

WTO DISPUTE SETTLEMENT AND THE MISSING DEVELOPING COUNTRY CASES: ENGAGING THE PRIVATE SECTOR

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ABSTRACT

The poorest WTO member countries almost universally fail to engage as either complainants or interested third parties in formal dispute settlement activity related to their market access interests. This paper focuses on costs of the WTO's extended litigation process as an explanation for the potential but 'missing' developing country engagement. We provide a positive examination of the current system, and we catalogue and analyze a set of proposals encouraging the private sector to provide DSU-specific legal assistance to poor countries. We investigate the role of legal service centres, non-governmental organizations, development organizations, international trade litigators, economists, consumer organizations, and law schools to provide poor countries with the services needed at critical stages of the WTO's extended litigation process. In the absence of systemic rules reform, the public-private partnership model imposes a substantial cooperation burden on such groups as they organize export interests, estimate the size of improved market access payoffs, prioritize across potential cases, engage domestic governments, prepare legal briefs, assist in evidentiary discovery, and pursue the public relations effort required to induce foreign political compliance.

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INTRODUCTION

The poorest countries in the WTO system are almost completely disengaged from enforcement of their market access rights through formal dispute settlement litigation. Although more advanced and larger developing countries have started to use the Dispute Settlement Understanding (DSU) – e.g., Central American countries have initiated cases against each other; India has challenged the European Union, Brazil has taken on the United States – the least developed countries (LDCs) are mostly absent, whether as complainants, respondents or third parties.

It is somewhat surprising that more groups have not been willing to work with poor developing countries to invoke dispute settlement on their behalf, given that WTO panels and Appellate Body decisions have indicated a potential opening for complainants with their *pro-trade* emphasis, calling into question some element of most every respondent trade restriction on which they have ruled. With very limited exception, the likely candidate groups of non-governmental organizations (NGOs) and private sector attorneys have not taken the lead to provide legal work on behalf of poor countries. This is particularly striking given the important and substantial role in WTO litigation undertaken by these groups in more developed countries.

An effective WTO dispute settlement system is important from an institutional perspective as it has public good characteristics, and appropriate Membership participation in the system can also generate positive externalities. The WTO dispute settlement system acts as a public good if it improves property rights – in this context market access rights – and thus each Member country's ownership stake in the system.¹ Improved security of these rights reduces uncertainty, increasing the likelihood that firms and individuals in countries on both the export and import sides of international transactions make mutually beneficial, relationship-specific investments. Active participation in dispute settlement activity by WTO member countries can also have positive externalities if one country's litigation efforts contribute to the removal of a trade barrier that adversely affected the market access rights of *other* WTO Members. The presence of these two potential market failures requires monitoring, vigilance, and possibly intervention by market non-participants so as not to miss opportunities for fully exploiting the global benefits of a functioning dispute settlement system.

While enforcement of existing market access rights is of considerable concern for all WTO Members, it is especially important for developing countries that are not yet fully integrated into the system. A failure of the dispute settlement system to enforce existing commitments and market access obligations may elicit a damaging feedback effect. If poor developing countries believe

¹ For a non-technical economic description of the GATT/WTO system more generally as one designed to reduce the uncertainty over market access rights, see K. Bagwell, P. C. Mavroidis and R. W. Staiger, 'It's a Question of Market Access', 96 *American Journal of International Law* (2002) 56.

they cannot enforce their market access rights through dispute settlement, they may be less willing to follow through with implementation of their own WTO commitments or undertake new commitments in the ongoing Doha Round.²

Our starting point is that there is likely to be substantial ‘missing’ WTO dispute settlement activity related to developing country trading interests. This activity includes both non-initiated cases, as well as non-participation as either co-complainants or interested third parties in initiated cases in which poor countries have market access interests at stake. The failure to engage is likely due to the confluence of market-driven economic incentives in the self-enforcing WTO trading system. A number of factors are likely to play a role here. First, on the import side, potential developing country complainants are typically small consumers that are unable to affect world prices. Under the current ‘retaliation-as-compensation’ approach, this implies that they lack the capacity to impose the large political-economic welfare losses on potential respondent countries that would generate the internal political pressure in those countries that may be a necessary element to induce compliance with adverse DSU rulings. Second, poor countries are more likely to be reliant on the larger and richer potential respondents for development assistance or preferential market access. The associated vulnerability to extra-WTO retaliation may decrease their willingness to invoke the DSU. Third, developing countries may be more likely to face market access restrictions affecting commodity exports both in low volumes and in competitive markets with low profit margins. This makes it difficult to charge mark-ups to cover any non-economic (i.e., litigation) costs associated with maintaining or enforcing market access. Regardless of the cause, a systemic pattern of missing dispute settlement activity calls into question whether the full public good and positive externality benefits of the trading system are sufficiently exploited.

This paper focuses on the third potential explanation behind the lack of poor country engagement: the costs of and access to legal services for WTO dispute settlement. We provide a positive analysis of the relatively high cost of litigation services facing developing countries, and we catalogue and analyze a set of proposals encouraging the private sector to provide DSU-specific legal assistance to poor countries. Our approach examines why the public-private partnerships that appear to be a central feature for WTO litigation involving

² For most developing countries that are small and unable to affect world prices, the standard economic argument would indicate that it is in their unilateral best interest to liberalize, as they cannot affect the terms of trade. However, a developing country in such a situation could be seeking to use the WTO as a commitment device to signal to its private sector that reforms are locked in. See J. Tumlrir, *Protectionism: Trade Policy in Democratic Societies* (Washington, DC: American Enterprise Institute, 1985) and R. W. Staiger and G. Tabellini, ‘Discretionary Trade Policy and Excessive Protection’, 77 *American Economic Review* (1987) 823.

the US and EU may *fail* to materialize in the case of developing countries if left to market-based incentives for litigation.³

There are two possible approaches to address concerns over the *cost* of WTO litigation as an impediment to developing country enforcement of market access rights. One is to reduce the cost of litigation through systemic reform. The other is to take the system as given and investigate how litigation costs could be lowered for poor countries. In the paper we limit attention to the second approach. While not denying the potential importance of considering systemic reforms, if the problem is the cost of litigation facing poor exporting countries, reducing the cost of litigation for all WTO Members could be too blunt an instrument in that it may introduce additional inefficiencies into the system.⁴ We therefore take the existing institutional setting and legal framework as given and examine the possibilities of engaging both self-interested and altruistic private sector actors to subsidize developing country agents' access to *litigation* expertise so that they can better enforce WTO rights.⁵ Specifically, we investigate the role of legal service centres, the private sector, NGOs, development organizations, international trade litigators, economists, consumer groups, and even law schools to improve poor country access to lower cost legal assistance. We then examine the implications that funding constraints, political realities and the recognition of the self-enforcing nature of the WTO system would have on the

³ For an informative discussion of the public-private partnerships that have evolved in DSU litigation involving the US and EU, see G. Shaffer, *Defending Interests: Public-Private Partnerships in WTO Litigation* (Washington, DC: The Brookings Institution Press, 2003). Furthermore, on the import side, poor developing countries themselves are also less likely to be confronted with (the threat of) dispute settlement against non-compliance with WTO rules or market access commitments because their markets are too small to make contesting perceived violations worthwhile for affected exporters. As this phenomenon raises separate additional concerns, we tackle it elsewhere in C. P. Bown and B. M. Hoekman, 'Tough Love, Reciprocity and Enforcement of WTO Commitments in Developing Countries', (on file with the authors). The focus here is on missing disputes related to poor country export market access interests.

⁴ One possible approach towards systemic reforms is to incorporate more 'special and differential treatment' or 'soft law' provisions in the WTO. Countries' willingness to take on more 'legalistic' regimes as they develop has been documented in a number of areas – e.g., intellectual property rights, where countries have increasing incentives to strengthen legal protection as they move up the technology ladder. For example, see K. E. Maskus, *Intellectual Property Rights in the Global Economy* (Washington, DC: Institute for International Economics, 2000). We ignore these issues in this paper, assuming that a system based on hard law should be preferred to one based on diplomacy if we abstract from uncertainty regarding the expected return of a specific rule and enforcement issues, and if we assume that legal resources and diplomatic resources in developing countries are equally scarce.

⁵ For proposals regarding more systemic changes to the DSU, rules and remedies that might improve poor country access to WTO litigation see, for example, B. M. Hoekman and P. C. Mavroidis, 'WTO Dispute Settlement, Transparency and Surveillance', 23 *The World Economy* (2000) 527; G. Shaffer, 'How to Make the WTO Dispute Settlement System Work for Developing Countries: Some Proactive Developing Country Strategies', (Geneva: ICTSD Resource Paper No. 5, 2003); and H. Nordström, 'The Cost of WTO Litigation, Legal Aid and Small Claim Procedures', (Stockholm: Swedish National Board of Trade (Global Trade Department) manuscript, 2005). For a discussion of alternative approaches to inducing compliance, see S. Charnovitz, 'Rethinking WTO Trade Sanctions', 95 *American Journal of International Law* (2001) 792.

caseload that would evolve under each alternative. Therefore, we speculate as to which 'missing cases' are likely to be picked up under alternative approaches and which are likely to remain 'missing' if one model over another would come to dominate.

Although the analysis centres narrowly on the cost of the litigation process facing poor countries under the existing system, we do not downplay the empirical seriousness of the other two explanations (i.e., lack of retaliation capacity and concern for extra-WTO retaliation) for missing developing country DSU activity. Nor do we argue that the options discussed in this paper should have priority over explicit policy proposals targeting the problems introduced by these other explanations.⁶ Indeed, our discussion of engaging the private sector is best thought of as complementing systemic reform proposals. Furthermore, our analysis seeks to clarify in what ways private interests are likely to fail to cover the missing caseload should such systemic reforms fail to proceed.

The rest of this paper proceeds as follows. Section I describes in more detail the current state of some of the relevant economic and legal research literature on WTO dispute settlement and the problem of developing country access to legal services based on the existing rules and procedures of use in practice. In section II we explore a number of approaches to improving developing country participation, taking the current dispute settlement system and institutional structure as it is currently structured. The concluding section offers proposals and recommends further research.

I. THE MOTIVATING WTO LITERATURE ON DISPUTE SETTLEMENT

The WTO is a set of *self-enforcing* agreements.⁷ From this perspective, developing countries may be unwilling to spend substantial resources on litigation tied to their market access interests if they believe that legally 'winning' a case would lead to an economically unsuccessful outcome relative to a world in which the dispute had never been pursued.

There are a number of factors that contribute to this outcome. Despite a legal victory on the merits, the economic result of no increased market access (i.e., noncompliance) could arise if developing countries ultimately cannot

⁶ For a recent proposal to address the retaliation capacity issue through tradable retaliation rights, see K. Bagwell, P. C. Mavroidis and R. W. Staiger, 'The Case for Tradable Remedies in WTO Dispute Settlement', (Washington, DC: World Bank Policy Research Working Paper No. 3314, 2004). See also G. Maggi, 'The Role of Multilateral Institutions in International Trade Cooperation', 89 *American Economic Review* (1999) 190. For an illuminating discussion of various efforts and suggestions made in the GATT context since the 1960s by developing countries to address this issue in practice, see R. E. Hudec, 'The Adequacy of WTO Dispute Settlement Remedies for Developing Country Complainants', in B. M. Hoekman, A. Mattoo and P. English (eds.), *Development, Trade and the WTO: A Handbook* (Washington, DC: The World Bank, 2002).

⁷ For a discussion of the economic issues that arise in self-enforcing trade agreements, see chapter 6 in K. Bagwell and R. W. Staiger, *The Economics of the World Trading System* (Cambridge, MA: MIT Press, 2002).

force respondent compliance due to the lack of retaliatory capacity through the imposition of unilaterally damaging trade restrictions as ‘compensation’.⁸ Alternatively, developing countries could face a bad economic outcome even if they legally win a case, if the respondent engages in retribution outside of the WTO system, for example, through the reduction of bilateral (e.g., development, military) assistance or reductions in preferential access under the Generalized System of Preferences (GSP) or another preferential trade agreement.⁹ Together, these factors may contribute to an unwillingness of developing countries to invoke the DSU against larger and richer trading partners.¹⁰

Nevertheless, there is additional empirical evidence that, even after controlling for these concerns, there are other economic hurdles contributing to the lack of developing country engagement in potential dispute settlement activity related to their market access interests. For example, two related research papers document how, despite an export interest in an existing or potential DSU case, exporters that lose a small value of trade are less likely to participate in dispute settlement activity related to those market access interests. One paper investigates this phenomenon using a set of US trade remedies imposed over the 1992–2003 period that were potentially challengeable through WTO dispute settlement.¹¹ The evidence from this sample indicates that, after controlling for other factors, countries adversely affected by US antidumping and countervailing duty measures were less likely to challenge those measures at the WTO, the smaller was the value of pre-trade remedy exports in the US market. Furthermore, a second paper has examined this issue by focusing on a set of WTO trade disputes between 1995–2000 concerning measures that were WTO-inconsistent

⁸ For empirical evidence as to how the retaliation capacity of the complainant country may affect the market access outcome of the trade dispute and any resulting liberalization by the respondent, see C. P. Bown, ‘On the Economic Success of GATT/WTO Dispute Settlement’, 86 *The Review of Economics and Statistics* (2004) 811, and C. P. Bown, ‘Developing Countries as Plaintiffs and Defendants in GATT/WTO Trade Disputes’, 27 *The World Economy* (2004) 59.

⁹ The evidence as to whether such political arrangements affect the willingness of countries to engage in dispute settlement activity related to their trading interests is inconclusive. For a limited sample of potential disputes involving potentially-challengeable US trade remedies which found no evidence, see C. P. Bown, ‘Trade Remedies and World Trade Organization Dispute Settlement: Why Are So Few Challenged?’, 34 *Journal of Legal Studies* (2005) 515. For evidence from participation decisions in WTO disputes that such relationships may affect engagement in the process as complainants or third parties, see C. P. Bown, ‘Participation in WTO Dispute Settlement: Complainants, Interested Parties and Free Riders’, *World Bank Economic Review* (in press, 2005). There are numerous anecdotal examples of how such relationships can affect the dispute settlement process. For example, in *EU – Banana Regime*, despite Ecuador being authorized to do so, it did not retaliate on intellectual property rights against the EU, reportedly in part because of such concerns.

¹⁰ This also implicitly assumes that developed and developing countries are targeted with an identical frequency of GATT/WTO-inconsistent trade policies. Even this may not necessarily be the case, as there is also evidence that countries lacking the capacity to retaliate (such as developing country exporters typically do) may be more likely to be targeted by import market access restrictions in the first place. See C. P. Bown, ‘Trade Disputes and the Implementation of Protection under the GATT: An Empirical Assessment’, 62 *Journal of International Economics* (2004) 263, and B. A. Blonigen and C. P. Bown, ‘Antidumping and Retaliation Threats’, 60 *Journal of International Economics* (2003) 249.

¹¹ See Bown, above n 9, *Journal of Legal Studies*.

and applied on a nondiscriminatory basis, thus negatively affecting the exports of many countries.¹² Evidence from that sample of potential litigants suggests that exporting countries with small amounts of trade adversely affected by the WTO-inconsistent measure are less likely to participate in the dispute in any formal role – either as a complainant or as an interested third party.¹³

A. A simple economic model

To put some structure on the focus of concern in this paper, consider a very simple world of two countries denoted ‘C’ and ‘R’ for the (potential) complainant and respondent, respectively. Suppose that the potential respondent has imposed a WTO-inconsistent trade barrier $\tau > 0$ on imports from the complainant at time t , so that the potential complainant exporter’s profits with the trade barrier in place are $\Pi_t(\tau) < \Pi_t(0)$, i.e., they are strictly lower than they would be had no trade barrier been imposed (i.e., $\tau = 0$). Assume that $\delta < 1$ is the discount factor, enforcement and extra-WTO political-economic retaliation are not of concern, and the legal costs of litigation are denoted by L . Then a potential complainant will file a dispute over a WTO-inconsistent trade restriction, τ , if

$$\Pi(\tau) + \sum_{t=1}^{\infty} \delta^t \Pi(0) - L > \Pi(\tau) + \sum_{t=1}^{\infty} \delta^t \Pi(\tau), \quad (1)$$

i.e., the discounted stream of future profits with the trade barrier removed, less the cost of litigation, are larger than the future profits with the trade barrier remaining in place. Using algebra and rearranging terms in equation (1) suggest that a country will file a complaint if

$$L < \delta / (1 - \delta) [\Pi(0) - \Pi(\tau)]. \quad (2)$$

Thus, a country will file a complaint if the legal fees are lower than the discounted gain in profits the complainant would receive from increased market access due to the removal of the WTO-inconsistent measure. If the costs of litigation (i.e., L) are too high or the additional profits associated with the market access gains (i.e., $[\Pi(0) - \Pi(\tau)]$) are too low, the potential complainant

¹² See Bown, above n 9, World Bank Economic Review.

¹³ The first paper in this literature was H. Horn, P. C. Mavroidis, and H. Nordström, ‘Is the Use of the WTO Dispute Settlement System Biased?’, in P.C. Mavroidis and A.O. Sykes (eds), *The WTO and International Trade Law/Dispute Settlement* (Cheltenham, UK: Edward Elgar, 2005). They use a probabilistic model to predict dispute settlement activity as a function of a WTO Member’s trade volume and diversity of trading partners. There is also a substantial empirical literature in political science and legal scholarship on various other elements of the WTO litigation process, for example, M. L. Busch and E. Reinhardt, ‘Developing Countries and GATT/WTO Dispute Settlement’, 37 *Journal of World Trade* (2003) 719; as well as A. Guzman and B. Simmons, ‘To Settle or Empanel? An Empirical Analysis of Litigation and Settlement at the World Trade Organization’, 31 *Journal of Legal Studies* (2002) S205. Nevertheless, such studies have not typically used product-level trade and thus do not examine this relationship as part of their estimation.

will choose to not litigate. The empirical results of various studies¹⁴ indicate that even after controlling for enforcement and extra-WTO retaliation concerns, the simple insight of equation (2) is an important contributor to the explanation of why some countries do not initiate or participate in WTO litigation, despite a market access interest in the potential dispute.

Consider now slightly enriching the assumptions underlying equation (2) by allowing for exporter uncertainty. Suppose, for example, that an exporter confronts uncertainty over the dispute settlement process and does not know the cost of litigation, L . Alternatively, suppose the exporter has only limited information as to the full extent of the potential respondent's trade restrictions and thus the resulting profit differential associated with increased market access. With uncertainty, if exporters consistently over-estimated the litigation costs and/or under-estimated the increase in profits associated with market access benefits, this would also increase the likelihood that an exporter would choose not to initiate a dispute at the WTO.¹⁵

While these simple theoretical frameworks and some of the economic evidence suggest potentially rational decision-making behavior from the small exporting country perspective,¹⁶ there are concerns associated with this outcome that are not captured by the model. First are the negative systemic externalities associated with the lack of willingness for a potential litigant to engage in dispute settlement activity, as this weakens the public good characteristics of the system. Second, there may also be equity concerns that the profit differential associated with increased market access, $[\Pi(0) - \Pi(\tau)]$, while not large in value terms, may be disproportionately important for small economies as a share of GDP, especially small economies that are poorly diversified and/or export-oriented.

In what follows we assume away concerns over compensation and (counter-) retaliation, so that the only impediment to developing country access to the DSU is captured by equation (2). Our focus is on proposals that could reduce the size of litigation costs (L) for poor country potential complainants, as well as actions to reduce the uncertainty associated with those costs and the size of market access benefits to pursuing a case [i.e., $\Pi(0) - \Pi(\tau)$], so that exporters can better decide which potential complaints to pursue.

B. Public-private partnerships in WTO litigation

Before proceeding, it is instructive to consider how the legal costs (L) and information on market access interests $[\Pi(0) - \Pi(\tau)]$ play out in WTO litigation

¹⁴ See Bown, above n 9, *Journal of Legal Studies* and Bown, above n 9, *World Bank Economic Review*.

¹⁵ For a discussion of the informational problems and other impediments to access to dispute settlement facing developing countries, see Hoekman and Mavroidis, above n 5.

¹⁶ It may be economically rational for a country not to spend more on litigation costs than it could possibly recoup in additional profits even if it had access to the import market under conditions of free trade.

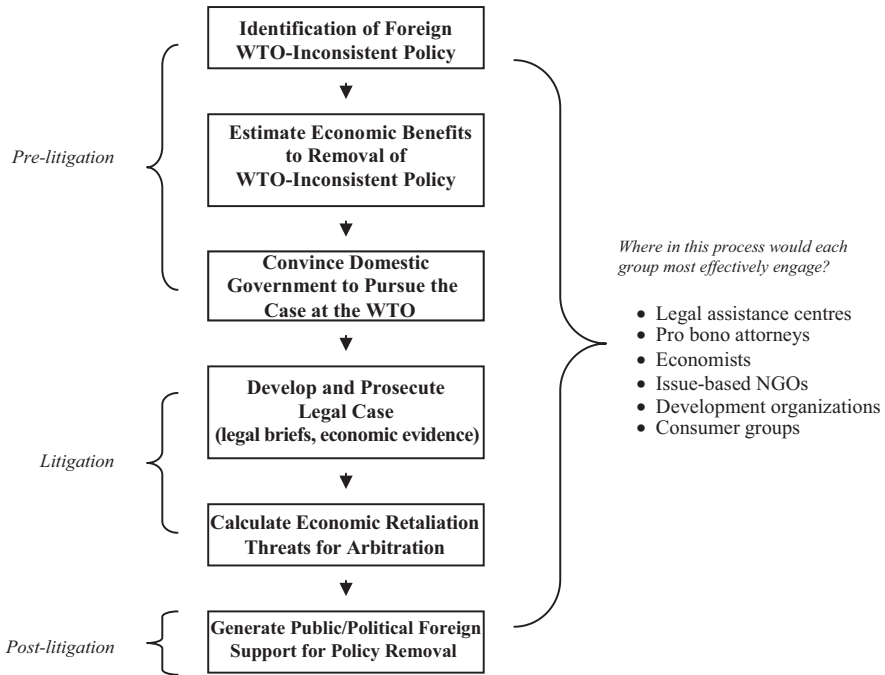


Figure 1. The WTO’s extended litigation process: engaging private sector support for poor country market access interests.

undertaken by *developed* countries. In practice, DSU litigation over market access interests is much more than government-to-government interaction in isolation, although the WTO of course only provides for state-to-state interaction. Private sector interests in the United States and the European Union work with public sector officials to develop a litigation agenda and to pursue and defend issues before the WTO.¹⁷ It is frequently firms, industry associations, private sector attorneys and consultants that do much of the pre-litigation and behind the scenes work forming the crux of the arguments that are litigated by US and EU government officials in Geneva.

Consider Figure 1 which illustrates the ‘extended litigation process’ for WTO dispute settlement and the various steps necessary to achieve economically successful litigation. First, the private sector typically undertakes the pre-litigation economic and legal research necessary to convince its government officials of the legal merits and economic benefits to pursuing a case. Then it engages its domestic government through access (or a threat of access) under the relevant domestic statutory provisions, such as the Section

¹⁷ For an excellent synthesis describing details of the public private partnership process in the US and EU, see the discussion in Shaffer, above n 3.

301 policy in the United States and the Article 133 Process and the Trade Barrier Regulation (TBR) in the EU, whereby domestic industries can petition the competent government authorities to raise potential market access concerns. Conditioning on the government's willingness to pursue the case at the WTO, the private sector's attorneys and consultants are then likely to assist in the preparation of the formal legal briefs and economic evidence to be used in the litigation in Geneva. Finally, the private sector may also help induce foreign compliance with DSU rulings, either through identifying the most effective foreign political targets when retaliation is authorized by the DSU, or through the engagement of a public relations campaign abroad to increase the political willingness needed to induce removal of foreign market access restrictions.

How large are the costs of the actual litigation, abstracting from the pre- and post-litigation costs also illustrated in Figure 1? Taking a conservative estimate of attorney fees in trade litigation cases at a billable rate of \$350 per hour, one estimate of the average number of hours indicates that the bill for hourly legal services could run from \$89,950 for a 'low' complexity DSU case to \$247,100 for a 'high' complexity case.¹⁸ Nevertheless, these fees would not include the cost of litigation support through necessary data collection, economic analysis and hiring of expert witnesses for testimony, which may lead to another \$100,000 to \$200,000. Furthermore, there are also substantial overhead costs to the actual litigation process associated with travel, accommodation, communication, paralegal and secretarial assistance. Given market rates, a 'litigation only' bill of \$500,000 to an exporter for a market access case is likely to be fairly typical. However, this would include neither the resources necessary to investigate potential claims in the pre-litigation phase, nor the resources necessary to engage public relations and/or political lobbying in the post-litigation phase to generate compliance.

Given the importance of the public-private partnership in the context of WTO litigation by developed countries, it is important to examine whether there are barriers in developing countries that prevent this model from being able to develop. There are at least three areas in addition to the costs to poor country litigation that may adversely affect active participation in DSU activity. A first concern is that developing country exporting interests may have a disproportionately more difficult time organizing to act collectively and pressure their domestic government to take up their case before the WTO. This could certainly be the case if developing country exporting industries were less concentrated and thus were more likely to suffer from the free rider problem. However, an equally important problem is simply

¹⁸ Advisory Centre on WTO Law, 'Billing Policy and Revised Time Budget', http://www.acwl.ch/e/pdf/time_budget_e.pdf (visited 9 September 2005).

the small value of low margin exports associated with these countries market access interests.¹⁹

A second concern is that even if exporters did overcome barriers to collective organization, exporting interests in developing countries may disproportionately lack the legal and institutional ‘entry’ routes to pressure their government to think about working on their behalf. Developing countries frequently lack an obvious statutory mechanism and public sector counterpart through which exporting industries can legally work in a transparent way to convince their government to take up the issue at the WTO. And while much of the public-private partnership that evolves into WTO litigation by the US and EU occurs *outside* of formal use of these Section 301 and Article 133/TBR-type policy instruments, surely the mere presence of these entry routes improves the ability to engage exporting interests in these countries. If nothing else, the policy instruments provide exporters with the legal standing to resort to filing petitions under these statutes, should the US and EU fail to take their concerns seriously. Even if the petitions would be filed with knowledge that they would not be granted, there may be transparency rationales for such an instrument if industries find it useful to get such actions and denials on record to engage an otherwise unresponsive government.²⁰ In addition to an entry point for access to government policymakers, the success of the public-private model requires a public sector counterpart that has the mandate and competence – both legally and administratively – to pursue the interests of the private sector. In practice this is often likely to be a constraint given scarce administrative capacity in many poor developing countries and limited representation in foreign markets. Even if there is capacity in the Ministry of Trade or Economy, such agencies may lack influence with the Foreign Affairs ministry that often takes the lead in international matters.

A third potential concern is simply that developing countries may lack a competent ‘private’ sector that is a necessary input into the public-private

¹⁹ Even in relatively diffuse industries, ‘ambulance-chasing’ attorneys will expend the effort to alert producers that they have been injured and have access to remedy, if there is a financial incentive for them to do so. Alternatively the government could step in if they could potentially wield market power as a group, i.e., as China did in 2005 with the imposition of export taxes on textiles to head off reduced market access threat by the US imposition of safeguards. See World Bank and IMF, *Global Monitoring Report, 2005: Millennium Development Goals – From Consensus to Momentum* (Washington, DC: World Bank, 2005).

²⁰ See S. Bermeo and C. Davis, ‘Who Files? Developing Country Participation in the WTO Adjudication’ (on file with the authors), who provide empirical support for the proposition that developing countries that are more democratic may be more likely to engage in dispute settlement activity at the WTO. The transparency benefits would, however, likely need to be tempered by some political ‘escape’ provision to ensure that the government is not legally required to pursue a case that it cannot win for political reasons, i.e., if pushing forward such a case threatens a broader economic and foreign policy relationship. Along those lines, P. Levy and T. N. Srinivasan, ‘Regionalism and the (Dis)advantage of Dispute-Settlement Access’, 86(2) *American Economic Review* (1996) 93, argue that if a domestic industry would have automatic ability to file before the WTO this might adversely affect the obligations the domestic government might be willing to take on in prior stage negotiations.

partnership model. While developing countries certainly do not have a comparative advantage in legal and consulting industries to assist their government officials prepare for WTO litigation, these services are internationally tradable. There are no tariffs on international trade lawyers, and the work can mostly be done remotely, relying on telecommunication services and express carriers for the needed exchanges of information. The large law firms with practice groups in the trade/WTO area are essentially multinational corporations with no particular allegiances even to their home country governments. Table 1 illustrates a number of examples of US-based law firms that have advised foreign governments in DSU claims, including a number of disputes in which the respondent was the United States government.

Of each of these potential barriers, only the private sector *access* to public officials and the competence and influence of those officials are likely to hinder effective public-private partnerships in developing countries, if the problem of the cost of litigation for poor countries were addressed. We will not

Table 1. Examples of US-based law firms providing counsel to non-US litigants in DSU cases

US Law Firm	Examples of WTO Disputes (Foreign Client)
King & Spalding	<p>DS60 – <i>Guatemala – Anti-dumping Investigation on Imports of Portland Cement from Mexico</i> (Guatemala)</p> <p>DS98 – <i>Korea – Definitive Safeguard Measure on Imports of Certain Dairy Products</i> (Korea)</p> <p>DS122 – <i>Thailand – Anti-dumping Duties on Angles, Shapes and Sections of Iron and Non-Alloy Steel and H-Beams from Poland</i> (Thailand)</p> <p>DS 156 – <i>Guatemala – Definitive Anti-dumping Measure Regarding Grey Portland Cement from Mexico</i> (Guatemala)</p>
Willkie Farr & Gallagher	<p>DS44 – <i>Japan – Measures Affecting Consumer Photographic Film and Paper</i> (Japan)</p> <p>DS178 – <i>United States – Safeguard Measures on Imports of Fresh, Chilled or Frozen Lamb Meat from Australia</i> (Australia)</p> <p>DS259 – <i>United States – Definitive Safeguard Measures on Imports of Certain Steel Products</i> (Brazil)</p> <p>DS296 – <i>United States – Countervailing Duty Measures Concerning Dynamic Random Access Memory (DRAM) Semiconductors from Korea</i> (Korea)</p>
Wilmer Cutler Pickering Hale and Dorr	<p>DS75 – <i>Korea – Taxes on Alcoholic Beverages</i> (Korea)</p> <p>DS87 – <i>Chile – Taxes on Alcoholic Beverages</i> (Chile)</p> <p>DS246 – <i>European Communities – Conditions for the Granting of Tariff Preferences to Developing Countries</i> (Andean Community)</p> <p>DS276 – <i>Canada – Measures Relating to Exports of Wheat and Treatment of Imported Grain</i> (Canada)</p>

Sources: King & Spalding, 'WTO Dispute Settlement', http://www.kslaw.com/practice_areas/practice.asp?practice_id=31#dispute (visited 9 September 2005);

Willkie Farr & Gallagher, 'Representative Experience: WTO Dispute Settlement', http://www.willkiefarr.com/practices/experience_detail.aspx?exID=325095705 (visited 9 September 2005); and

Wilmer Cutler Pickering Hale and Dorr, 'Using International Dispute Settlement Mechanisms to Open Markets', http://www.wilmerhale.com/world_markets/ (visited 9 September 2005).

address this potentially additional, but more systemic concern in our discussion below, except to note where certain proposals may help engage policy-makers by highlighting the economic problems associated with the status quo and thus influence their willingness to engage on behalf of their private sector.

II. IMPROVING POOR COUNTRY ACCESS TO WTO LITIGATION SERVICES

If the provision of legal services to poor countries to enforce their market access rights has public good characteristics or generates positive externalities that fail to materialize in the presence of small trade volumes or low profit margins for exports, then leaving its supply to market forces alone will likely lead to under-provision for standard economic reasons. The successful public-private partnership that has evolved in the developed country context to facilitate WTO litigation may not materialize in developing countries, suggesting a role for intervention. This section presents a number of alternative approaches to improve developing country access to legal services. For each approach, we describe how it has worked in other litigation contexts, how it might work in the trade litigation context, and what difficulties might arise. As will become clear, we draw on some basic analogies between developing country access to international trade litigation and individual employee access to employment litigation. Although we believe that the insights of the well-developed body of research on employment law – i.e., the evolution of centres and organizations designed to assist atomistic agents (i.e., individuals) protect their interests against much stronger opponents (typically corporations) – are relevant to the WTO setting,²¹ there are also differences relating to the issues of organization, funding, and sovereignty that have to do with the WTO being a self-enforcing agreement. Thus there are limitations as to how far one can push the analogy.

A. Legal service centres

A first approach to providing developing countries with access to low cost legal assistance would be to establish ‘legal service centres’ that are analogous to those set up for individual workers in the domestic context of violations of employment law (discrimination, wrongful termination, etc.). The argument in the employment law context is that private sector lawyers won’t take on these cases because the damages that would be awarded to plaintiffs are small relative to the costs of litigation. For example, if the case relates to an injured individual earning low wages, there is no class action lawsuit on which the lawyer could collect a substantial fee on contingency. Furthermore, damage

²¹ For an excellent survey of these organizations’ role in enforcing provisions of employment law, see C. M. Jolls, ‘The Role and Functioning of Public-Interest Legal Organizations in the Enforcement of the Employment Laws’, in R. B. Freeman, J. Hersch and L. Mishel (eds), *Emerging Labor Market Institutions for the Twenty-First Century* (Chicago, IL: The University of Chicago Press, 2005).

awards may be small and limited to lost wages and compensation and/or perhaps re-employment.

In this context, legal service centres are typically established to provide attorneys for individuals in need of legal assistance, where the individual has limited financial resources and likely a limited expected payoff to winning or settling the case. Like the trade litigation context, the provision of legal services to poor individuals may be beneficial to society if it encourages individuals to stand up for their rights, which then encourages employers not to mistreat workers and to better adhere to the law. In order to encourage attorneys with otherwise lucrative outside options to work in public interest law, legal service centres are typically directly subsidized by local or federal government funding. If such centres create a public good or generate positive externalities, government funding for such centres generates the proper incentives.

1. The Advisory Centre on WTO Law

For the case of WTO trade litigation, a legal services centre for developing countries – the Advisory Centre on WTO Law (ACWL) – was established in Geneva in 2001. In addition to more general legal advice on WTO matters, it offers support to complainants, respondents and third parties in WTO dispute settlement proceedings at subsidized (below market) rates, provided the parties are developing countries, customs territories, or economies in transition.²² Funding for the ACWL is through a ‘cooperative’ approach. Its membership, with the exception of the LDCs, contributes to an ‘Endowment Fund’. Contributions for developing country members are made on a sliding scale based on country characteristics (share of global trade, corrected for per capita income). High-income members of the ACWL – who do not have access to the legal services provided by the Centre – have made substantial contributions to the Endowment Fund.²³

With respect to fees for legal services, the ACWL provides a very transparent process to help developing country litigants budget for WTO dispute settlement proceedings. In addition to creating a sliding scale of hourly billing rates depending on the developing countries’ categories, the ACWL has also developed an expected time budget for the average number of billing hours it expects to have to spend to help adequately advise clients.

Finally, the ACWL also maintains a ‘Roster of External Legal Counsel’ of private sector attorneys willing to provide counsel to LDCs and other ACWL

²² As of November 2004, services provided by the Centre were available to 27 developing countries who had become Centre Members, in addition to another 41 WTO Members and countries in the process of acceding to the WTO (but non-Members of the ACWL) designated by the United Nations as LDCs. All information on the ACWL was taken from its website, ACWL, <http://www.acwl.ch>, (visited 9 September 2005). For an initial description of the role the ACWL might play at its inception, see J. H. Jackson, ‘Perceptions about the WTO Trade Institutions’, 1 *World Trade Review* (2002) 101.

²³ Developed countries that have each contributed \$1 million or more to the Endowment Fund include Canada, Denmark, Finland, Ireland, Italy, Netherlands, Norway, Sweden and the United Kingdom.

Members if a conflict of interest arises so that the ACWL cannot provide services through its own attorneys. As of September 2005, eleven law firms and four individuals had registered to offer their services through the ACWL.²⁴

The ACWL may do much to offset the lack of legal assistance available to poor countries. Because it is not funded by any interest groups it is not otherwise expected to develop an issues-oriented agenda and seek notoriety by trying to influence the composition of cases that come across its doorstep. This is an important and beneficial quality that will not necessarily be the case for some of the alternative models of subsidized provision of legal services to poor countries that we discuss below. Nevertheless, there are a number of potential problems with reliance on the current legal services centre model in the international trade litigation context that make it unlikely to completely fulfill a goal of providing sufficient low cost legal assistance to developing countries in pursuit of enforcing their market access interests.

First is the problem of funding. Unlike the funding of legal assistance centres by governments in the context of domestic employment law where the government does not consider itself to be a likely substantial target of litigation, in the trade litigation context there is a funding conflict of interest. For political reasons, a rich country government may be hesitant to sufficiently fund a legal assistance centre that ultimately provides litigation assistance directly challenging its own actions.²⁵ An alternative would be for the ACWL to seek funding from non-governmental sources, or for an agency with a similar mandate funded by non-governmental sources to evolve. As we discuss below, to the extent that funders are issues-based, this will likely have ramifications for the scope of legal assistance of emphasis to the centre.

An additional problem relates to pre-litigation investigation and access to legal services. As it stands, the ACWL can advise clients in need of assistance only once they arrive and request it. The ACWL has neither the resources nor the mandate to go out into the field and provide information to developing country exporters that they have a legally viable case that they could pursue at the WTO to enforce their market access rights. Related to this problem is *who* has access to the legal services provided by the ACWL. The current format allows only developing country *governments* to seek subsidized legal assistance, and not necessarily the exporters or trade industry associations themselves that are the key part of the public-private partnership framework. Thus,

²⁴ See ACWL, 'News: Eleven law firms and four individuals applied to be listed on the ACWL's Roster of External Legal Counsel', http://www.acwl.ch/e/tools/news_detailsphoto_e.aspx?id=3c188583-5884-4a1d-ae02-e65b14370cc9 (visited 9 September 2005). The law firms include Baker & McKenzie, Clyde & Co., King & Spalding, Minter Ellison, O'Connor and Company, Sidley Austin Brown & Wood LLP, Thomas and Partners, Van Bael & Bellis, Vermulst Waer & Verhaeghe as well as White & Case.

²⁵ Noteworthy by their absence from the list of ACWL endowment contributors (as of September 2005) are the governments of the United States, France, Germany (as well as the EU collectively) and Japan.

developing country exporters cannot go to the ACWL, investigate whether they have a legal basis for the country to present a WTO challenge, and then report back to their government. They must have already convinced their government that it is worth proceeding at the ACWL.

An additional problem is that the ACWL does not appear to currently staff any professional economists, and thus cannot provide technical economic consulting services as litigation support. This is of substantial concern for two reasons. First, while the ACWL may be able to provide information at reasonably low cost to a potential poor country client as to the *legal* merits of a case, without economic expertise and insight, it can provide no information on the size of the economic benefit to pursuing a case [i.e., $\Pi(0) - \Pi(\tau)$]. Thus the potential complainant may still be left with too little information to be able to make an informed choice across a menu of potential cases to pursue. Second, much of the actual litigation over trade matters at the WTO is likely to require a strong legal-economic *partnership* to put together a strong case. Economists can help clarify the consistency of an economic argument within legal briefs and assist in the establishment or rebuttal of economic evidence – e.g., econometric and statistical estimates for the level of ‘injury’ associated with a WTO-inconsistent policy, for the attribution of injury to imports (i.e., ‘causation’ as in trade remedy investigations), or for estimating the size of damages in arbitration awards. WTO litigation increasingly involves the use of technical economic tools and economic evidence – i.e., evidence that lawyers may have insufficient training to capably comprehend and contest on their own.²⁶

The need to combine legal and economic expertise has been recognized. For example, it is clearly reflected in the name of a recently established NGO that is active in providing trade-related technical assistance to developing countries – International Lawyers and Economists Against Poverty (iLEAP). In what follows we identify additional ways the ACWL or similar legal centres could better engage private sector interests to expand service offerings to developing countries.

2. *Public interest law and law schools*

An indirect subsidy that frequently ‘funds’ legal assistance centres is provided by law schools, many of which have loan forgiveness programs to help subsidize the cost of a legal education for students that are willing to eschew highly

²⁶ For a discussion of the various technical economic techniques used in DSU cases, see WTO, ‘Economic Analysis in WTO Dispute Settlement’, in *World Trade Report 2005* (Geneva: WTO, 2005) and Daniel Sumner, Richard Barichello, and Mechel Paggi. ‘Economic Analysis in Disputes over Trade Remedy and Related Measures in Agriculture, with Examples from Recent Cases’, presented at the conference ‘Agricultural policy reform and the WTO: where are we heading?’, Capri, 23–26 June 2003. The usefulness of legal-economic partnerships to WTO dispute settlement is also highlighted in the research literature on WTO dispute settlement jurisprudence found in scholarly legal-economic collections such as H. Horn and P. C. Mavroidis, *The WTO Case Law of 2001: The American Law Institute Reporters’ Studies* (Cambridge, UK: Cambridge University Press, 2003).

paid jobs in the private sector and take a position in ‘public interest law’. A law school’s motivation for indirectly subsidizing such legal services could be to generate a public good for society, but is also perhaps a by-product of the university’s self-interest in generating a diverse student body within which to provide a well-rounded educational experience. While it is certainly possible that subsidization of legal education through loan forgiveness is already in existence, a quick perusal of a handful of resource rich US law schools with prestigious programs and reputations in international trade law did not indicate any explicit encouragement of the use of such programs for students interested in pursuing trade litigation on behalf of poor countries’ market access interests.²⁷ One explanation for this may be that the mechanisms and institutions to provide such services simply do not exist – this could be an avenue for organizations with an interest in providing dispute settlement assistance to developing countries to explore with such universities.

B. Pro bono work by private sector law firms

A second avenue through which legal assistance is frequently provided to poor clients in the domestic litigation context is the service of private sector law firms on a pro bono basis. Large law firms in particular may provide pro bono services to low income clients, in effect cross-subsidized by their high income clients, perhaps to improve the law firm’s reputation as being a contributor to its community.²⁸ To maximize the public relations benefit of its efforts, the best kind of pro bono work for a law firm may be high profile cases with precedent value or an emotionally-charged case that is likely to generate significant media attention.

While pro bono work receives substantial attention in other areas of law, there is scant mention of it in the context of international trade litigation. The exception, perhaps, is the eleven law firms and four individuals that registered on the ACWL’s ‘roster of external legal counsel’, who have signaled their willingness to provide counsel to developing country governments in WTO litigation at the reduced rates set by the ACWL, if not on a pro bono basis. Certainly it is possible that other law firms also provide similar services on an

²⁷ These include the top four programs in international law as ranked by *U.S. News and World Report*, i.e., New York University, ‘NYU School of Law – Office of Student Financial Services, Loan Repayment Assistance Program’, <http://www.law.nyu.edu/depts/financialaid/lrap/moreinfo.html> (visited 9 September 2005); Columbia University, ‘LRAP for Public Interest Lawyers’, http://www.law.columbia.edu/current_student/financial_aid/LRAP (visited 9 September 2005); Georgetown University, ‘Georgetown Law - LRAP (Financial Aid)’, <http://www.law.georgetown.edu/finaid/lrap/> (visited 9 September 2005); and Harvard University, ‘HLS Financial Aid: LIPP Participants at Work’, <http://www.law.harvard.edu/students/finaid/lipp/people.php> (visited 9 September 2005).

²⁸ Furthermore, M. Galanter and T. Palay, ‘Public Service Implications of Evolving Law Firm Size and Structure’, in R. A. Katzman (ed), *The Law Firm and the Public Good* (Washington, DC: The Brookings Institution, 1995, at 46) indicate that ‘[a] high volume of pro bono work may offer an inducement for recruiting talented associates and may enable the firm to facilitate development of its lawyers’ professional skills while projecting a coveted image of public service.’

ad hoc basis not through the ACWL, in which case the amount of low cost legal assistance provided to developing countries may be underreported. However, if this is not the case (which is what we expect), it could prove beneficial to have the ACWL or a similar centre develop a more explicit system, if for no other reason than monitoring, coordinating and publicizing the availability of such activity.²⁹

1. Coordinating pro bono work with ACWL-like centres

Why might pro bono work by private law firms be a substantial untapped resource, and what infrastructure might be developed to allow it to be more fully exploited? For reasons associated with the relatively long history of international trade litigation in the US and EU through antidumping, countervailing duty, and safeguard investigations and actions (and their legal similarities and overlap with issues covered in much DSU litigation), the supply of the world's practicing attorneys in the field of international trade law is located not in Geneva, the physical site of the ACWL, but in Washington, DC and Brussels. Given that there are no locational spillovers to the developing country exporter client from having the ACWL office in Geneva (i.e., the developing country clients are no more likely to prefer Geneva to Washington or Brussels) it seems sensible to have legal service centre offices also set up in Washington and Brussels, to take advantage of the high concentration of trade litigation expertise and potential excess capacity located in those cities.³⁰

There are economic reasons why such satellite offices in Washington and Brussels might be better positioned to tap into local talent relative to Geneva's ACWL. First, much of the trade remedy litigation business that is the specialty of many trade law practice groups is cyclical. Thus, during periods when trade remedy business is slow because there are few domestic anti-dumping investigations to litigate, for example, there may be excess legal capacity in a firm's international trade practice group. Given that trade law expertise is highly specialized, there may not be much overlap of interest or skill set of the attorneys in the trade groups with other practice areas within the firm where there may be demand. Moreover, firms may have incentives to allocate attorneys to legal exercises that are more likely to enhance or maintain their skill set. It is in this context that for cyclical reasons, law firms might

²⁹ Similar statements would apply to the many economic consulting firms that provide services such as the provision of evidence in support of litigation in the public-private partnership model, i.e., on the size of the economic effects of the policies under contention. This may prove to be more effective if the litigation support function evolves to be driven more by larger consulting firms, and less on an ad hoc basis by individual (e.g., academic) economists in their private capacity.

³⁰ An additional argument would be to set up satellite centres in developing countries in order to establish a regional network of activity. However, this proposal would not be to take advantage of locational spillovers of available attorneys on the supply side, but instead proximity to clients may be useful to better identify needs and areas in which cases could be effectively pursued, generating benefits on the demand side.

be willing to have any temporary excess capacity of trade lawyers work either on pro bono cases or to engage in assistance at legal service centres working on trade dispute litigation. 'Locational' benefits would also arise as pro bono work is more attractive to a law firm, the lower the (non-legal) variable costs associated with the case, such as travel and accommodation. Minimizing such costs could help increase participation rates of private sector law firms willing to take on cases on a pro bono basis.³¹

2. *The value of WTO litigation to private sector law firms*

Is it likely that pro bono WTO litigation would be of value to law firms concerned with their public relations image?³² As the DSU is the 'Supreme Court' of the international trade litigators' system, working on even a relatively tedious matter before the WTO lends some element of prestige that has value for marketing or client-building purposes. For example, an internet search of the website of Washington-based law firms with international trade practice groups reveals the value to advising client litigation on WTO matters. The prominent Washington, DC firm Sidley, Austin Brown & Wood states on its website that it has '[a]dvised numerous governments and companies in over 175 WTO disputes on intellectual property, government procurement, subsidy, trade remedy, environment, taxation, telecommunications and investment matters. They have done so by writing the briefs, arguing the cases, developing the case strategy, and coordinating the dispute settlement consultations.'³³ Table 1 reports other self-identified examples of Washington firms' activity in formal DSU litigation at the WTO.

Aside from the pro bono work in non-trade fields of law, many larger law firms have specific arrangements with local district attorneys, prosecutors and government agencies to temporarily (for 6–12 months) 'loan' their junior-level attorneys out at low cost.³⁴ The purpose of these arrangements from the

³¹ In the domestic legal context, some private law firms have even established their own legal service centres in joint ventures with law schools. For example, the Hale and Dorr Legal Services Center of Harvard Law School, which provides legal assistance to the Boston community, has evolved to become a joint venture between the law firm of Hale and Dorr (now Wilmer Cutler Pickering Hale and Dorr) and Harvard Law School. See Hale and Dorr Legal Services Center, <http://www.law.harvard.edu/academics/clinical/lsc/main.shtml>, (visited 9 September 2005).

³² Our statements should not be interpreted as indicating that international trade litigators are less likely to engage in pro bono work than lawyers in other specialties, as we have no reason to believe this is the case. However, it is likely that their pro bono work involves low income clients involved in domestic litigation (e.g., employment discrimination) and not the potential pro bono work in the trade litigation context under discussion here.

³³ Sidley Austin Brown & Wood LLP, 'International Dispute Resolution', <http://www.sidley.com/practice/group.asp?groupid=1520> (visited 9 September 2005). Admittedly, such figures are likely to be overstated as some of this reported DSU activity may have taken place while current firm attorneys worked on DSU litigation not in their private capacity, but in a prior position as a government official.

³⁴ The law firms frequently continue to pay the attorney's existing salary, or will make up the difference between the government salary and the normal salary. See also Arnold and Porter, 'Sample of Pro Bono Work', http://www.arnoldporter.com/docs/resources/pro_bono_sample.pdf (visited 9 September 2005, at 11), which describes a similar program of loaning out attorneys to 'poverty law or public interest law organization'.

firm's perspective may be twofold. First, it benefits the firm over the long term if such a rotation outside of the firm gives its attorneys additional practical litigation/courtroom expertise that they might not otherwise receive in the early years of their professional career, without that experience coming at the expense of the law firm's own corporate clients and reputation. Second, such programs also presumably are an extension of goodwill between law firms and their communities, i.e., another form of public service.

A similar program could be modeled for trade litigation for the law firms with extensive trade practice groups with paying clients involved in WTO-related measures. One possibility might be to develop a public-private partnership in international trade litigation through explicit arrangements between law firms and centres like the ACWL.³⁵ Again, the junior-level attorneys for whom such programs might be most appropriate, would also likely be more willing to undertake a 6–12 month rotational arrangement at such a legal service centre if it did not necessarily involve them relocating from Washington or Brussels to Geneva, i.e., if there were satellite legal service centres set up in these other locations.

There are additional untapped opportunities for collaboration between private law firms and service centres to assist developing country legal interests in enforcing market access. For law firms that do not want to send their attorneys on rotation to the ACWL, they might consider corporate sponsorship of fellowship opportunities or the funding of salaries of legal service centre personnel. Furthermore, prominent law schools will frequently sponsor legal assistance 'clinics' set up as a course where a law school student works with practicing attorneys to provide supervised legal services to low income clients.

3. Expanding ACWL-like centres to set and monitor pro bono standards

An organization like the ACWL could also be used to coordinate private sector activity as well as serving an implicit monitoring role. It could be used to advertise 'subsidized' rates for law firms not willing or able to offer free legal services to developing countries to help identify to law firms what rates are reasonable. A higher profile for an institution like the ACWL could also serve to encourage more law firms to provide low cost legal services to developing countries. If substantially all of the well-known firms in the field have signed up on the 'roster of external legal counsel,' this might encourage more law firms into active participation. Presently, since there is little advertising for the eleven firms that have participated by putting their names on the list, there is little reputational cost to those firms whose name is not on the list. Increasing the profile of this monitoring element of the ACWL could thus increase law firm participation in the program of offering sufficient pro bono services.

³⁵ Shaffer, above n 3, describes the revolving door nature of the Washington, DC trade bar in and out of government positions at the USTR, Department of Commerce and US International Trade Commission. In these cases, while there may be implicit recognition that a firm's departing attorney may be welcomed back when his or her government service is completed, these are not formalized into explicit arrangements like the ones being proposed here between private firms and the ACWL.

4. Limitations of the *pro bono* legal assistance model

There are likely to be differences in the pattern of cases that would be brought forward under a legal service centre versus a *pro bono* model. The *pro bono* work is much more likely to focus on high profile cases that can garner significant media attention (i.e., precedent-setting cases) as opposed to cases that are more rudimentary, unglamorous, and that involve more straightforward enforcement of existing and well-understood provisions. On the other hand, the work directly undertaken with the assistance of the law firms' loaned-out attorneys through the legal services centre is more likely to be of the latter type – especially if the *pro-bono* model is implemented – as the law firms themselves will not be worried about having their brand names attached to a case.

Whether directly provided *pro-bono* work or through legal assistance centres, the point of this section is that there may be substantial potential to tap private sector legal resources to assist developing countries defend their interests, and that these firms should be willing to provide such resources given the associated benefits – maintaining and augmenting human capital of staff, additional prestige, and possible positive spillover effects in terms of additional work on similar cases involving developed countries' paying clients.

C. NGOs and issue-based organizations

Issue-based organizations are a second untapped resource that could support developing country interests in WTO litigation. There are currently few NGOs that have the expertise and resources to do every part of the process (illustrated in Figure 1) that the private-public partnership is able to accomplish in the US and EU. In this section we use the framework of comparative advantage to examine the usefulness of different types of groups in various phases of the WTO's extended litigation process.

While more radical NGOs and anti-globalization protestors have been quite successful at drawing media and sometimes even political attention to the systemic inequities of the current WTO system, there has not yet been a concomitant evolution of complementary organizations willing to take the steps necessary to *proactively* assist disadvantaged countries by helping to engage within the system.³⁶ In

³⁶ M. Winston, 'NGO Strategies for Promoting Global Corporate Social Responsibility', 16 *Ethics & International Affairs* (2002) 71, categorizes the breakdown of the activist groups into 'Confronters' and the 'Engagers' for the case of the anti-sweatshop movement. See also the discussion in K. A. Elliott and R. B. Freeman, 'White Hats or Don Quixotes? Human Rights Vigilantes in the Global Economy', in R. B. Freeman, J. Hersch and L. Mishel (eds), *Emerging Labor Market Institutions for the Twenty-First Century* (Chicago, IL: The University of Chicago Press, 2005). In the trade dispute context, one excuse that NGOs could use is that they do not have legal standing before the DSU and thus the standing to formally engage in the process. Nevertheless, they can submit amicus briefs, and presumably even if that right had no influence, there is nothing to prevent NGOs from either providing legal services themselves (except, perhaps sufficient expertise) or providing directed funding for legal services in order to assist the preparation of briefs, discovery of evidence, etc. of use to developing country governments. Thus our perspective is that the 'Engagers' in the trade litigation context have not yet sufficiently emerged.

the trade litigation context, what is missing are the NGOs willing to substitute their resource activity toward legal and technical support of active developing country engagement in the dispute settlement process and away from protests and lobbying efforts that generate more publicity and media attention.

The pro-trade emphasis adopted by DSU panel and Appellate Body decisions suggests an opening for such groups to organize to exploit this opening to the benefit of their constituents' market access interests. To date, however, NGOs have focused almost exclusively on public awareness and lobbying campaigns – e.g., Oxfam's 'Make Trade Fair' campaign – and engaging on the substance of existing and proposed WTO rules, e.g., opposing the so-called 'Singapore Issues' from being negotiated in the Doha Round, pushing for 'special products' to be defined in the Agreement on Agriculture, etc. as well as assisting developing countries define and defend their interests in negotiations.³⁷

1. Implications of NGO funding constraints for caseload coverage and composition

The participation of issue-based organizations in other legal contexts is fairly common practice. For example, with respect to US employment law, there are a number of issue-based organizations in the United States that have developed their own staff of attorneys to routinely offer legal assistance to private clients whose case is aligned with the organization's 'issue'.³⁸ Illustrative examples include litigation with employment discrimination allegations based on race (National Association for the Advancement of Colored People), sexuality (Lambda Legal Defense and Education Fund), age (National Senior Citizens Law Center), gender (Legal Momentum), etc.³⁹

Not surprisingly, however, the funding needs of these organizations strongly influence decisions on how their legal resources are allocated, and thus which cases the organizations accept for litigation. Much like the pro bono work undertaken by private sector law firms, the potentially high profile and precedent-setting cases generating media attention are the disputes of

³⁷ An example is the activity of the Swiss NGO, Ideas, which provided assistance to the four West African countries that pushed for cotton subsidies by the US and other countries to be addressed on a priority basis in the run-up to the Cancun ministerial meeting and thereafter. While a number of large NGOs, especially environment-focused groups, have been very active in lobbying in particular disputes, they have primarily pursued their own interests, not those of individual developing countries. In assessing the extent of NGO involvement in dispute settlement this distinction is important, as the action of an NGO may not be aligned with the interest of the developing country that it being used as the vehicle to publicly air the NGO's issue.

³⁸ Jolls above n 21.

³⁹ Another example from the US domestic law context might be issue-based environmental organizations. Groups like the Sierra Club, for example, routinely engage in litigation against the Environmental Protection Agency alleging the failure to sufficiently enforce environmental protection laws enacted by the Congress. There is less overlap with these groups and the trade litigation context primarily for reason of standing, i.e., the Sierra Club can self-initiate litigation in the US, whereas an NGO like Greenpeace could only participate in WTO litigation through a particular WTO member country.

greatest interest to issue-based legal organizations that must simultaneously be concerned with future financial support of their cause through appealing to individual donors and foundations. Unlike legal assistance centres, issue-based organizations therefore have no intention of taking on as many cases as possible and are likely to be uninterested in pursuing routine cases that simply enforce existing laws and standards and are not precedent-setting.

2. *Towards more effective NGO 'engagement' in the enforcement process*

There are many stages of the extended litigation process illustrated in Figure 1 where interested NGOs could effectively engage in support of the market access interests of poor countries. In this section we briefly assess the competency for engagement in the pre-litigation collection of information and evidence of the effects of WTO-inconsistent policies, the assistance with legal briefs and economic evidence, and finally the role of lobbying, public relations, and inducing political momentum to generate compliance.

The first stage is the pre-litigation phase of identifying economically beneficial cases to pursue. One source of 'competitive' advantage that larger NGOs have is a local presence in many countries, including developing economies. These may be branches, 'subsidiaries', or less formal networks of partners with similar interests. This allows such groups to more easily identify the foreign market access interests of local stakeholders in order to assess whether these interests could in specific situations be pursued through WTO litigation. Thus, local NGO offices or entities could help mobilize the public-private partnership required to use the DSU most effectively by helping to *identify* cases that could be brought to domestic government officials with evidence that they are worthy of pursuit at the WTO. Furthermore, while private sector interests in the US or EU that engage the litigation process have typically been export-oriented *industries*, there is nothing to preclude the engagement in developing countries of workers or unions that are concerned with safeguarding the jobs associated with exports into specific markets. NGOs concerned with economic development therefore may have an interest in assisting communities to support employers to bring forward cases to their government.

A requirement for NGOs to play a more substantive and proactive role in the actual litigation associated with the second stage of the dispute resolution process on behalf of poor country market access interests is technological upgrading. There is little evidence that the existing infrastructure of this community has the capacity to engage in this role without additional investment. Many development NGOs have the capacity and expertise to 'confront' and mobilize supporters.⁴⁰ While useful in generating political momentum, this expertise is not particularly useful in a legalistic setting. These groups have not developed the skill set for the complementary role of providing technical

⁴⁰ Winston, above n 36.

legal and economic advice to ‘engage’ their constituents’ interests by assisting in the preparation of actual cases.⁴¹ A more substantive role for general development NGOs will require a willingness to retool to engage in this process on a more formal level – i.e., restructuring their technical capabilities to fit what is required by the existing legalistic setting.⁴²

This in turn would seem to call for greater specialization and complementarity across organizations. Think tanks and research institutes – entities with a focus on development but with a greater analytical capacity or interest than most NGOs – might have a greater incentive to assist in dispute settlement. Existing entities that may ‘fit’ this mould, and to some extent may already have a mandate to assist countries with dispute settlement, do many other things as well.⁴³ For NGOs and think tanks to become more effective in identifying and bringing forward the ‘missing cases’, there are likely to be substantial gains from specialization. Thus, some could become more focused on the pre-litigation, investigative and information-gathering work that is required to identify to developing country exporters the most economically important cases to pursue. Others might develop stronger expertise in crafting legal arguments and working with the legal assistance centres, while yet others might be more adept at constructing economic evidence to support potential litigation and work with economic think tanks and researchers.

Another significant constraint limiting the effectiveness of existing NGOs in the context of subsidizing access to trade litigation is that they each tend to have a narrow focus – they are single issue organizations typically centred on the environment, human rights, labor standards, etc. Perhaps for funding reasons, NGOs with a higher discount rate also may have an incentive to take on developing country governments for perceived inappropriate or ineffective policies. On the other hand, taking on actions by foreign governments that impede developing countries’ access to markets may only indirectly benefit the NGO’s ‘issue’: e.g., through the longer-run benefit of trade leading to economic growth which then increases the ability of the government to mobilize

⁴¹ Nevertheless, one example of a technical report with relevance to a WTO trade dispute with the potential to form the basis of use to a developing country litigant is Oxfam, ‘Drug Companies vs. Brazil: The Threat to Public Health’, http://www.oxfam.org.uk/what_we_do/issues/health/drugcomp_brazil.htm (visited 9 September 2005), which relates to *Brazil – Measures Affecting Patent Protection*, brought by the US (DS199). However, to be useful in the DSU process, such a report would require technical upgrading in order to refine legal arguments and construct methodologically-appropriate economic evidence in support of those arguments.

⁴² Furthermore, it may be difficult for such groups to access the right to sensitive, business confidential information to play an active role in the actual case, given that private sector agents may be worried about the organization’s agenda and illegal misuse of such information to pursue additional litigation or campaigns designed to adversely affect public relations.

⁴³ Possible examples include the International Centre for Trade and Sustainable Development (ICTSD) in Geneva and the previously mentioned iLEAP. The former focuses mostly on negotiations, policy advice and provision of information and opinion on trade issues. Litigation advice is not a major activity. ILEAP may come closer to the type of entity required, but here also the focus is mostly on capacity-building and policy advice.

the tax resources to pursue the NGO's preferred domestic policies. What is needed is increased engagement by NGOs that are committed to and/or willing to put the long-run commercial interests of developing countries first.⁴⁴ This requirement would appear to rule out the majority of single issue NGOs. The exceptions are general development-focused NGOs such as Oxfam and specialized NGOs that also have a development focus but limit their attention to trade/investment issues. As mentioned, however, the existing stock of the latter is not yet actively engaged in assisting in the prosecution of cases. Instead, they tend to provide information and assistance in the identification of national policy options, interests and negotiating positions. What is needed is the creation of entities that focus on the enforcement as opposed to the rule-making dimensions of the WTO process.

There is also a potential role for NGOs in the post-litigation phase identified by Figure 1, where it is necessary to generate the domestic political support to convince respondent governments to comply with adverse panel rulings. For example, discussants of globalization and human rights advocates for labor standards in developing countries sometimes describe human rights groups as 'supplying' a product to developed country consumers by providing them with information on the working conditions associated with the goods they buy.⁴⁵ A much more sophisticated set of organizations and messages is required if a similar informational 'product' on trade litigation issues is to be supplied to consumers in developed countries who may be interested in knowing of the detrimental effects of their governments' WTO-inconsistent market access restrictions impacting poor countries. While it may be no less important, it seems much more difficult to educate the public to generate political action against the welfare implications of subsidies, antidumping measures, and other non-tariff barriers than it is to generate a similar groundswell of public opinion against child labor or threats to dolphins, for example.

To conclude this section, there is an opening for more proactive scrutiny of trade policies by think tanks and NGOs. There is the opportunity for them to help hold governments and successful rent seekers more accountable for their actions, especially given that there is an explicit legal mechanism established that can be used to exploit their constituents' interests. Moreover, there is a need for increased *cooperation* between these nonprofit groups, potential exporting industries in developing countries, attorneys and other organizations with the potential to help. There is nothing inherently bad about assisting poor firms in developing countries to export.

⁴⁴ This may well imply taking on local governments as well as foreign ones, which in turn may require a multinational presence (network) through which export interests abroad are mobilized in order to deal with a violation in an import market. Regardless, the key is that the focus be squarely on the economic interests of poor countries.

⁴⁵ Elliott and Freeman, above n 36.

D. Official development organizations

As discussed previously, abstracting from the important issue of increasing the expected return to litigation, actions are needed to reduce the costs of litigation and uncertainty regarding expected payoffs. Development institutions such as UNCTAD, UNDP, the International Trade Centre (ITC) in Geneva, and the World Bank could also more actively support poor country litigation interests in WTO dispute settlement. These organizations possess the capabilities to provide technical assistance and undertake relevant (market) research in support of litigation. Given the inter-governmental nature of these international institutions, however, they cannot become active participants in dispute settlement, as this pits members of the organization concerned against each other. Bilateral development agencies do not confront such general constraints. While they may confront constraints in providing assistance to countries that are seeking to sue their government for non-compliance with WTO obligations, they could provide funding to national and regional think tanks to undertake the type of discovery and analysis described above.

E. Consumer organizations and importers in the export market

Other groups with a private interest in assisting developing country export interests are importers and the consumer groups in developed countries that benefit from access to increased varieties and volume of such trade and the corresponding low prices. Such groups frequently do not have sufficient legal standing in the policy-imposing country to affect the policy-implementation process in the first place, and thus may find it a potential useful avenue to team up with foreign exporters at the WTO. For example, despite organization of the steel-consuming industries in the US through the Consuming Industries Trade Action Coalition, because the US safeguard and antidumping statutes do not include consumer interest provisions in the determination of injury, consumers have an economic interest in teaming with foreign exporters in public-private partnerships to challenge US trade remedies on steel imports at the WTO.⁴⁶ Here, note that the private sector entity with interests aligned with the public sector in a potential public-private partnership is a *foreign* party.

In principle, consumers have a strong incentive to assist developing countries in their market access litigation. However, consumer interests typically have a difficult time organizing collectively due to the free rider problem, which is the first barrier that must be overcome before one can pose the follow-up question of whether even organized groups would have an incentive to assist foreign exporters in support of WTO litigation. Thus, it is important to

⁴⁶ In the WTO dispute *EU – Trade Description of Sardines* filed by Peru, the consumer group UK Consumers Association worked pro bono to write an amicus brief on behalf of the Peruvian sardine exporters. See Shaffer, above n 5, at 35.

note that consumer groups are more likely to organize, the greater is their own concentration⁴⁷ and the greater the adverse affect on the domestic price of the WTO-inconsistent market access barrier. This suggests that more concentrated importer associations may be a more likely counterpart to assist the developing country exporters concerned.

Given that antidumping and countervailing duty actions and other discriminatory market access barriers generate trade diversion (i.e., an increase in trade for exporters that do not face the discriminatory policy) that mitigates any price increase, trade remedy cases are less likely to face opposition from domestic consuming groups and importers. The latter are more likely to oppose nondiscriminatory trade barriers. As nondiscriminatory trade policy actions are easier to prevent from being implemented in the first place, this contributes to the explanation of the observed prevalence of discriminatory trade barriers against developing country exporters. Thus, reliance on consumer organizations and importers in importing countries to form partnerships with developing country exporters in WTO litigation may only cover a small share of the missing caseload.

F. The need for coordination

A final issue to highlight explicitly is the need for coordination and transparency. The approaches proposed in this paper involve different potential actors with different interests. Single issue NGOs generally have clear objectives, as will importer associations, both of which could work with exporters in developing countries and providers of legal/economic assistance. But exporters and legal service providers have confidentiality requirements that may preclude sharing of information and data. Exporters may not have full confidence that NGO interests are aligned with their own or that such entities will be accountable for their actions. Similarly, the types of think tanks specialized in enforcement of treaty obligations suggested above may or may not be effective and useful in providing the analytical inputs needed to assist in the identification and prosecution of potential cases.

Introducing a ‘coordinator’ entity at the national level in developing countries could help increase the confidence of exporters and export-oriented interests that the ‘agents’ providing services are serving the ‘principals’ as well as the broader public good. One option would be for WTO Members to create an entity with the mandate to monitor actions of national government agencies for consistency with WTO obligations. This function could be a public-private partnership through which the NGOs, consumer groups, importers and exporters in a developing country can raise issues, seek to get them investigated (an initial pass to see if there appears to be a WTO inconsistency), and

⁴⁷ This condition is more likely to be satisfied if they are consumers of intermediate inputs, as opposed to consumers of end products.

eventually bring them to the attention of the legal service providers and the competent government body to litigate at the WTO.

G. The counterfactual: defending developing country interests by proxy

In the absence of increased services from legal assistance centres, pro bono private sector assistance, and greater engagement of issues-based organizations, some developing country cases will be represented by proxy – i.e., through private sector entities working on poor country exporter's interests because this happens to be aligned with their own interests. For example, consider the WTO's *EU – Banana Regime* case from the perspective of the banana exporting countries of Latin and Central America. Because of GATS and services trade being subject to WTO disciplines, the banana distributor Chiquita (a US firm) was able to convince the US government to litigate the case at the WTO. Thus it is possible that we may see additional outsourcing of the litigation burden to third parties with related interests.

A concern with relying on this proxy mechanism is that the third party is not likely to have its interests exactly aligned with the poor country producers themselves. In the *EU – Banana Regime* dispute, as a distributor, Chiquita did not desire free trade in the EU market for bananas, but simply an increase in its allocation of licences and a larger share of the existing import quota that propped up banana prices. As Chiquita could source bananas from a number of different exporting countries, it had market power and therefore would not necessarily pass along a substantial share of profits associated with the outcome of the dispute to the local producers in the developing countries.⁴⁸

H. Discouraging developing country investment in trade litigators

An advantage of the various approaches discussed above to mobilize private sector support to help poor countries defend their WTO interests is that it does not encourage developing countries to divert scarce resources into training their own stock of trade litigators. There are a number of downsides associated with technical assistance or capacity building efforts that are aimed at expanding this stock. First, it fails to capitalize on the potential excess capacity of internationally tradable legal expertise available in developed countries that may also have a low social opportunity cost. Second, presumably there is a high opportunity cost to poor country resources being spent on developing

⁴⁸ Furthermore, the *Bananas* case also illustrates that interests of issue-based organizations may not be aligned with those of the private sector export interests of developed countries and the developing country exporters. Thus, in *Bananas*, development NGOs might have conflicting incentives as the US firms supporting the case are opposing a regime that is designed to assist another group of developing countries – mostly ex-colonies of France and the UK. This points to the potential need to broaden the agenda so as to mobilize the support of NGOs to prosecute a case – e.g., accompany the legal challenge with an effort to put into place alternative, non-trade-distorting instruments to assist those countries that are purported to benefit from the WTO illegal policy. Such coordination challenges are likely to be nontrivial, and suggest yet another task for local or regional think tanks.

their own trade litigators. The social value associated with domestic contract enforcement in many poor countries is likely to be much higher than training a lawyer to pursue trade litigation. And since international lawyers are less likely to be substitutable in the context of domestic contract enforcement, the emphasis of the stock of domestic legal expertise should be focused there.

Another concern is that developing countries may be ‘learning’ from the US/EU model by establishing antidumping, countervailing duty and safeguard statutes under the assumption that successfully applying import protection through these mechanisms is a necessary condition to giving trade litigators pre-WTO litigation experience. If so, this would be a socially costly way of providing lawyers such experience as it leads to additional import restrictions while the trade litigators are in the ‘infant industry’ phase of skill-building. Furthermore, as the experience of the US, EU and an increasing number of developing countries illustrates, it may be difficult for governments to restrain the use of such trade remedies once the statutes have been established.⁴⁹

CONCLUSION

This paper focuses on the cost of the WTO litigation process as a potential explanation for the limited participation of poor countries in dispute settlement. We catalog and examine a number of different proposals to reduce those costs and the likely impact of each proposal on reducing the magnitude and altering the scope of the ‘missing’ developing country caseload. Using the private-public partnership model as our guiding framework, we identify a number of useful roles for various self-interested and altruistic groups – including legal service centres, non-governmental organizations, development organizations, international trade litigators, economists, consumer organizations and importers, and even law schools – in the enforcement process. These groups may assist with needed information-generation and increased transparency, if they are willing to invest in technological (legal and economic) upgrading so as to contribute to the provision of these services to help poor countries use the formal WTO dispute settlement process.

There are a number of caveats and omissions from our approach, which has focused exclusively on the role of the private and not-for-profit sector in increasing access to legal services to defend poor country exporters’ market access interests. The first substantial omission is the neglect of missing developing country disputes on the ‘import side’, i.e., those that would challenge

⁴⁹ Some of the largest users of the antidumping mechanism are now developing countries, including India, South Africa, Argentina, Brazil and Mexico. See C. P. Bown, ‘Global Antidumping Database Version 1.0’, (Washington, DC: World Bank Policy Research Paper No. 3737, October 2005). J. Michael Finger and Julio Nogues. ‘Safeguards and Antidumping in Latin American Trade Liberalization: Fighting Fire with Fire’ (mimeographed, 2005), argue that in a number of Latin American countries instruments of contingent protection were used deliberately to facilitate and sustain a broader trade liberalization strategy.

poor countries' own WTO-inconsistent import restrictions. Despite continued mercantilist rhetoric, a substantial share of the gains from increased international trade for all countries derives from access to low-priced and greater variety of *imports*. Developing countries – especially the poorest ones – go almost completely unchallenged by WTO litigation. It is unlikely that this is because they are in full compliance – instead, the small size of their markets is likely the dominant explanation. This particular concern may be important, to the extent that trade patterns are regional and depend on distance, as the failure to confront illegal poor country import restrictions may disproportionately impact exports from other poor country neighbors.⁵⁰

A second omission concerns the underlying normative question as to whether the current WTO DSU framework is the 'right' place for poor country market access litigation to occur. One argument might be to draw an analogy between the claims that, just as a low wage worker's wrongful termination suit ought not to be litigated before the US Supreme Court, the DSU should be reserved for the more 'important' issues and not be used to address disputes that pertain to small trade volumes. Unlike the domestic litigation context, however, there is currently no system in the WTO of lower courts, an ombudsman, or binding arbitration to handle such cases. And although the consultations phase of formal dispute settlement was in part designed to allow Members to come to a settlement, private settlements can raise additional transparency concerns, as most WTO-inconsistent policies affect the market access interests of many member countries' exporters. Therefore, this is a question that involves changing the current system – a topic we have deliberately abstracted from in this paper so as to take the institutional framework as given. A number of proposals have been made in the literature to adapt the current system to introduce additional, 'lighter' dispute settlement mechanisms.⁵¹ Much more research on this topic – including alternatives to litigation – is required.

⁵⁰ We address this subject separately in Bown and Hoekman, above n 3.

⁵¹ Nordström, above n 5.