. The Panel and the Appellate Body were not convinced that the measure was consistent with the obligations under SPS Article 5. The Appellate Body clearly stated that the EC had not conducted a risk assessment that supported the import ban of growth hormone-fed beef.
products. Respondents and – even more so – complainants are well advised to gather evidence from early on in their examination of the trade barrier and conduct the legal assessment clearly in light of the available evidence.

2.3. The Third Party Option

Another frequent topic of the legal assessment is whether to become a third party in a case brought by another Member, or instead to file one’s own “copycat” complaint and join it to the original case. Typically a Member joins as a third party when it has a relatively weak trade interest in the dispute. In Brazil – Aircraft, the EU had only a small trade interest because only one Member state, Germany, was negatively affected. 51

Besides the benefits from being a third party to a dispute, there may also be disadvantages. The most striking two benefits are that it is more cost-friendly since the parties typically conduct the extensive legal analysis, and also that the third party benefits from the removal of the trade barrier when the claim is successful. The caveat of not joining the complaint as a party is that the Member will not be able to appeal or retaliate against the unsuccessful respondent. Retaliation, in some circumstances, can be desirable for the Member to pursue its trade interests. This downside is best illustrated by the dispute US – Cotton where four West African countries received what appears to be bad advice (at least in retrospect) when they decided to become third parties with Brazil rather than to file their own cases. 52 This left the four West African countries not only without rights to appeal by themselves, but also without rights to compensation at the end of the case. Brazil, a quite wealthy country in many respects, now gets $170 million a year from the US to avoid retaliation while the four much poorer West African countries get nothing. 53

Nevertheless, the third party route also presents an instructional value. In this respect, the dispute settlement mechanism has recently seen an interesting dynamic. Many newly acceded WTO Members or those that have not previously had a strong interest in dispute settlement start their engagement with a third party case. The paradigm example is China which was a third party in nine panels before its first Request for the Establishment of a Panel. Furthermore, in its first Panel, China was part of a very comfortable group of 8 Members challenging the US steel safeguard, and it was joined by seven more Members as third parties. 54 China then followed this initial period with another 57 cases in which it was a third party before finally filing its first solo WTO case in September 2008 in United States – Anti-Dumping and Countervailing Duties. 55 Clearly third party submissions might serve as training ground for new staff.

2.4. Recommendations

In light of the above discussion, the following recommendations might be helpful for developing

51 Brazil – Aircraft, supra note 36.
52 United States – Subsidies on Upland Cotton, supra note 10.
53 The US is now offering $16 million, in an apparent bidding war with China, which is offering $20 million.
54 United States – Definitive Safeguard Measures on Imports of Certain Steel products (DS252).
55 United States – Definitive Anti-Dumping and Countervailing Duties on Certain Products from China (DS379).
countries dealing with the preparation of cases for WTO litigation and decisions whether to bring them:

- The first task for a developing country WTO Member in preparation for WTO litigation is to become familiar with the process before any litigation occurs. As of this writing, a total of 35 developing countries have participated as Parties in WTO litigation, and many more have been third parties. That number includes Bangladesh, the only least developed country to bring a dispute. 175 cases have been brought by developing countries representing 40.98% of the total 427 cases at the time of this writing. Consequently, it is likely that any given developing country is likely to be involved in WTO litigation at some point. Although many developing countries do not have the resources available to make elaborate preparations, certain steps can be taken without massive expense.

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

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

- Create in-house WTO expertise. Most, although not all, developing countries have a mission in Geneva with people assigned to the WTO. Monitoring the daily functioning of the WTO, with its numerous committee meetings, as well as observing litigation as a third party, should be part of the mission’s responsibility. And equally important, delegates who have served in those roles in Geneva should remain involved with WTO issues when they are posted back home. Often, there are bureaucratic obstacles – such as if the mission is part of the foreign ministry – to keeping people on WTO assignments, but a conscious attempt should be made to track people who have served in the mission to the WTO and recapture them from time to time in their career so the expertise is not lost. In addition, many developing countries have students in programs such as the World Trade Institute at the University of Berne or at universities such as Georgetown University Law Center, Columbia Law, National University of Singapore, Cambridge and Geneva and many others. Many of those students would be very valuable as interns in a country’s mission to the WTO in Geneva, or working in related offices in the capitols. Efforts could be made to seek those people out, or at least welcome them when they apply.

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

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56 India – Anti-Dumping Measure on Batteries from Bangladesh (DS306).
57 Including China. (See the chronological list of disputes cases on the WTO website, available at http://www.wto.org/english/tratop_e/dispu_e/dispu_status_e.htm).
Establish a central office to handle the legal analysis for each case. This will not only assure consistency of analysis – and thus avoid politically embarrassing contradictions – but it will also serve as a training centre, and people from this office can be rotated after three-four years to other offices where WTO expertise is relevant. This office could be part of the same office as the central inquiry point referred to above. The size and nature of the legal analysis office will vary with the resources available and, most importantly, the anticipated number of cases. Countries such as China, the EU, and the US, and to some extent Canada and Brazil, can anticipate being in numerous cases at any one time. This is also true for countries that are also members of regional trade agreements with active dispute settlement mechanisms. Those with enough anticipated cases to handle the complete litigation of at least some of those cases “in-house.” At the other end of the spectrum, a smaller country with less money and less case volume might not be able to justify even a single full-time employee for this office. Even having one person with some legal background or legal training perform this function, even along with other functions, and using the opportunity to train different people in sequence, means that the government will soon have three or four people with useful knowledge of WTO law and litigation at different places in the government.

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

It is crucial to subject the legal analysis to second opinion(s). It is better to find any flaws before the other party or a panel points them out.

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

The legal opinion needs to be vetted on an inter-ministry basis. Because many WTO obligations are “inside the border,” they may well affect actions by ministries, which normally pay no attention to WTO issues. A government needs to know if the legal position it takes in one case would have an adverse effect on measures taken by other ministries.58

58 Section 5.1 describes the inter-agency cooperation in the US and the EU.
2.5. The Defensive Case: A Respondent’s Legal Analysis

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

Reputation. A responding WTO Member might consider the effect of the case and litigation on its reputation more than a complainant does. The most important concern is that given a potential infringement of WTO law, one does not wish to get a reputation for overt or deliberate non-compliance with WTO rules. Thus, giving up as a respondent too quickly and without any rebutting of the complaining Members’ arguments, especially if the non-compliance is too obvious, can create a bad reputation. Moreover, a WTO Member should try to avoid a reputation for giving up on a case as soon as challenged, since this might simply invite more challenges. However, on the other hand, a Member will not want to defend its inconsistent measure for too long, since pursuing an already lost case for many Members involves an unnecessary cost burden. 59 This entails very intricate and at the same time essential considerations that require a careful weighing and balancing of the factors.

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

3. ECONOMIC ASSESSMENT

The “economic assessment” done before filing a WTO can be divided into three categories which have considerable overlap. 60

First, certain cases require a fairly sophisticated economic analysis in order to determine if there is a chance of success. “Adverse effects” subsidies cases under Articles 5-7 of the ASCM, and

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59 Further details about the cost will be discussed in the following section 2.3.
60 This chapter does not deal with the economic assessment in trade remedy cases. WTO challenges to trade remedies often involve a great deal of economic analysis such as the amount of dumping or subsidies, the determination of injury or causation, but according to ADA Art. 17.6 (i), WTO reviews are limited to the record of the cases, so the WTO Member government considering (or defending) a case can only rely on analyses done in the underlying national cases and so does not conduct any additional economic assessment of the case.
many cases on the Agreement on Agriculture, require an economic component, so, in these scenarios, analysis must be done before the case is filed.\textsuperscript{61} Similarly, the AB decision in the \textit{Japan – Liquor} Tax case seems to invite duelling economic tests of “like” or “directly competitive and substitutable products” under GATT Article III:2 Sentence 1 and 2 (such as through price elasticity).\textsuperscript{62} Later, in the \textit{Korea – Alcohol} case, the Appellate Body stated that an economic analysis is not required. It confirmed the Panel that a quantitative analysis should not exclusively determine if the spirits are in a competitive or substitutable relationship.\textsuperscript{63} Nevertheless litigants in subsequent cases like \textit{Philippines – Distilled Spirits} arranged such economic assessments before the case began.\textsuperscript{64}

A second type of economic analysis, and the type most frequently completed, is a cost-benefit analysis. This highlights the problems for small and especially developing countries. Even though the AWCL provides legal services at quite low rates for the poorer developing countries (as discussed further in section 2.3) richer countries are inevitably advantaged over poor countries in their ability to muster the necessary resources for WTO dispute resolution. This disparity is exacerbated by size in the WTO. The US, EU, China, and Canada all have decided that they are likely to be in enough cases at any one time to justify hiring full-time WTO experts on staff. To bring a case (or, for that matter, to defend one), their first question is not “how will we pay for it?” In effect, the cost of bringing or defending cases for those large countries is a fixed cost. By contrast, smaller countries cannot rationally keep a large staff of WTO lawyers,\textsuperscript{65} so if a case comes up, money must be found on an ad hoc basis. In effect, the cost becomes a marginal cost. Even worse, for a small poor country, there is less likelihood that they will be able to raise the money easily than for a large rich country. Thus, the cost-benefit calculation becomes very different for big rich countries than small poor countries.\textsuperscript{66}

In practice, big developed countries do very little sophisticated economic analysis before bringing cases that do not require such analysis. Usually the “benefit” in the analysis is calculated by looking at the lost actual or potential sales caused by the alleged WTO-inconsistent trade barrier, typically in consultation with that government’s private economic actors seeking the case. As noted above, those governments often have no cash costs involved – even smaller developed countries have enough staff to do the work in-house, sometimes with outside consulting on a relatively low-cost basis. The real “cost-benefit” test is often done by the private sector interests, as they decide whether it is worth the money to provide the necessary legal and economic resources to assist their government in prosecuting or defending a case. Again, this is

\textsuperscript{61} See, e.g., Chile – Price Band System and Safeguard Measures Relating to Certain Agricultural Products (DS207).
\textsuperscript{62} Appellate Body Report, Japan – Taxes on Alcoholic Beverages, WT/DS8/10/11/AB, p. 25.
\textsuperscript{63} Appellate Body Report, Korea – Taxes on Alcoholic Beverages, WT/DS75/84/R, ¶¶ 109, 133.
\textsuperscript{64} Philippines – Distilled Spirits, supra note 10.
\textsuperscript{65} Pornchai Danvivathana notes that even a large fairly advanced developing country such as Thailand was only involved in 13 cases from 1995 to 2004 and that includes several cases as third party. (Danvivathana, P., “Thailand’s experience in the WTO dispute settlement system: challenging the EC Sugar regime” in Shaffer, G. & Meléndez-Ortiz, R., supra note 27, p 214.
\textsuperscript{66} Shaffer and Trachtman suggest that the Appellate Body’s balancing test, such as in Brazil – Tyres (DS332), favors “Large and wealthy states who are repeat players in WTO litigation” over “smaller and poorer ones.” Shaffer, G. & Trachtman, J., “Interpretation and Institutional Choice at the WTO”, 52 Va. J. of Int’l Law 103, 144 (Fall 2011). They also suggest that market-based competition between allegedly “like” products with voluntary labeling and advertising, rather than the Appellate Body’s deference to (large) national authorities’ PPM distinctions (Id. at 152).
usually not a sophisticated economic model, but rather a vote by a board of directors or executive committee or a decision by a general counsel whether to spend a certain amount of money and to budget for it (or, frequently, make a special assessment to members of the association). There may be no formal measurements at all of the benefits – each company has its own internal estimate of how much it is losing because of the trade barrier, and votes accordingly. The same is true in developing countries that follow the Brazilian model of having the affected private industry normally pay for legal services.

The third common form of “economic assessment” for developing countries is “where can we get the resources?” The difficulties of assembling the resources necessary to mount a WTO case are so daunting that most developing countries have never brought a case. Those resources include not just the legal resources to analyze the trade barrier and ascertain if there is a legally convincing case, but also the infrastructure necessary – or thought to be necessary – to bring the case. These include a mission in Geneva which can make the formal notifications and filings and coordinate with ACWL or a law firm; a small but knowledgeable cadre of people with WTO expertise in the relevant ministry in the capitol; links to the private sector to educate it and to get information from it; and so on. These resources, which are pre-existing and already established in many developed and advanced developing countries (Brazil is a good example, with a carefully chosen and trained staff of WTO experts, an active core of high quality professionals in the Geneva mission and pre-established trade associations in Brazil67) must often be created on an ad hoc basis for any given case in a smaller country with less frequent exposure to WTO cases. Perversely and precisely because the entire infrastructure must be created on a one-time basis, it is more costly for a small developing country than for a large developed country to generate funding for a single case. To some extent, this is a problem of development beyond the reach of the WTO institutions, but on the other hand, the credibility and legitimacy of the institution depends on having all of its members able to take advantage of/use its facilities, and the empirical data are that this does not occur at present.

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

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

There is no legal requirement of an economic impact analysis before a case is brought. As pointed out already in the introduction, the WTO Dispute Settlement Mechanism employs a relatively low threshold for a case to be admissible. Various Panels and the Appellate Body have noted that the WTO Agreement does not set out any specific requirements for a right to bring a claim.68 Article 3.7 of the DSU permits the Member to assess whether a complaint is fruitful.69 In

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67 See section 1.1 above.
69 Article 3.7 of the DSU reads, “Before bringing a case, a Member shall exercise its judgement as to whether action under these procedures would be fruitful.”
EC – Bananas, the Appellate Body found that this provision grants “broad discretion” and self-regulating power to the Members. Confirming the Panel’s position, the AB reasoned that, because of the economic interdependency between the Members, any digression from the negotiated trade rules of one Member is highly likely to affect several others, may it be directly or indirectly. This implies that all Members have an interest in enforcing the rules. The Appellate Body found that the US as a minor banana producer had sufficient interest in pursuing its claim against the EC’s banana regime under GATT, since it had a potential export interest. It went on that the impact of the Community’s banana rules on the world market is highly likely to affect the US internal banana market. This ruling made clear that only an attenuated economic interest is necessary for bringing a complaint if a trade interest that might potentially be affected. The Panel in Korea – Dairy went further and noted that the WTO Agreement did not set out any requirements regarding an “economic interest.” It also referred to Article 3.8 of the DSU according to which any infringement of a WTO obligation is presumed to be a nullification or impairment of the benefits under the WTO Agreement. The Panel appears to imply that no actual economic loss is needed. However, it went on to find that the EC being a dairy exporter had sufficient interest to pursue the claim against the Korean dairy safeguard measures. The same rationale can be found in Article XXIII.1 of the GATS, which gives any Member the right to initiate proceedings against other Member that allegedly violates its obligations under the GATS. Certain types of cases in practice require economic assessments, but they are not legally mandated.

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

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

However, some cases do require an economic analysis. In United States – Upland Cotton, a case which required economic analysis to show adverse effects, Brazil relied initially on a model maintained by the International Cotton Advisory Committee (a Brazilian official was the chairman) to decide whether to bring the case. The Netherlands funded a study of the cotton issue for the West African third parties in the case. In another case requiring an economic analysis of adverse effects, European Communities – Export Subsidies on Sugar, Oxfam and the

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71 Id. ¶ 136.
73 Id.
74 Id. ¶ 7.14.
75 GATS Article XXXIII.1 reads, “If any Member should consider that any other Member fails to carry out its obligations or specific commitments under this Agreement, it may with a view to reaching a mutually satisfactory resolution of the matter have recourse to the DSU.”
76 Interview with experienced trade lawyer.
Netherlands Economic Institute performed detailed analyses of the EC sugar program, and Australian private economists and a Brazilian consulting firm were hired to help with the case. Economical analysis was also provided by government economists. Interestingly, the recent Panel in United States – Country of Origin Labeling paid a great deal of attention to the parties’ detailed economic studies, even while acknowledging the analyses were not legally required by the TBT provisions at issue. If the case is appealed and the Appellate Body follows the same economic analyses, it could well lead to increased use of economic assessments.

3.3. Cost – Benefit Analysis: Bringing the Case?

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

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

In addition, cost of bringing a case is dependent on many aspects. First and foremost, the total cost depends on whether the Member has an in-house legal infrastructure and how advanced it is. (USTR has more than 30 in-house lawyers for WTO cases, while at least 20 WTO Member countries do not even have a mission to the WTO in Geneva, nor full-time WTO dispute resolution lawyers).

The Advisory Centre on WTO Law, which was founded by Members, supports developing countries in WTO disputes. For the 30 developing country Members participating in the ACWL in Geneva, the cost of a case is limited to a total of Swiss francs 276,696 to pursue or defend from the request for consultations through the Appellate Body proceedings. Where the ACWL cannot provide legal counselling – typically for reasons of conflict – it has established a list of outside law firms, from which the responding Member can choose. The Centre arranges for firms to charge no more than the same 276,696 Swiss francs and subsidizes the fees to that point. Of

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77 European Communities – Export Subsidies on Sugar (DS266).
78 Danvivathana, P., supra note 27, pp. 218-19.
80 Article 62 (1) of Convention on the Settlement of Investment Disputes between States and Nationals of other States (the tribunal decides how to allocate the expenses).
81 For Developing country Members falling under category A with the ACWL. The total maximum costs for Least Developed Countries is Swiss franc 34,100. (See “ACWL Fees,” available at http://www.acwl.ch/e/disputes/Fees.html).
82 If the Member seeks private counsel on its own, the cost of a case has been estimated by Hakan Nordström at up to several hundred thousand dollars, even in less complex cases, when topnotch law firms are involved. He also
course, even this fee may be too much for a poor country.

Since the cost of bringing a case is so low (compared to the cost of a private jet for the head of state for example) the real question becomes how to measure the economic impact of winning or, equally important, the economic impact of not bringing the case. These cost and benefits might not easily be assessed, but the economic value of overturning the measure is usually quite tangible. In general, there are three different outcomes: (1) The winning complainant can determine the value of gaining more market access, involving prospective higher market share and profits, or the right to retaliate up to a certain amount. (2) In case of a negative outcome of its petition for help, the industry will suffer a loss through the trade measure remaining in place. The negative impact of the already impeded business will continue. (3) The third possible outcome is the respondent wins and can maintain its measure. Depending on the nature of the measure, this again involves a measurable economic impact. (In addition to burdening the imported good insofar as it increases its price on the Member’s market, tariffs also contribute to the governmental revenue even if only to small extent, as do AD/CVD/Safeguard duties - although each could be a net negative for the economy).

Finally, it should be mentioned that the costs of bringing a dispute or defending one’s trade measures have usually been such a small fraction of the complained-of losses that a cost-benefit analysis is not the major roadblock to filing a case. One of the reasons for this might well be that Members have different reasons for pursuing a WTO case. Sometimes systemic considerations may be factored in. Governments file or defend disputes that have only small economic implications. This was the case in United States – Broadcast Music.83 The EU brought this case on behalf of the rather small Irish music industry that was affected by the US copyright measure. There are number of other cases that are triggered by rather political or systemic reasons.84 A dispute might have implications for other pending disputes, as well as controversies that have not yet been brought to a dispute stage and are still subject to a pre-litigation dialogue. Thus, a ruling by a Panel or the Appellate Body in a particular direction will give useful guidance for bringing future cases. Moreover, the beauty of bringing a case with a rather small economic interest is that in case the complaint is unsuccessful, the economic loss is not too painful.

These considerations are well displayed by the EU Commission’s practice in deciding whether to support a WTO case. According to an official in the Directorate General Trade, the final decision to file a complaint is not merely an economic decision. Legal and political interests can well balance out the lack of a strong economic interest and present strong reasons for the Commission to bring the case to WTO dispute settlement mechanism.85

points out that these numbers might well be exaggerated and provides a detailed chart. (See “The cost of WTO litigation, legal aid and small claim procedures,” p. 3). Although, in exceptionally fact intensive and long enduring cases, such as the US/EC Aircraft cases, the cost could be some large multiple of that, though not always borne by the Member government. Shaffer estimated that the costs of the dispute for each company assisting the US and EC trade authorities might exceed 20,000,000 USD if not settled; (See Shaffer, G., “Developing Country Use of the WTO Dispute Settlement System: Why it Matters, the Barriers Posed, and its Impact on Bargaining”, available at http://ictsd.org/downloads/2008/05/shaffer_1.pdf).

83 United States – Section 110(5) of US Copyright Act (DS160), supra note 23.
84 See section 4 for further discussion.
85 Telephone interview with EU Commission Directorate trade official.
3.4. Recommendations

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

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

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

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

- Most fundamentally, Members need to recognize the increased use of economic analysis in cases even where not required (US – COOL, Philippines – Distilled Spirits).

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86 Most recently, United States – Certain Country of Origin Labelling (COOL) Requirements (DS384).
87 Abbot, F. M., “Cross-Retaliation in TRIPS: Options for Developing Countries”, ICTSD Issue Paper No. 8, April 2009, p. 20 (Arguing that the value of IP assets are reasonably predictable. Abbot posits that stock market analysts know how to value the transition to a generic product, film royalties and sales of a copyright).
88 US – COOL, supra note 78.
89 Philippines – Distilled Spirits, supra note 4.
Apparently, two economists from the WTO Economic Research Division are now assigned to assist each panel.\(^9\) Logically, the lawyer-dominated offices that handle WTO cases in Members such as the US, China, Brazil and other countries will/should add Ph.D. economists as a result. That would create a pool, which could even lead to more Ph.D.-level economists on panels (only two have served on panels so far, it appears).

### 4. STRATEGIC ASSESSMENT

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

Examples include retaliatory cases\(^9\) and cases that have been brought for systemic reasons. None of these cases are pursued for purely systemic or political reasons, and the industry in the complaining Member always has had an economic interest in the dispute settlement. But, economic interest may be relatively small for the Member and may be seen as not worth pursuing in Geneva without a contingent systemic or political interest.\(^9\)

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

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

#### 4.1. Retaliatory Cases

The WTO already has a history of retaliatory cases. Here, two categories can be identified. First, disputes that have been brought as a direct counter-charge and, second, disputes that have been initiated to strike back for an earlier dispute on a different matter. Examples for the first category are the Aircraft cases. US – Aircraft was brought because the US had filed EC – Aircraft as were the respective second complaints in DS347 and DS353.\(^9\) Similarly, Canada – Aircraft (DS70)

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\(^9\) See the recommendations in Brown, C. P., “The WTO Secretariat and the role of economists on panels and arbitrations,” ICTSD Ch. 19, at pp. 419, 426.

\(^9\) See, e.g., EC – Definitive Anti-Dumping Measures on Certain Iron or Steel Fasteners from China (DS397) and China – Provisional Anti-Dumping Measures on Certain Iron or Steel Fasteners from the European Union (DS407).

\(^9\) As noted in the introduction, WTO dispute settlement involves costs that might not be seen necessary for minor disputes between WTO Members.

\(^9\) United States – Measures Affecting Trade in Large Civil Aircraft; European Communities – Measures Affecting
was filed in response to Brazil – Aircraft (DS46).\(^{94}\)

Moreover, it is no secret that Members file complaints in response earlier and unrelated disputes. These have been identified as second category of retaliatory cases. For example, it is contended that the US initiated EU – Aircraft because the EU had successfully contested the US Foreign Sales Corporations FSC Tax.\(^{95}\) But the FSC case itself is rumoured to have been filed because the US had joined the Bananas dispute.\(^{96}\) Interestingly, more rumours are that the Airbus case was the reason why the EU filed a complaint in the US – FSC compliance stage.\(^{97}\) A less prominent example fitting in this category is Australia – Quarantine Regime, which – was rumoured to have been brought as a response to EC – Trademarks and Geographical Indications.\(^{98}\)

More recently in this category, an EU antidumping case against Chinese fasteners led to a Chinese antidumping case against EU fasteners and a Chinese WTO case against the EU antidumping duties, which lead to a EU WTO case against the Chinese duties.\(^{99}\)

4.2. Cases not Filed because of Political Reasons

Another interesting consideration for a complainant is whether there are any political obstacles to bringing a case. A major aspect of this analysis is knowledge of the relationship with the potential responding Member. Japan, for example, notably never brought a GATT case against the US, which provided Japan with military security during the Cold War. Early complaints against threatened US duties on Japanese luxury autos were settled in the early stage of consultations.\(^{100}\) James Durling concluded that the Japanese reluctance of spoiling the good relations with the US only changed after the “Film dispute.”\(^{101}\) Nevertheless, after that it did not bring a WTO case against the US until it was joined by eight other Members challenging the US Steel safeguards in 2002.\(^{102}\) On the contrary, Korea has brought nine complaints against US trade barriers to the WTO dispute settlement.\(^{103}\)

It has been argued that developing countries would think twice before bringing a WTO complaint against a developed country. For example, developing countries might fear to lose

\(^{94}\) Canada – Measures Affecting the Export of Civilian Aircraft; Brazil – Export Financing Programme for Aircraft, \textit{supra} note 36.

\(^{95}\) United States – Tax Treatment for “Foreign Sales Corporations”, \textit{supra} note 19.

\(^{96}\) EC – Bananas (DS27), \textit{supra} note 3.

\(^{97}\) United States – Tax Treatment for “Foreign Sales Corporations”, \textit{supra} note 19.

\(^{98}\) Horlick, G. N. & Fennell, K., “WTO Dispute Settlement from the Perspective of Developing Countries,” in \textit{Law and Development Perspective on International Trade} (Cambridge, 2011) at 12. See also, Australia – Quarantine Regime on Imports (DS287) and EC – Protection of Trademarks and Geographical Indications for Agricultural Products (DS174).


\(^{100}\) United States – Imposition of Import Duties on automobiles from Japan under Section 301 and 304 of the Trade Act of 1974 (DS6).

\(^{101}\) Durling, J. P., \textit{supra} note 40, p. 674.

\(^{102}\) United States – Definitive Safeguard Measures on Imports of Certain Steel Product (DS249).

\(^{103}\) DS89, DS99, DS179, DS202, DS217, DS251, DS296, DS402 and DS420.
important development aid if they complain against a developed country’s trade regime. Some arguments are made that developing countries hesitate to attack their donators’ trade barriers. However, there might also be reasons for not bringing a case to the formal WTO dispute settlement but instead being interested in negotiating with the barrier-imposing Member about the abolition of the barrier in a different forum or, at least, before requesting consultations.

4.3. Systemic Considerations

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

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

4.4. Political Considerations

Despite rather negligible economic interest some cases might have a political value for the complaining Member as well as for the responding Member that does not want to be seen giving up without fighting. These political considerations can be either domestically motivated or additionally have a more general political value. For the first sub-category, two Canadian cases come to mind. First, in EU – Asbestos, Canada filed a complaint against a French decree

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105 Generally confirmed as one factor in a number of different motivations to file a complaint by a EU Commission official.
106 United States – AD/CVD (China), supra note 54.
107 European Communities – Hormones, supra note 14.
108 The authors want to emphasize that political considerations are not solely a Canadian phenomenon, which is underlined by the further two cases being brought by India and Brazil.
banning the importation and marketing of asbestos products.\(^\text{109}\) The economic loss for the Canadian asbestos industry was considerable but for Canada as a whole negligible. However, at that time the asbestos industry’s existence in one of the Canadian provinces was important for the Canadian government, which wanted to be seen as standing up for that part of its constituency.

The second dispute is the Norwegian and Canadian complaints against the EU seal product regulation banning the importation and marketing of seal products in the EU.\(^\text{110}\) Canada does not sell much in terms seal furs and other seal products to the EU but instead Russia and Asia. In this respect it is noteworthy that in one of the complaints in EC – Seal Products II, Canada complained about Belgian legislation that additionally prohibited the transit of seal products through its territory.\(^\text{111}\) This dispute appears to be of more economic relevance for Canada since the seal products might well be shipped through Belgium on their way to Russia or Asia.

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

Moreover, the EU – Seal Products I and II also serve as a prime example of the respondent standing up for a domestic constituency. The EU, as respondent in three seal product disputes, has very strong environmental and animal welfare-interest groups in the European Parliament and several NGO and interest groups. Lastly, animal welfare recently became an objective of the Treaty of Lisbon.\(^\text{112}\)

A final example is the two EU – Seizure of Generic Drugs in Transit disputes.\(^\text{113}\) India and Brazil filed complaints against the seizure of generic drugs that were off-patent in India and Brazil and seized in transit from India to Brazil in the Netherlands. By the time both complainants contacted the EU Commission about the incident, the consignments had already been released and were on route to Brazil. The economic loss seems to be miniscule if not inexistent. The motivation for both complainants could be systemic – clarifying the question of IP protection applies to goods in transit that are off-patent in the producing Member and the destination Member. It could also be political – blaming the EU and Netherlands for their overly strict IP protectionist regime and impeding the sales of necessary live-saving drugs in Brazil respectively.

5. PROCEDURAL ASPECTS OF TRADE BARRIER ASSESSMENT

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

\(^{109}\) European Communities – Measures Affecting Asbestos and Products Containing Asbestos (DS135).

\(^{110}\) European Communities – Seal Products, supra note 18.

\(^{111}\) European Communities – Seal Products (DS369), supra note 18.

\(^{112}\) Article 13 of the Treaty of Lisbon introduced animal welfare as one of the community objectives.

\(^{113}\) European Union and a Member State – Seizure of Generic Drugs in Transit (DS408, DS409).
5.1. Internal Political Decision-making Process to File a WTO Complaint

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

Similarly, the European Union employs “inter-service consultations.” The European Commission only files a WTO complaint upon the Commission’s decision. The Directorate General of Trade is in charge of preparing of this decision and will cooperate with other relevant Commission Services like the Directorate General Taxation and Customs Union or the Directorate General of Agriculture.114 Before a case is brought, the EU Commission will inform the “Trade Policy Committee,” which was formerly the “Article 133 Committee”, consisting of representatives of the 27 Member-States and seek for their informal confirmation.115 Achieving this confirmation, according to an official in DG Trade, is usually not too difficult. The Member States generally support the enforcement of trade rules strongly and do not discuss the filing of the case in much detail.116

Thus, in both countries, it is a central institution – USTR and DG Trade respectively – that manages the cooperative trade barrier assessment and dispute settlement.117

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

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

The US has a formal procedure for petitions requesting trade barrier investigations in Section 301 of the Trade Act of 1974.118 Under this procedure, almost any entity can file a petition requesting USTR to conduct investigations of a foreign country’s WTO obligations. These could be economic actors, such as Kodak in Japan – Photofilm,119 unions like the United Steelworkers in China – Windmills,120 and non-economic entities such as individuals or organizations. In July 2011, the USTR rejected two Section 301 petitions to investigate FTA cases under the CAFTA

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114 Telephone Interview with EU Commission Directorate General trade official.
115 See Article 207 of the Lisbon Treaty.
116 Email by EU Commission Directorate General trade official.
117 As concluded by Evans and Shaffer in Shaffer, G. & Meléndez-Ortiz, R., supra note 27, p. 345; effective trade litigation depends on the effective flow of information and cooperation between the state and private actors involved.
118 Pub.L. 93-618, 19 USC § 2411.
119 Japan – Film, supra note 39.
120 China – Measures concerning wind power equipment, supra note 15.
by two individuals and under the Israel FTA by the “Institute for Research: The Middle East.”\(^{121}\) However, there is no requirement that a Section 301 be filed for a WTO case to start, and, after concluding the investigation, USTR has been given broad discretion to pursue the WTO case or to decline to do so.\(^{122}\)

In practice, Section 301 is not used much. US industry seems to prefer a more informal way of communicating with the government about trade barriers. Indeed, almost all Section 301 cases are filed as public relation devices, and very few entities spend the time and money on Section 301 rather than dealing with USTR directly to try to start the process. During this informal dialogue, USTR sometimes recommends that the entity file a Section 301 petition. A prominent example for that request was the case in Japan – Photofilm.\(^{123}\)

The EU analogy of Section 301, the Trade Barriers Regulation, Council Regulation (EC) No, 3286/94 (TBR), seems to be used more frequently.\(^{124}\) But even so, only 12 of the EU WTO cases since 1995 were based on TBR petitions. The Directorate General Trade is in charge of the investigations but it heavily relies on data input from the private sector. Since the TBR’s entry into force in 1995, 27 petitions were filed and investigations were started. Nine cases were settled after TBR proceedings without initiating a WTO case, which shows that it is a useful tool for the industry to investigate and fight trade barriers.\(^ {125}\)

Like the EU, China adopted a similar mechanism to Section 301 a couple of years ago with Rules on Trade Barrier Investigation (TBI).\(^{126}\) As Han Liyu and Henry Gao pointed out in the ICTSD studies preceding this study, it has been used only once.\(^{127}\) Furthermore, they concluded that the TBI as such is not the problem. Rather, the deficient accessibility and structure of the relevant governmental division and the lack of representation through industry associations is what impedes communication.\(^ {128}\)

The findings regarding all three examples of legal instruments provoke the question whether such a formal trade barrier investigation regulation is a necessary precondition for the successful pre-litigation preparation of the WTO disputes. Most Members heavily involved in WTO litigation do not have such a formal instrument and where it exists, it is not much used since most investigations are launched after the industry has sought informal dialogue with the

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\(^{121}\) USTR Declines To Investigate Section 301 Claims Under CAFTA, Israel FTA, Inside US Trade, July 14, 2011.

\(^{122}\) supra note 117.

\(^{123}\) Japan – Film, supra note 39.


\(^{125}\) However, the TBR is less often used than the traditional immediate dialogue between the EU commission and the industry, Bronckers and McNelis, supra note 123, pp. 89-90.

\(^{126}\) With effect of January 1, 2005; the TBI are based on the November 1, 2002 Provisional Rules on Trade Barrier Investigation.


\(^{128}\) Id. at 162.
Developing countries might especially face institutional and financial challenges to employ a formal procedural instrument. However, the authors recommend putting in place a uniformly conducted and fast procedure for the industry to bring trade barriers to the attention of the Member. This procedure should be equally open to all industries and for any kind of trade barrier allegations and guarantee that the government assesses all complaints with regard to their WTO (or FTA) consistency. This way, the government can begin from early on to assess the barrier and can, as soon as possible, involve external counsel, whether a private law firm or the ACWL. The authors think that the inquiry point recommended above (in section 2) as a central office should not only manage the cooperation between the different governmental actors as well as the industry but also provide the infrastructure and procedure for industry complaints to be handled professionally.

6. CONCLUSION

The pre-litigation assessment of a trade barrier is an essential part of a WTO trade dispute. Questions taken into account at this early stage will avoid surprises for the litigant before the Panel or the Appellate Body. A comprehensive and thorough preparation of the dispute from early on is the groundwork for the litigation of a trade dispute. Recommendations are aimed at providing developing countries with a better toolset for litigating trade disputes. More generally, as the history of trade disputes has shown, the WTO dispute settlement mechanism provides a good system in which the developing countries can solve trade disputes especially with the support of the ACWL. In addition to the recommendations for the developing country complainant as well as respondents, the following more systemic recommendations should be considered:

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

Perhaps some disputes could be avoided by better WTO scrutiny of new measures enacted by WTO Member governments. Some governments and legislators assess the WTO consistency of legislative proposal during the adoption process.\(^{130}\) Even if this does not avoid WTO disputes once the measure is in place, it at least draws the government’s (and other relevant actors with interest in WTO disputes) attention to issues of WTO consistency.

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\(^{129}\) Canada, just to name an example, has never adopted such an instrument.

\(^{130}\) See for many examples, Statement of Joost Pauwelyn, Testimony before the Subcommittee on Trade on the House Committee on Ways and Means, 24 March 2009, available at http://waysandmeans.house.gov/media/pdf/111/pauw.pdf- (although so far the measure has not been adopted).
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