

**DEVELOPMENT THROUGH TRADE DISPUTES:  
BUILDING A REPUTATION USING THE WORLD TRADE  
ORGANIZATION'S DISPUTE SETTLEMENT SYSTEM**

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I. INTRODUCTION

The World Trade Organization's (WTO) dispute settlement system<sup>1</sup> is one of the most active forums in the field of public international law.<sup>2</sup> By and

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<sup>1</sup> The WTO's dispute settlement system is governed by the Dispute Settlement Understanding and is administered by the Dispute Settlement Body: a division within the WTO made up of all member states that is charged with forming panels when complaints are brought

large, the WTO provides an arena for members to bargain with each other for binding commitments to change trade policies for the welfare of other member states.<sup>5</sup> Thus, to help enforce such commitments, the WTO's dispute settlement system was created. Rules, not power, are meant to be the foundation for the system.<sup>4</sup> It is a mechanism to resolve disputes between members arising from legal obligations under WTO law.<sup>5</sup> By providing such a venue, the system discourages members from taking unilateral actions against each other—hence, “provid[ing] security and predictability” among all trading partners.<sup>6</sup> The judicialization of the international trade dispute settlement procedures has helped improve compliance with member states' trade obligations.<sup>7</sup> In fact, many observers believe it has been remarkably effective in maintaining stability in the international trading system.<sup>8</sup>

On the other hand, the system is often faced with criticism. Some believe the panel and appellate decisions made in the Dispute Settlement Body (DSB)<sup>9</sup> are incoherent and serve no precedential value.<sup>10</sup> Others strongly argue

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by members against other members, adopting the reports submitted by the panels and the Appellate Body, approving retaliatory trade action by a winning complainant against a losing defendant, generally monitoring compliance of trade commitments by members. Peter M. Gerhart & Archana Seema Kella, *Power and Preferences: Developing Countries and the Role of the WTO Appellate Body*, 30 N.C. J. INT'L L. & COM. REG. 515, 516 n.2 (2005).

<sup>2</sup> Niall P. Meagher & David Palmeter, *World Trade Organization Dispute Settlement*, in THE PRINCETON ENCYCLOPEDIA OF THE WORLD ECONOMY 1201 (Kenneth A. Reinert & Ramkishen S. Rajan eds., 2009). In 2012 alone, 27 complaints were initiated by members, 11 panels were formed, and 18 panel reports and 11 Appellate Body reports were adopted. WTO, WTO ANNUAL REPORT 2013, available at [http://www.wto.org/english/res\\_e/booksp\\_e/anrep\\_e/anrep13\\_chap5\\_e.pdf](http://www.wto.org/english/res_e/booksp_e/anrep_e/anrep13_chap5_e.pdf).

<sup>3</sup> Gerhart & Kella, *supra* note 1, at 523.

<sup>4</sup> AUTAR KRISHEN KOUL, GUIDE TO THE WTO AND GATT: ECONOMICS, LAW, AND POLITICS 45 (2005).

<sup>5</sup> Donald McRae, *Measuring the Effectiveness of the WTO Dispute Settlement System*, 3 ASIAN J. WTO & INT'L HEALTH L. & POL'Y 1, 4 (2008) (proposing that the United States hoped to bind other members to resolve their differences, while the EU and Japan sought to protect themselves from U.S. unilateral action under Section 301 of the U.S. Trade Act).

<sup>6</sup> *Id.*

<sup>7</sup> Dr. Bernhard Zangl argues that the emergence of judicial international dispute settlement procedures, particularly in the WTO, appears to have increased states' likelihood of compliance of their external legal obligations. Bernhard Zangl, *Judicialization Matters! A Comparison of Dispute Settlement Under GATT and the WTO*, 52 INT'L STUD. Q. 825, 826 (2008). Studying the United States' dispute settlement behavior during GATT and after the creation of the WTO, he concluded that there is strong evidence that the judicialized WTO dispute settlement system was more effective at gaining compliance than the diplomatic system under GATT. *Id.* at 827.

<sup>8</sup> See, e.g., Meagher & Palmeter, *supra* note 2, at 1201.

<sup>9</sup> The Dispute Settlement Body is one of the important bodies of the World Trade Organization that is responsible for administering the rules of the Dispute Settlement Understanding. KOUL, *supra* note 4, at 34. As discussed in more detail in Parts II.B–C below, the

that the system is significantly biased against developing countries. These critics believe a bias exists because the dispute settlement system does not effectively deal with power or capacity imbalances between wealthy states and poorer states, thus deterring the latter from filing complaints against the former.<sup>11</sup>

First, less developed countries lack the power to negotiate on an equal footing with their rich counterparts.<sup>12</sup> Furthermore, smaller countries may fear the possibility of economic and political retaliation in response to pursuing their complaints—preventing them from fully participating in the system.<sup>13</sup> Second, developing countries tend to lack the institutions, people, or finances to “identify, analyze, pursue, and litigate a dispute.”<sup>14</sup> Essentially, prosecuting a complaint in the DSB is a long, complex process that requires a high level of expertise in WTO law, and developing countries do not have the resources to compete.<sup>15</sup> As such, the system discriminates against less developed countries by giving the wealthy unfair advantages.

At the same time, other scholars argue that no substantial bias truly exists, and that the frequency of participation in the dispute settlement system is actually determined by a country’s volume of trade.<sup>16</sup> In other words,

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DSB is charged with establishing panels, adopting the panel and Appellate Body reports, monitoring the implementation of those decisions, appointing Appellate Body members, and authorizing the “suspension of trade concessions and other obligations.” *Id.*

<sup>10</sup> KOUL, *supra* note 4, at viii–ix.

<sup>11</sup> See, e.g., Andrew T. Guzman & Beth A. Simmons, *Power Plays and Capacity Constraints: The Selection of Defendants in World Trade Organization Disputes*, 34 J. LEGAL STUD. 557 (2005); Henrik Horn, Petros C. Mavroidis & Håkan Nordström, *Is the Use of the WTO Dispute Settlement System Biased?*, in CENTRE FOR ECONOMIC POLICY RESEARCH DISCUSSION PAPERS (C.E.P.R. Discussion Papers No. 2340, 1999); see also Fabien Besson & Racem Mehdi, *Is WTO Dispute Settlement System Biased Against Developing Countries? An Empirical Analysis*, Second International Conference on ‘European and International Political & Economic Affairs,’ Athens, Greece (2004), available at <http://ecomod.net/sites/default/files/document-conference/ecomod2004/199.pdf>.

<sup>12</sup> Guzman & Simmons, *supra* note 11, at 559.

<sup>13</sup> *Id.*

<sup>14</sup> *Id.* at 559.

<sup>15</sup> *Id.* at 566.

<sup>16</sup> In their 2003 study, Dr. Peter Holmes, Prof. Jim Rollo, and Prof. Alasdair Young found that, statistically, the most active participants in the WTO dispute settlement system tended to be those with the largest volume of global trade. Peter Holmes, Jim Rollo, and Alasdair R. Young, *Emerging Trends in WTO Dispute Settlement: Back to the GATT?* 5 (The World Bank Development Research Group, Policy Research Working Paper No. 3133, 2003), available at [http://www-wds.worldbank.org/external/default/WDSContentServer/IW3P/IB/2003/10/03/000094946\\_03092310565344/Rendered/PDF/multi0page.pdf](http://www-wds.worldbank.org/external/default/WDSContentServer/IW3P/IB/2003/10/03/000094946_03092310565344/Rendered/PDF/multi0page.pdf). For example, the United States and the EU were a party to a dispute approximately 60% of the time. Matthew C. Turk, *Why*

developing countries participate at a much lower rate because they have less at stake economically. And yet, at least one commentator argues that reputational costs,<sup>17</sup> not economic factors, are primary considerations in deciding whether to litigate a dispute.<sup>18</sup> The risk of losing reputation, not the fear of institutional bias, keeps countries from filing frivolous claims.<sup>19</sup> In deciding whether to file a complaint, developing countries must ask the same question as developed countries: are the risks to reputation outweighed by the potential benefits of winning the case?

This Note argues that the system may—and, in fact, should—be used to promote the interests of both developed and developing countries by looking at the reputation factor as more than a potential cost. While reputation may be at risk when filing a complaint, it can also provide a benefit. Filing a complaint makes a statement to other members, both those involved in the suit and those who are not.<sup>20</sup> By declaring to others that trade violations are consistently unacceptable, developing countries can demonstrate a willingness to participate and to help strengthen the trading system as a whole. This is not to say that filing a complaint should be a developing country's first resort—in fact, all other avenues of negotiating a dispute should first be exhausted—but when those methods fail, a country should pursue its rights under the WTO system. In this manner, these members will foster reputations as assertive and dependable trading partners. At the same time, developed countries would reap the benefits of dynamic trading partners that feel more included and, therefore, more willing to cooperate. In other words, instead of providing a biased arena where only the largest economies can fully address their disagreements, the WTO dispute settlement system may be capable of promoting development through trade disputes.

In support of this argument, this Note will study the case of Costa Rica, a small country—both in population and in physical size—whose conscious decisions to actively participate in the WTO and the dispute settlement system have helped produce positive outcomes.<sup>21</sup>

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*Does the Complainant Always Win at the WTO?: A Reputation-Based Theory of Litigation at the World Trade Organization*, 31 *NW. J. INT'L L. & BUS.* 385, 393 (2011).

<sup>17</sup> Turk, *supra* note 16, at 388. Turk proposes that a country's reputation within the international community plays a pivotal factor in deciding whether to file complaints in the DSB. *Id.* at 388. It is concern for losing reputation that limits countries to filing only claims that they are confident are meritorious—as evidenced by the 90% win rate for cases in the DSB. *Id.* at 387.

<sup>18</sup> *Id.* at 414.

<sup>19</sup> *Id.* at 414–15.

<sup>20</sup> *Id.*

<sup>21</sup> See, e.g., *Bilateral and Regional Trade Agreements Notified to the WTO*, WORLDTRADELAW.NET, <http://www.worldtradelaw.net/databases/ftas.php> (last visited Nov. 6, 2014) (discussing the multiple Regional Trade Agreements Costa Rica has been a part of in the last couple of decades).

Part II of this Note provides a relatively detailed background of the WTO and the dispute settlement system for two reasons: (1) to introduce the unique attributes of a system, which is largely unfamiliar to those outside of the field; and (2) to support the assertion that the dispute settlement process is full of complexities that may be daunting for smaller WTO members. Part II.A provides the history of the WTO and the formation of the new dispute settlement system, and Parts II.B and II.C provide step-by-step descriptions of how a dispute progresses in the DSB and what entities are involved at each stage. The claims of bias based on power and capacity imbalances are presented in Part III.A.<sup>22</sup> In contrast to the bias claim, Part III.B describes how the correlation between share of the volume of trade and levels of participation could explain why developing country participation in the system is relatively low. Part III.C explains the reputation-based theory, formulated by Matthew Turk,<sup>23</sup> that argues that concerns over reputation are a major influence over whether or not to bring a claim.<sup>24</sup> The second part of Part III.C takes the reputational effect theory further to argue why developing countries *should* bring meritorious claims to improve their reputation. Part III.D presents a case study of Costa Rica: a small, developing country whose participation in the WTO and the WTO's dispute settlement system has helped build its reputation to the point that it has been offered admission into the Organization of Economic Cooperation and Development (OECD).

## II. BACKGROUND: THE DISPUTE SETTLEMENT SYSTEM ORIGINS AND CURRENT FRAMEWORK

Although the work of the dispute settlement system represents only a portion of the activities in the WTO, it seems to garner the largest share of the attention from scholarly articles discussing the organization.<sup>25</sup> The dispute settlement system consists of a set of rules—known as the Dispute Settlement

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<sup>22</sup> The Note later argues that these claims of bias are more of an obstacle of perception rather than substance. In other words, the fear that power or capacity imbalances will affect a poor country's ability to litigate complaints is more of an impediment to participation than the alleged imbalances.

<sup>23</sup> Matthew Turk is an attorney for Sullivan & Cromwell LLP—one of the most prestigious international law firms in the world. *Vault Law 100*, VAULT.COM, <http://www.vault.com/rankings-reviews/company-rankings/law/vault-law-100.aspx> (last visited Nov. 6, 2014) (ranking Sullivan & Cromwell the fourth most prestigious firm in the world). His theory of reputation-based litigation in the WTO dispute settlement system will be discussed below.

<sup>24</sup> Turk, *supra* note 16, at 388. In his article, Turk seeks to explain the high win rates in WTO cases and concludes that countries are highly selective about their claims—bringing only the most meritorious complaints. *Id.* The cost-benefit analysis is based on the reputational effects of winning or losing the case: the effect on the reputation of the opponent. *Id.*

<sup>25</sup> See McRae, *supra* note 5, at 2 n.1.

Understanding (DSU)—that are administered by the Dispute Settlement Body (DSB). The DSB, through the DSU, has the authority to establish panels; select the sitting members of the Appellate Body; adopt panel and Appellate Body reports; and, if necessary, permit the use of retaliatory measures.<sup>26</sup> The system is one of the more exceptional aspects of the World Trade Organization because it serves a uniquely judicial function.<sup>27</sup> In fact, it is widely considered to be the international tribunal that “most . . . resembles a domestic court” because it exercises compulsory jurisdiction over all members, uses panels that resemble a trial court and a separate and permanent appeals system, and makes legally-binding decisions.<sup>28</sup>

The only international courts that resemble the WTO dispute settlement system are the International Court of Justice (ICJ), the European Court of Justice (ECJ), and the European Court of Human Rights (ECHR).<sup>29</sup> Like the DSB, all three exercise some form of compulsory jurisdiction, hear cases on a regular basis, and give out binding decisions.<sup>30</sup> However, the ICJ’s compulsory jurisdiction only applies to certain states, and the ECJ and ECHR are bodies within a governmental structure—the EU.<sup>31</sup>

The WTO’s dispute settlement system is governed by a framework established by the Understanding on Rules and Procedures Governing the Settlement of Disputes, which is universally known as the Dispute Settlement Understanding.<sup>32</sup> First, the system operates under clearly defined procedural rules that include establishing timelines and creating panels.<sup>33</sup> Second, the system also includes an appeals process for when either side disagrees with the ruling.<sup>34</sup> Third, unlike some other areas of international law, the DSB’s decisions have a relatively high rate of compliance by losing parties.<sup>35</sup> Although under the General Agreement on Tariffs and Trade (GATT) dispute settlement system nearly 90% of panel reports were accepted by both parties, that system allowed losing parties to essentially block any adverse rulings with

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<sup>26</sup> Gerhart & Kella, *supra* note 1, at 516 n.2.

<sup>27</sup> *Id.* at 516–17.

<sup>28</sup> Turk, *supra* note 16, at 386–87.

<sup>29</sup> *Id.* at 395.

<sup>30</sup> *Id.*

<sup>31</sup> *Id.* at 395 n.58.

<sup>32</sup> Gerhart & Kella, *supra* note 1, at 516 n.2.

<sup>33</sup> *Understanding the WTO: Settling Disputes*, WTO [http://www.wto.org/english/thewto\\_e/whatis\\_e/tif\\_e/disp1\\_e.htm](http://www.wto.org/english/thewto_e/whatis_e/tif_e/disp1_e.htm) (last visited Nov. 6, 2014) [hereinafter *Understanding the WTO*].

<sup>34</sup> *Id.*

<sup>35</sup> McRae, *supra* note 5, at 3.

ease—in fact, there was a growing trend in the 1980s to block such reports.<sup>36</sup> Rulings under the WTO system became much more robust, making it more difficult for losing parties to avoid compliance.<sup>37</sup> Equally, the judicialization of the process—that is the move to make dispute settlement a legal rather than diplomatic process—arguably has helped in garnering compliance from member states.<sup>38</sup> For those reason, the WTO views its dispute settlement system as a “central pillar” of the organization.<sup>39</sup>

The parts below discuss the WTO dispute settlement system in greater detail. Part II.A provides a history of the organization since its previous inception as the International Trade Organization. Part II.B covers the development of the dispute settlement system after the GATT years. Finally, Part II.C presents the framework under which the system works, outlining the process of litigating a complaint in the DSB from start to finish.

#### A. *The Uruguay Rounds: The Origins of the WTO and the Dispute Settlement Body*

The Dispute Settlement Body came about as a result of the Uruguay Round<sup>40</sup> with the creation of the WTO.<sup>41</sup> While the prior rounds covered tariff issues almost exclusively, the agenda for the Uruguay Round also included discussions on dispute settlement, non-tariff barriers, natural resources, agriculture (one of the biggest points of contention), textiles, anti-dumping, subsidies, intellectual property, services, and the GATT system.<sup>42</sup> Out of the

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<sup>36</sup> DAVID PALMETER & PETROS C. MAVROIDIS, *DISPUTE SETTLEMENT IN THE WORLD TRADE ORGANIZATION: PRACTICE AND PROCEDURE* 9 (2d ed. 2004).

<sup>37</sup> McRae, *supra* note 5, at 3. *But see*, C. O’Neal Taylor, *Impossible Cases: Lessons from the First Decade of WTO Dispute Settlement*, 28 U. PA. J. INT’L ECON. L. 309, 319 (2007). Taylor argues that even under the DSU, a losing country’s political will still determines whether or not it will comply. *Id.* Thus, it may still refuse to comply with panel or Appellate Body decisions if the benefits of continuing the prohibited action outweigh the possible repercussions. *Id.*

<sup>38</sup> Zangl, *supra* note 7, at 826.

<sup>39</sup> *Understanding the WTO*, *supra* note 33.

<sup>40</sup> WTO Rounds are multilateral trade negotiations involving several trade issues that can take place over years and in multiple locations. Each trade round is named after the place where it begins, not necessarily where it ends. The Uruguay Round was the eighth round since the signing of the General Agreement on Tariffs and Trade, or GATT, in 1946. *Timeline: World Trade Organization*, BBC NEWS, [http://news.bbc.co.uk/2/hi/europe/country\\_profiles/2430089.stm](http://news.bbc.co.uk/2/hi/europe/country_profiles/2430089.stm) (Feb. 15, 2012, 11:31 GMT). It was thought to be the longest, most contentious, and most expansive multilateral trade round in the history of the GATT. PALMETER & MAVROIDIS, *supra* note 36, at 11. Out of the final agreements to come out of the round, the most significant accomplishment was the creation of the World Trade Organization.

<sup>41</sup> Taylor, *supra* note 37, at 311.

<sup>42</sup> *The GATT Years: from Havana to Marrakesh*, WTO, [http://www.wto.org/English/thewto\\_e/whatis\\_e/tif\\_e/fact4\\_e.htm](http://www.wto.org/English/thewto_e/whatis_e/tif_e/fact4_e.htm) (last visited Nov. 6, 2014).

final agreements to come out of the round, the most significant accomplishment was the creation of the World Trade Organization—the reincarnation of the ill-fated Bretton Woods organization,<sup>43</sup> the International Trade Organization (ITO).<sup>44</sup>

The GATT Secretariat that administered the GATT agreements prior to the formation of the WTO was less like a formal organization and more like a provisional body. The WTO, on the other hand, has a formal structure and multiple bodies.<sup>45</sup> The WTO Secretariat, headed by the Director General, carries out administrative functions for the WTO and has no decision-making powers.<sup>46</sup> The top governing body of the organization is the Ministerial Conference, which is made up of trade ministers from each member state.<sup>47</sup> It meets at least once every couple of years and makes the final determinations on major policy issues.<sup>48</sup> Since such agreements must be made by consensus, the operational decisions are generally relegated to the General Council.<sup>49</sup>

The General Council consists of permanent representatives from the member states that handle the day-to-day matters for the organization.<sup>50</sup> The Council also oversees most of the other bodies of the WTO: the Trade Policy Review Body; the Councils on Trade in Goods, on Trade in Services, and on the Agreement on Trade-Related Aspects of Intellectual Property Rights; the

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<sup>43</sup> The Bretton Woods Conference was held to create international agreement for a new method of currency exchange that tied other currencies to the U.S. Dollar. M.J. Stephey, *A Brief History of Bretton Woods System*, TIME (Oct. 21, 2008), <http://content.time.com/time/business/article/0,8599,1852254,00.html>. The conference took place in 1944, toward the end of World War II, and was joined by 44 nations. *Id.* It is best known for having resulted in the creation of the International Monetary Fund and the World Bank. *Id.* These organizations are commonly known as Bretton Woods organizations.

<sup>44</sup> The creation of the WTO was a watershed moment because it was nearly 49 years in the making. In 1946, the International Trade Organization (ITO), the failed precursor of the WTO, was formulated with the intention of making it the third Bretton Woods organization. PALMETER & MAVROIDIS, *supra* note 36, at 1–2. The ITO was too ambitious for the U.S. Congress and thus suffered a quick demise; however, the GATT agreement survived and remains the backbone of the WTO. *Id.* at 2.

<sup>45</sup> See JOHN H. JACKSON, *THE WORLD TRADING SYSTEM*, 109–111 (2d ed. 1997) (comparing the WTO's rule based system after the Uruguay Round with the power-oriented system of GATT).

<sup>46</sup> KOUL, *supra* note 4, at 35.

<sup>47</sup> PALMETER & MAVROIDIS, *supra* note 36, at 14.

<sup>48</sup> KOUL, *supra* note 4, at 33.

<sup>49</sup> *Id.*

<sup>50</sup> *Id.*

Committees on Trade and Development and on Trade and the Environment; and the Dispute Settlement Body (DSB).<sup>51</sup>

The DSB is comprised of representatives from every member state, and it serves as a forum for all trade matters in dispute.<sup>52</sup> Furthermore, the body has a significant amount of power over specific disputes between individual WTO members. Not only does the DSB establish panels for disputes and decide whether or not to adopt panel reports, but it also has the authority to allow the winning party of a dispute to temporarily retaliate against the losing party if the latter fails to abide by the DSB's ruling in a timely manner.<sup>53</sup> The framework for how the DSB system carries out those duties is discussed below.

### B. *The Dispute Settlement Mechanism: The DSB Under the DSU*

The present dispute settlement system came about as a result of a series of agreements: the 1979 Understanding on Dispute Settlement, the 1989 Dispute Settlement Procedure Improvements Agreement, and the 1994 Dispute Settlement Understanding (DSU).<sup>54</sup> The current jurisdictional and institutional scope for the DSB is based on these agreements, particularly the DSU.<sup>55</sup> It is especially unique in the realm of public international law because it most closely resembles domestic court systems,<sup>56</sup> and it gives the DSB compulsory jurisdiction over any and all trade disputes among members.<sup>57</sup> In other words, member states are bound to give the DSB the authority to decide such disputes

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<sup>51</sup> *Id.* The Trade Policy Review Body reviews the trade policy of WTO Members under the Trade Policy Review Mechanism (TRPM). *Id.* The Council on Trade in Goods oversees the activities of 12 committees: Agriculture, Antidumping Practices, Customs Valuation, Import Licensing Procedures, Information Technology, Market Access, Rules of Origin, Safeguards, Sanitary and Phytosanitary Measures, Subsidies and Countervailing Measures, Technical Barriers to Trade, Trade-Related Investment Measures (TRIMS), and the Working Party on State Trading Enterprises. *Council for Trade in Goods*, OFFICE OF THE UNITED STATES TRADE REPRESENTATIVE, <http://www.ustr.gov/trade-agreements/wto-multilateral-affairs/-world-trade-organization/council-trade-goods> (last visited Nov. 6, 2014). The Councils on Trade in Services and on the Agreement on Trade-Related Aspects of Intellectual Property Rights administer the GATS and TRIPS respectively. *Id.*; *Council for Trade in Services*, USTR, <http://www.ustr.gov/trade-agreements/wto-multilateral-affairs/-world-trade-organization/council-trade-services> (last visited Oct. 5, 2014).

<sup>52</sup> PALMETER & MAVROIDIS, *supra* note 36, at 15.

<sup>53</sup> *Id.*

<sup>54</sup> Kara M. Reynolds, *Why Are So Many WTO Disputes Abandoned?*, in *TRADE DISPUTES AND THE DISPUTE SETTLEMENT UNDERSTANDING OF THE WTO* 191, 193 (James C. Hartigan ed., 2009). The DSU itself consists of 27 sections, 143 paragraphs, and four appendices. PALMETER & MAVROIDIS, *supra* note 36, at 16.

<sup>55</sup> PALMETER & MAVROIDIS, *supra* note 36, at 16.

<sup>56</sup> Turk, *supra* note 16, at 386–87.

<sup>57</sup> McRae, *supra* note 5, at 4.

between them, as opposed to, for example, the International Court of Justice, whose jurisdiction is based on consent.<sup>58</sup> Additionally, the DSU establishes the formation of a standing Appellate Body and contains the rules, procedures, and timelines under which the DSB operates, which include the suggested timelines for the dispute settlement process, the steps and guidelines for setting up panels, the appellate process, and how the reports are implemented.<sup>59</sup>

One of the more innovative procedural concepts in the DSU is that of “negative consensus.”<sup>60</sup> Under the GATT system, the reports of a panel and the Appellate Body had to be adopted by “positive consensus”—meaning every member of the DSB, and thus the WTO, needed to vote in favor of accepting the ruling.<sup>61</sup> Unfortunately, this meant that the losing party could essentially veto any adverse report.<sup>62</sup> To avoid making compliance voluntary, the DSU now makes adoption of the report in effect automatic, unless *every* member votes against it.<sup>63</sup> Thus, the negative consensus rule promotes a higher likelihood of compliance by ensuring that panel and Appellate Body reports are binding.

Disputes tend to be based on allegations of either policies or practices that lead to increased protection of the defendant’s industries that actively compete with imports or failures to follow through on trade liberalizing measures previously agreed upon.<sup>64</sup> They are settled according to a timeline set forth by the DSU that consists of a series of stages.<sup>65</sup> At the first stage, parties to the dispute must first participate in “Consultations” wherein they attempt to

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<sup>58</sup> The ICJ has been recognized to have compulsory jurisdiction over states who have acquiesced to such jurisdiction in writing. The United States, for example, has not recognized the compulsory jurisdiction of the ICJ; thus, the Court does not have compulsory jurisdiction over any disputes brought by or against the United States. *Declarations Recognizing the Jurisdiction of the Court as Compulsory*, I.C.J. (last visited Nov. 6, 2014) <http://www.icj-cij.org/jurisdiction/?p1=5&p2=1&p3=3>.

<sup>59</sup> PALMETER & MAVROIDIS, *supra* note 36, at 15.

<sup>60</sup> *Id.*

<sup>61</sup> *Id.*; *Understanding the WTO*, *supra* note 33.

<sup>62</sup> PALMETER & MAVROIDIS, *supra* note 36, at 15

<sup>63</sup> *Id.*

<sup>64</sup> Chad P. Bown, *On the Economic Success of GATT/WTO Dispute Settlement*, 88 REV. ECON. & STAT. 811 (2001). They generally deal with contract or commercial law matters (i.e. terms of contracts), trade barrier issues, intellectual property concerns (i.e. TRIPS), and tax law variances (i.e. transfer pricing). Fernando Piérola, Senior Counsel for the Advisory Centre on WTO Law, Lecture on WTO Dispute Settlement, Geneva, Switzerland, (June 27, 2013). Regarding trade barrier disputes, the specific issues under contention tend to include anti-dumping, zeroing, countervailing measures, and safeguards. *Id.*

<sup>65</sup> Of course, if the complainant decides to withdraw the complaint at any moment or fails to take steps to go on to the next stage, the process ends there. Bown, *supra* note 64, at 2.

come up with a settlement through negotiations.<sup>66</sup> The parties may have up to 60 days to settle the dispute before the next stage may be triggered.<sup>67</sup> If the Consultations fail, the complainant can decide to progress to the second stage.<sup>68</sup>

After the request is made to form the panel, the DSB has 45 days to select the panelists.<sup>69</sup> Once the panel has been selected, it establishes its own working procedures—supplementing the general procedures set out by the DSU.<sup>70</sup> Subsequently, the panel has six months to complete its final report to the DSB, unless the parties agree to extend that time.<sup>71</sup> After the panel reports on its conclusions, the report becomes a ruling by the DSB unless negative consensus occurs.<sup>72</sup> Either party can appeal the report to the Appellate Body.<sup>73</sup> Appeals may last a maximum of 90 days, and once that decision has been made the DSB can only reject it by consensus.<sup>74</sup> Finally, if the defendant loses, it has 30 days to signal its intention to comply with the decision, followed by “a reasonable period of time” to take actions to comply.<sup>75</sup>

If the losing defendant fails to comply within that time, the DSB may authorize remedies for the winning complainant in the form of compensation or temporary suspension of concessions or obligations.<sup>76</sup> Compensation refers to the defendant reducing trade barriers or tariffs with the purpose of off-setting the harm done by wrongful act.<sup>77</sup> Under the DSU, refusal to comply even after

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<sup>66</sup> Meagher & Palmeter, *supra* note 2, at 1197. At the same time, by this stage, the parties would have likely had informal consultations. *Id.* The formal negotiations can happen, either bilaterally or with the assistance of the Director-General. *Id.* Third parties may also participate at this stage, which often frustrates the possibilities of reaching a compromise due to the additional competing interests. *Understanding the WTO*, *supra* note 33. Nonetheless, the member filing the complaint can actually draft the request for consultations so as to block third party involvement. Meagher & Palmeter, *supra* note 2, at 1198. Consultations serve to allow the parties to gather information about the matter to decide whether to come up with a compromise or to proceed with the next step. *Id.*

<sup>67</sup> Reynolds, *supra* note 54, at 191 & n.1.

<sup>68</sup> *Id.*

<sup>69</sup> *Understanding the WTO*, *supra* note 33.

<sup>70</sup> Meagher & Palmeter, *supra* note 2, at 1198.

<sup>71</sup> *Understanding the WTO*, *supra* note 33; *see also* Meagher & Palmeter, *supra* note 2, at 1199.

<sup>72</sup> Meagher & Palmeter, *supra* note 2, at 1200.

<sup>73</sup> *Id.*

<sup>74</sup> *Id.*

<sup>75</sup> *Id.* at 1201. The “reasonable period of time” to comply may be determined by the arbitrator when requested by the party demanding compliance. *See, e.g., United States—Certain Country of Origin Labelling (COOL) Requirements*, WTO, [http://www.wto.org/english/tratop\\_e/dispu\\_e/cases\\_e/ds384\\_e.htm](http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds384_e.htm) (last visited Nov. 6, 2014).

<sup>76</sup> *Id.*

<sup>77</sup> *Id.*

such remedies are imposed means that the complainant can demand sanctions, wherein members—not parties to the dispute—will remove concessions; however this option has never been used.<sup>78</sup>

The actual panel selection rules and procedures, the panel hearing and decision-making process, the appellate review process, and the steps taken to ensure compliance are complex and require some expertise to navigate. For that reason, members on either side of a dispute need lawyers specializing in WTO law to be successful. In fact, as discussed below in Part III.A, some commentators have theorized that the level of expertise required in the process and the capacity needed to possess that expertise create an unbalanced playing field for developing countries that may lack the resources to competitively represent their interest within the system.<sup>79</sup> Part II.C below explains some of the more important stages of the panel, appeals, and remedies (compliance) processes.

### C. *The Dispute Settlement Procedures: Panels, Appeals, and Compliance*

Complainants in WTO disputes win at an extremely high rate in relation to other types of litigation.<sup>80</sup> Unlike the persistent 50-50 rate found in other forums, complainants in the WTO win at a rate of 90%.<sup>81</sup> As Part III discusses below, such results weaken the argument that the system is biased due to the disparity in capacity between developed countries and developing.

This Part sets out in more detail the processes of panel formation, panel and Appellate Body procedures, panel and Appellate Body reports, and remedies and compliance. The main purpose of breaking the process down is to provide a basic idea of the complexity of the process and explain why a high-level of expertise is required to navigate it.

Part II.C.1 discusses the panel composition, the procedures for the panel hearings, and the reports from the panel. Part II.C.2 presents the basics of the Appellate Body procedure and reports. Finally, Part II.C.3 describes what happens once the defendant is found to have violated a trade agreement.

#### 1. Building a Panel

The member bringing a complaint may request the establishment of a panel by submitting a formal, written request to the DSB.<sup>82</sup> In doing so, the member is fulfilling the due process step of advising the defendant and all other

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<sup>78</sup> Turk, *supra* note 16, at 391–92.

<sup>79</sup> Guzman & Simmons, *supra* note 11, at 558–59.

<sup>80</sup> Turk, *supra* note 16, at 387.

<sup>81</sup> *Id.*

<sup>82</sup> Meagher & Palmeter, *supra* note 2, at 1198.

members that it intends to proceed with the complaint.<sup>83</sup> In contrast to the compulsory nature of the DSB's jurisdiction over trade disputes, the panel selection process provides the parties with a significant amount of control. In a way, the parties to a dispute can pick their own judges.

First, unlike most other international adjudicatory bodies, the panels do not consist of a permanent body but are instead selected on an ad hoc basis.<sup>84</sup> Second, the parties may select the panelists from a list compiled by the Secretariat.<sup>85</sup> In fact, there are two methods for composing a panel: composition by agreement and composition by fiat.<sup>86</sup> The former occurs when the parties come to an agreement on the panelists; whereas, the latter results from a failure to reach a mutually agreeable list, requiring the Director-General to compose the panel under paragraph 7 of Article 8 of the DSU.<sup>87</sup> Thus, the method to be used depends on how well the parties can successfully negotiate a compromise.<sup>88</sup>

Arguably, the ability to select or reject panel candidates based on their own criteria gives the parties a power analogous to the jury selection process in the United States court system: once presented with the list of nominees, the parties can evaluate each candidate and make choices strategically intended improve the likelihood that the panel will side with them.<sup>89</sup>

The strategic importance of this stage of the process is underscored by the oft-contentious nature of the negotiations;<sup>90</sup> thus, advanced legal tactics and planning are required to make the best choices. One caveat is that the Secretariat generally does not pick candidates from the same country as the parties.<sup>91</sup> In fact, in light of possible biases, when a developing country faces a

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<sup>83</sup> *Id.*

<sup>84</sup> Andrew W. Shoyer, *Panel Selection in WTO Dispute Settlement Proceedings*, 6 J. INT'L ECON. L. 203 (2003).

<sup>85</sup> *Id.* at 204.

<sup>86</sup> *Id.*

<sup>87</sup> *Id.* at 205.

<sup>88</sup> *Id.* at 204–05 The steps for a composition by agreement are outlined in the DSU. Initially, the Secretariat compiles a list of candidates to present to the parties. *Id.* at 204. The list is created, in conjunction with the Legal Affairs Division, by the division within the Secretariat that focuses on the trade issue in dispute. *Id.* The Secretariat formulates a list—or a “slate”—that is most likely to satisfy the criteria set out by the parties. *Id.* Often the Secretariat makes the nominations with the understanding that the entire slate may be discarded; thus, it often keeps a few strong candidates in its back pocket, so to speak, in case the Director-General must compose the panel by fiat. *Id.* at 205.

<sup>89</sup> *Id.* at 205.

<sup>90</sup> *See id.* at 205–06.

<sup>91</sup> *Id.* at 204 Granted this limitation would seem obvious in order to avoid an apparent bias by the panelists; however, the parties can actually agree to make an exception to that rule. *Id.*

developed country, paragraph 10 of Article 8 of the DSU allows the former to insist that at least one panelist be from a developing country.<sup>92</sup> The parties may set criteria that can include insisting on specific credentials—for example, a certain type of educational or work background—on specific language skills—for example, fluency in English and Spanish—or on geographic or national origin.<sup>93</sup> The idea is that the selected panelists would either be biased for the party's side or as neutral as possible.<sup>94</sup>

If the parties fail to reach a compromise on the composition of the panel, either party can invoke the DSU rules to request that the Director-General select the panel—also known as composition by fiat.<sup>95</sup> It would be inaccurate to assert that at this point the parties have relinquished all control over the panel selections. In fact, the Director-General must still consult with the parties and rely on their criteria when composing the panel.<sup>96</sup> Additionally, the Director-General is under pressure to put together a panel that can in no way appear to be biased.<sup>97</sup>

When the contentious but important process of selecting a panel is complete the complaint proceeds on to the hearing stage. Usually, two meetings are held with the panel and the parties.<sup>98</sup> First, the parties present their case to the panel in writing followed by the initial hearing wherein the complaining country presents the basis of its complaint and the responding party makes its defense.<sup>99</sup> Second, the parties rebut the prior arguments through written rebuttals and oral arguments.<sup>100</sup> The parties require the assistance of highly-skilled attorneys, deeply familiar with WTO law, to effectively navigate these hearings.

The panels may ask questions by interrupting the oral arguments, waiting for one of both parties to finish, or by presenting only written questions to the parties.<sup>101</sup> Third, the panel may request expert opinions for any technical or scientific points brought up.<sup>102</sup> The panel may also request information from

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<sup>92</sup> *Id.* at 205–06. The concept is that if the panelist comes from a developing country, it will provide the developing country party a more sympathetic ear. *Id.*

<sup>93</sup> *Id.* at 205.

<sup>94</sup> *See id.*

<sup>95</sup> *Id.*

<sup>96</sup> *Id.* at 207.

<sup>97</sup> *See id.*

<sup>98</sup> Meagher & Palmeto, *supra* note 2, at 1199.

<sup>99</sup> *Understanding the WTO*, *supra* note 33.

<sup>100</sup> *Id.*

<sup>101</sup> Meagher & Palmeto, *supra* note 2, at 1199.

<sup>102</sup> *Id.*

an expert or an expert review group.<sup>103</sup> Other members may participate as third parties if they file a notification of their intent to do so within ten days of the panel formation.<sup>104</sup> Third party participation is generally limited to receiving the initial submissions made by the parties, and perhaps attending the first meeting of the panel.<sup>105</sup>

Fourth, after debating amongst itself and reaching a conclusion, the panel submits to both parties a series of reports (first draft, intermediate report, and final draft) and allows time for a response.<sup>106</sup> These reports are supposed to be confidential, but often they are made available to the press by one or both of the parties. Fifth, the final draft is submitted to all other WTO members and, if the panel concludes there was a violation of an existing trade obligation, it may recommend how the defendant may comply with its prior trade agreements.<sup>107</sup> Finally, barring an unlikely consensus within the DSB—since every member, including the winner, would have to vote against it—the report is accepted as the DSB’s ruling.<sup>108</sup> However, either party has the right to appeal the panel’s decision to the Appellate Body.

## 2. The Appellate Body

The Appellate Body is unique amongst international forums because it follows principles of common law as opposed to civil law.<sup>109</sup> In other words, it uses many of the substantive and procedural standards used in common law court systems—particularly the concept of due process.<sup>110</sup> One major difference, however, is that unlike common law appellate courts, the Appellate Body cannot remand a case to the panel if it modifies any of the panel’s

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<sup>103</sup> *Id.* Under Article 13.2 of the DSU, a panel that finds it necessary to consult with experts to be able to “make an objective assessment of the facts . . . may consult either individual experts or appoint an expert review group to prepare an advisory report.” *WTO Bodies Involved in the Dispute Settlement Process*, WTO [http://www.wto.org/english/tratop\\_e/dispu\\_e/dispu\\_settlement\\_cbt\\_e/c3s6p1\\_e.htm](http://www.wto.org/english/tratop_e/dispu_e/dispu_settlement_cbt_e/c3s6p1_e.htm) (last visited Nov. 6, 2014) (citation omitted).

<sup>104</sup> Meagher & Palmetier, *supra* note 2, at 1199.

<sup>105</sup> *Id.*

<sup>106</sup> *Id.*

<sup>107</sup> *See id.* at 1200.

<sup>108</sup> *Id.*

<sup>109</sup> Surya P. Subedi, *The WTO Dispute Settlement Mechanism as a New Technique for Settling Disputes in International Law*, in *INTERNATIONAL LAW AND DISPUTE SETTLEMENT: NEW PROBLEMS AND TECHNIQUES* 173 (Duncan French et al. eds., Hart Publishing 2010). The I.C.J., for example, is based on civil law principles. *Id.*

<sup>110</sup> John P. Gaffney, *Due Process in the World Trade Organization: The Need for Procedural Justice in the Dispute Settlement System*, 14 *AM. U. INT’L L. REV.* 1173, 1175–76 (1999).

findings.<sup>111</sup> Furthermore, it possesses its own secretariat and is largely separate from the rest of the WTO structure.<sup>112</sup>

Unlike the ad hoc panel compositions, the Appellate Body consists of seven permanent members.<sup>113</sup> These permanent members are selected by the DSB and are intended to be geographically representative of the WTO membership.<sup>114</sup> They have no government affiliations and all members are respected within the field of international trade law.<sup>115</sup> Membership in the Appellate Body is for a four-year term.<sup>116</sup>

When any party appeals a panel report, the appeal is presented before three of the seven members of the Body, picked by rotation.<sup>117</sup> Since any member can sit on any appeal depending on rotation, a member may be from the same country as one of the parties.<sup>118</sup> As is the case with many common law appellate courts, the Appellate Body only considers arguments based on the points of law and legal interpretations in the panel report instead of questioning the factual findings of the panel.<sup>119</sup> Thus, the three members must decide whether to uphold, modify, or reverse the panel report, and their report is then submitted to the DSB for acceptance.<sup>120</sup> Once more, that decision is put to a vote that would require negative consensus to reject.<sup>121</sup>

### 3. Compliance: The Dispute Is Over . . . What Now?

Once the panel and appeals processes are completed—and if the defendant loses—there is still the challenging task of obtaining compliance from the losing party. The panel and Appellate Body reports recommend that the offending country conform to the WTO agreement at issue, but the implementation of the recommendations need only prevent future harm and not redress past injury.<sup>122</sup> That party has a generous amount of time to attempt to

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<sup>111</sup> Meagher & Palmeto, *supra* note 2, at 1200.

<sup>112</sup> *Id.* at 1199.

<sup>113</sup> *Id.*

<sup>114</sup> *Id.*

<sup>115</sup> *Understanding the WTO*, *supra* note 33.

<sup>116</sup> Meagher & Palmeto, *supra* note 2, at 1199.

<sup>117</sup> *Id.*

<sup>118</sup> *Id.*

<sup>119</sup> *Id.* at 1200.

<sup>120</sup> *Id.*

<sup>121</sup> *Id.*

<sup>122</sup> *Id.*

change its current policies that were found in violation, but it has thirty days to signal to the DSB an intention to do so.<sup>123</sup>

If the losing party does not want to carry out such changes, the parties must then meet to decide what form of compensation will be offered.<sup>124</sup> For example, the defendant can offer the complainant a reduction in tariffs in a different trade sector, or some other concession.<sup>125</sup> However, when a losing defendant fails to take steps to comply with the final decision, or the steps it takes do not satisfy the complainant, that complainant may request permission from the DSB to exercise its right to impose temporary retaliatory trade measures against the defendant called “cross-retaliation.”<sup>126</sup>

Retaliatory measures may include temporary suspension of existing trade concessions or obligations.<sup>127</sup> The defendant has the ability to challenge the retaliation by requesting arbitration.<sup>128</sup> The arbitration serves to determine whether the plaintiff followed the rules when setting the measures and whether the level of retaliation was proper.<sup>129</sup> Proportionality is the important factor in determining if a retaliatory measure is appropriate.<sup>130</sup> In other words, the suspension of concessions must be proportionate to the harm done to the complainant.

Ironically, after all is said and done, there is agreement by many economists that retaliatory action does not tend to benefit, in any real way, the domestic industries affected.<sup>131</sup> There are multiple occasions wherein the winning complainant was given the right to impose such measures, but refused to do so.<sup>132</sup> Given such facts, the question remains, why then—with so much cost in time and resources to litigate these complaints—would any WTO member undertake the process? Moreover, if there is little to gain and the system is biased against developing countries, why would any developing countries participate as complainants? Part III below analyzes whether or not the system is actually biased, what alternative explanations there are for the low

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<sup>123</sup> *Id.*

<sup>124</sup> *Id.* at 1201.

<sup>125</sup> *Id.*

<sup>126</sup> JEANNE J. GRIMMETT, CONG. RESEARCH SERV., RS20088, DISPUTE SETTLEMENT IN THE WORLD TRADE ORGANIZATION: AN OVERVIEW 4 (2006), available at <http://www.fpc.state.gov/documents/organization/74910.pdf>.

<sup>127</sup> *Id.*

<sup>128</sup> *Id.*

<sup>129</sup> *Id.*

<sup>130</sup> Meagher & Palmeter, *supra* note 2, at 1201.

<sup>131</sup> *Id.*

<sup>132</sup> *Id.*

participation rates from developing countries, and if the system is a viable tool for development.

### III. ANALYSIS

Greater participation in the World Trade Organization dispute settlement system has the potential to improve trading relationships among all members in a number of ways: Universal participation will lend the organization as a whole added legitimacy. Developing countries can gain a deeper understanding of the mechanics of international trade law. Further, as this Note argues, developing countries can improve their reputation, which may help their continued development in the long run. Lastly, even developed countries benefit from more reliable trading partners who can establish themselves as dependable.

However, the WTO is often accused of discriminating against developing countries by only advancing the interests of the rich members—and the dispute settlement system is not exempt from such criticisms.<sup>133</sup> The common condemnation, in essence, is that WTO and the DSU are structured so as to be disproportionately advantageous to the wealthiest members of the WTO. The system prevents smaller, poorer members from being able to benefit in the way it claims. Thus, according to this critique, the DSB gives the biggest economies an unfair advantage.

First, Part III.A discusses the arguments that the dispute settlement system is biased against developing countries based on power imbalances or capacity imbalances. The principal claim is that the wealthiest members can use their disproportionately-vast economic and political power to dissuade developing countries from bringing complaints against them, and the developing countries lack the capacity to effectively participate in WTO disputes.<sup>134</sup> The power imbalance claim fails because developing countries actually tend to litigate disputes more often against developed countries than they do against other developing countries,<sup>135</sup> which should not occur if power truly played a serious role. Additionally, the capacity imbalance argument, although much more compelling, is also flawed. The availability of outside

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<sup>133</sup> See, e.g., DONATELLA ALESSANDRINI, DEVELOPING COUNTRIES AND THE MULTILATERAL TRADE REGIME: THE FAILURE AND PROMISE OF THE WTO'S DEVELOPMENT MISSION (2010); Anup Shah, *The WTO and Free Trade*, GLOBALISSUES.ORG, <http://www.globalissues.org/article/42/the-wto-and-free-trade> (last updated July 2, 2007).

<sup>134</sup> Guzman & Simmons, *supra* note 11, at 559.

<sup>135</sup> *Id.*

resources, such as the Advisory Center of WTO Law (ACWL),<sup>136</sup> and the fact that developing countries win as often as developed countries actually implies that any capacity imbalance is more perceived than real. Furthermore, Parts III.B and III.C demonstrate that there may be other factors explaining lower participation by developing countries.

Second, Part III.B analyzes the claims that participation in the system is not necessarily biased, but that it is related to the size of the member's share of the total global trade—i.e. that the larger the share the more it participates—looking particularly at the findings by Holmes, Rollo, and Young.<sup>137</sup> Thus, the idea is that developing countries are less likely to participate because they have less at stake.<sup>138</sup> Although this Note does not debate the findings that share of trade and amount of participation are correlated, it does argue against the assumption that only economic benefits are at stake in WTO disputes.

Third, Part III.C looks at the relatively unmentioned reputational factor behind the decision to bring a case before the DSB. This Part analyzes Matthew Turk's reputation-based theory that reputational effects, not bias or share of trade, determine whether a complaint is brought. A country's reputation is negatively impacted if it loses a case either because it is found to be at fault or because it has brought a non-meritorious complaint.<sup>139</sup> However, this Note argues, aside from losing reputation, a winning complainant may also improve its international reputation.

Finally, Part III.D presents the case of Costa Rica—a small country with a nascent economy—and how its experience in the system implies a possible benefit to developing countries for participating in the dispute settlement system. Through its involvement in the WTO system and its experience in the dispute settlement system, the country has succeeded in establishing a reputation as a reliable trading partner and willing participant in international trade. As a result, Costa Rica has managed to sign multiple Regional Trade Agreements—including with the United States, the EU, and China—and has recently received an invitation to join the prestigious Organization of Economic Cooperation and Development (OECD). Strengthening ties to the world's economic powerhouses will increase trade activity and attract greater foreign investment, resulting in economic development.

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<sup>136</sup> The ACWL is an agency independent from the WTO that provides developing countries with free legal advice and training related to WTO Law. *About Us: The ACWL's Mission*, ACWL.CH, [http://www.acwl.ch/e/about/the\\_acwl's\\_mission.html](http://www.acwl.ch/e/about/the_acwl's_mission.html) (last visited Nov. 6, 2014).

<sup>137</sup> See *supra* text accompanying note 16.

<sup>138</sup> See *supra* Part II.C.3.

<sup>139</sup> Turk, *supra* note 16, at 388.

### A. *Challenges to Participation: Power and Capacity*

As mentioned above, the dispute settlement process can be complex and requires extensive expertise to navigate.<sup>140</sup> Some recent writing on the WTO's dispute settlement system argues that developing countries lack the power to either negotiate effectively during the Consultation stage or to guarantee that they do not face retaliation for the dispute itself, and that they have a shortage of capacity to deal with the disputes in terms of financial resources and know-how.<sup>141</sup> While on its face, this argument makes sense, some studies have found that the power and capacity hypotheses do not hold up.<sup>142</sup> However, this Part discusses these arguments because of their prevalence, with the thought that perhaps the perception of bias may be nearly as strong as the reality.

As with any litigation, the decision to take action is largely a cost-benefit analysis.<sup>143</sup> Part III.A.1 covers the theory that a defendant's power to impose political and economic retaliation on the complainant, outside of the trade regime, may be a considerable cost that generates developing countries' unwillingness to file complaints in the DSB. Part III.A.2 discusses the theory that a state that lacks qualified individuals specializing in the area trade law, that have less experienced institutions to handle trade matters, and that have fewer financial resources to deal with trade dispute issues face higher costs and thus fewer benefits.<sup>144</sup>

Overall, one main reason both theories fail is because they base their findings solely on the possible tangible benefits (i.e. short-term economic) that a complainant may gain from winning a dispute. As discussed in Part III.C below, the gain or loss of reputation is likely a much more compelling reason for bringing the case.

#### 1. The Power Imbalance

The argument that a power imbalance creates a serious disadvantage for a developing country bringing a complaint against a developed country is two-fold: first, the small developing country lacks the leverage to receive

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<sup>140</sup> See *supra* Part II.B.

<sup>141</sup> Guzman & Simmons, *supra* note 11, at 557.

<sup>142</sup> For example, Guzman and Simmons determined that from their study that power does not play a strong role in who participates; although, they find that capacity is important. Guzman & Simmons, *supra* note 11. However, Holmes, Rollo, and Young found share of global trade, instead, to be the main determining factor. HOLMES ET AL., *supra* note 16. Turk asserts that reputational costs are a countries biggest concern when filing a complaint. Turk, *supra* note 16.

<sup>143</sup> Guzman & Simmons, *supra* note 11, at 559.

<sup>144</sup> *Id.* at 557.

favorable terms from a dispute Consultation; second, the wealthy country's ability to retaliate against the poorer one is greater than any possible benefit the poorer would receive if it were to win the complaint. In other words, a wealthy country has more power to hurt the smaller country than the smaller country has to hurt the richer "through trade, foreign aid, or other areas of international relations."<sup>145</sup> Given that the developing country is more likely to have a greater reliance on trade with the developed country than the other way around, the latter has the ability to punish the former for bringing the dispute.<sup>146</sup>

Trade disputes do not happen in a vacuum. There are other avenues outside the DSB in which a trade dispute can play out.<sup>147</sup> The power hypothesis points out that in retaliation for dragging it in front of a panel, a developed country has the ability to punish the developing country in two general ways: (1) by political retaliation, and (2) by economic retaliation.<sup>148</sup>

Political retaliation can come in the form of a diplomatic backlash in ways that may even seem unrelated.<sup>149</sup> For example, treaty negotiations on some separate issue could suddenly fall through after the complaint is filed. Economic retaliation could also be just as harmful. The developed country can retaliate on a developing one, for instance, in the form of the withdrawal of some form of aid or some other preferential treatment.<sup>150</sup> A poor country that depends on the financial assistance of a wealthy country may be reticent to file a complaint if they believe that aid would be withdrawn as a result. Thus, one would expect that the more power the richer country has over the poorer country, the less likely it that the poorer one would file a complaint against it.<sup>151</sup>

As feasible as the theory may seem to explain the motivation behind a developing country's participation in the system, the data gathered by Dr. Andrew Guzman<sup>152</sup> and Dr. Beth Simmons<sup>153</sup> demonstrates otherwise.<sup>154</sup> Their

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<sup>145</sup> *Id.* at 569.

<sup>146</sup> *Id.*

<sup>147</sup> Turk, *supra* note 16, at 422.

<sup>148</sup> Besson & Mehdi, *supra* note 11, at 4.

<sup>149</sup> *Id.* at 12.

<sup>150</sup> *Id.* at 11.

<sup>151</sup> Guzman & Simmons, *supra* note 11, at 569.

<sup>152</sup> Dr. Guzman is a professor of law from Berkeley Law School, has a J.D. and Ph.D. from Harvard, and has focused much of his writing on international trade law issues. *Berkeley Law – Faculty Profiles*, BERKELEY LAW [http://www.law.berkeley.edu/php-programs/faculty/faculty\\_profile.php?facID=583](http://www.law.berkeley.edu/php-programs/faculty/faculty_profile.php?facID=583) (last visited Nov. 6, 2014).

<sup>153</sup> Dr. Simmons is a professor of International Affairs in Harvard University's Department of Government, is the Director of the Weatherhead Center for International Affairs at Harvard University, and has a Ph.D. from Harvard. *People*, HARVARD UNIV. <http://www.gov.harvard.edu/people/faculty/beth-simmons> (last visited Nov. 6, 2014).

findings actually suggest that poor countries were more likely to avoid filing complaints against poorer countries and instead file them against richer countries.<sup>155</sup> Such results would seem to show that developing countries do not consider the possibility of retaliation in order to decide whether or not to file a complaint—or at least it is not the determinative factor. The question is, what is their main concern, then? Another alternative is presented below.

## 2. The Capacity Imbalance

A second argument that developing countries face discrimination in the dispute settlement system is based on the presumption that they lack the capacity to successfully litigate or defend a complaint.<sup>156</sup> Capacity refers to the institutional, financial, and human resources needed to fully participate in a DSB case.<sup>157</sup> Hence, this time, the developing country is at a disadvantage with respect to developed countries because they lack the funds and the expertise to win their case. Threats to resort to the DSB miss credibility when countries do not have the ability to mobilize the legal resources necessary to carry out the dispute through to the end.<sup>158</sup>

Here, Drs. Guzman and Simmons assert that their findings show that poor states have limited resources that they will use strategically; therefore, wealthy states tend to be willing to file complaints against a broader range of defendants while poor states tend to be reluctant to file against other poor states—indicating the bias that benefits developed countries.<sup>159</sup> Because of their limited resources, and with the expectation of larger possible gains, developing countries will use the dispute settlement system to bring complaints against countries that have larger rather than smaller markets for their products.<sup>160</sup>

There are serious financial costs associated with any dispute before a panel or the Appellate Body.<sup>161</sup> For example, there are attorneys' fees and diplomats' wages, and the more complex the legal procedure, the higher the costs.<sup>162</sup> Furthermore, there are costs associated with collecting the necessary

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<sup>154</sup> Guzman & Simmons, *supra* note 11, at 572–74.

<sup>155</sup> *Id.*

<sup>156</sup> Chad P. Bown & Bernard M. Hoekman, *WTO Dispute Settlement and the Missing Developing Country Cases: Engaging the Private Sector*, 8 J. INT'L ECON. L. 861, 861 (2005).

<sup>157</sup> Guzman & Simmons, *supra* note 11, at 566.

<sup>158</sup> Besson & Mehdi, *supra* note 11, at 9.

<sup>159</sup> Guzman & Simmons, *supra* note 11, at 572.

<sup>160</sup> *Id.*

<sup>161</sup> *Id.* at 566.

<sup>162</sup> *Id.*

information for the case.<sup>163</sup> Since a trade dispute is based on a harm done to a member state's particular industry or industries, that country must be able to gather, prepare, and interpret that information from multiple sources to present before the panel—which takes time and personnel.<sup>164</sup> Of course, there is also the possibility of having to pay experts. Finally, the parties to a case must have a legal team that is familiar with WTO law, and the cost of maintaining such staff would be much more burdensome to a developing country than a developed country.<sup>165</sup> In fact, since the volume of trade of developing countries is smaller, they are probably less likely to regularly file complaints and so will have less need for a dedicated WTO legal team.<sup>166</sup>

In the end, the theory goes, despite the transition from a power-based system under the GATT to a rule-oriented system under the WTO, such changes have also raised the transaction costs of dispute settlement.<sup>167</sup> By preventing defendants from blocking complaints, establishing set timeframes for cases to proceed, and providing an appellate process to review panel decisions, the system has gotten more expensive to navigate.<sup>168</sup>

On the other hand, there are resources available to poorer states. The Advisory Centre on WTO Law (ACWL) has the specific mission of providing legal assistance to poorer WTO members on matter related to WTO law, including the DSU.<sup>169</sup> The ACWL is an organization independent from the WTO that recognizes the possibility of a capacity deficiency and aims to redress it.<sup>170</sup> The ACWL then would seem to help level the playing field in that respect. The fact that developing countries win at the same rate as developed countries also insinuates that greater capacity does not make for unequal outcomes. At the same time, there are still other real costs besides having a team of WTO legal experts that would seem to reduce a poor country's willingness to participate in the system. However, a lower capacity to

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<sup>163</sup> *Id.*

<sup>164</sup> *Id.*

<sup>165</sup> Marc L. Busch & Eric Reinhardt, *Developing Countries and General Agreement on Tariffs and Trade/World Trade Organization Dispute Settlement*, 37 J. WORLD TRADE 719, 721–22 (2003), available at <http://faculty.georgetown.edu/mlb66/JWT.pdf>.

<sup>166</sup> Besson & Mehdi, *supra* note 11, at 9.

<sup>167</sup> Gerhart & Kella, *supra* note 1, at 527.

<sup>168</sup> *Id.* Furthermore, most international dispute settlement bodies—and the DSB in particular—base their procedural and substantive rules on the judicial traditions of the Western states. Barbara Marchetti, *The WTO Dispute Settlement System: Administration, Court, or Tertium Genus?*, 32 SUFFOLK TRANSNAT'L L. REV. 567, 567 (2009). Western attorneys, then, would have the advantage of being trained under such systems.

<sup>169</sup> *About Us: The ACWL's Mission*, ACWL.CH, [http://www.acwl.ch/e/about/the\\_acwl's\\_mission.html](http://www.acwl.ch/e/about/the_acwl's_mission.html) (last visited Nov. 6, 2014).

<sup>170</sup> *Id.*

participate does not explain why some developing countries still file complaints.<sup>171</sup> After all, if they cannot afford to participate, why would they? Furthermore, if developing countries tend to file complaints against developed countries because they need to maximize their gains, then why do some still litigate against their poorer counterparts? As Part III.D discusses, Costa Rica has actually filed the majority of its complaints against other developing countries.<sup>172</sup>

*B. Participation in the WTO Dispute Settlement System: Only for the Rich and Powerful?*

Many commentators have argued extensively that the World Trade Organization's dispute settlement system benefits the developed countries and does little to help developing countries—citing, as evidence, statistics showing that developed countries are disproportionately the most active participants.<sup>173</sup> Many scholars have conducted empirical studies in order to try to determine who in fact is participating in the system, and why. One such study—conducted by Doctor Holmes,<sup>174</sup> Professor Rollo,<sup>175</sup> and Professor Young<sup>176</sup>—determined that there was a correlation between the amount of participation and the volume of global trade.<sup>177</sup> Those countries with the largest share of international trade tended to be the most frequent complainants or defendants in a dispute.<sup>178</sup>

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<sup>171</sup> See, e.g., *Dispute Settlement: The Disputes, Disputes by Country/Territory*, WTO.ORG [http://www.wto.org/english/tratop\\_e/dispu\\_e/dispu\\_by\\_country\\_e.htm](http://www.wto.org/english/tratop_e/dispu_e/dispu_by_country_e.htm) (last visited Nov. 6, 2014) (Costa Rica with five complaints filed, Ecuador with three, Guatemala with nine, Honduras with eight, and Thailand with thirteen).

<sup>172</sup> Two complaints have been against Dominican Republic and two against Trinidad and Tobago. *Dispute Settlement: The Disputes, Disputes by Country/Territory*, WTO.ORG, [http://www.wto.org/english/tratop\\_e/dispu\\_e/dispu\\_by\\_country\\_e.htm](http://www.wto.org/english/tratop_e/dispu_e/dispu_by_country_e.htm) (last visited Nov. 6, 2014).

<sup>173</sup> See, e.g., Besson & Mehdi, *supra* note 11; Guzman & Simmons, *supra* note 11; see also *supra* Part III.A.

<sup>174</sup> Dr. Peter Holmes is an economics professor at the University of Sussex, with a B.A. and Ph.D. from Cambridge University. *Dr Peter Holmes*, UNIV. SUSSEX, <http://www.sussex.ac.uk/profiles/1275> (last visited Nov. 6, 2014). He is a specialist in European Economic Integration and other global public policy issues, including the EU's relations with the WTO. *Id.*

<sup>175</sup> Professor Jim Rollo is an Emeritus Professor of law from the University of Sussex. *Prof. Jim Rollo*, UNIV. SUSSEX, <http://www.sussex.ac.uk/profiles/105976> (last visited Sept. 26, 2014).

<sup>176</sup> Professor Alasdair Young is currently the Associate Professor of International Affairs and the Co-Director for the Center for European and Transatlantic Studies (CETS) at Georgia Tech's Sam Nunn School of International Affairs. *People, Alasdair Young*, SAM NUNN SCHOOL INT'L AFF., <http://inta.gatech.edu/people/faculty/aldasair-young> (last visited Sept. 26, 2014).

<sup>177</sup> HOLMES ET AL., *supra* note 16, at 21.

<sup>178</sup> *Id.* By 2008, developed countries had initiated 239 out of 376 complaints. Christina L. Davis & Sarah Blodgett Bermeo, *Who Files? Developing Country Participation in GATT/WTO*

The United States and the EU alone, two of the largest trading blocs, were involved in 60% of the cases in the DSB.<sup>179</sup> Additionally, the United States and the EU confronted each other the most frequently.<sup>180</sup> In fact, the most famous and most contentious series of GATT/WTO cases were essentially disputes between the United States and the EU.<sup>181</sup> Intuitively this makes sense, since being the largest economies logically entails having the most areas of trade in which to compete.

The study found little evidence that developing countries were in any way “bullied” by the developed countries.<sup>182</sup> Furthermore, the statistics demonstrate that the rate at which developed countries won was roughly equal to the rate of wins by developing countries.<sup>183</sup>

One can infer from these findings that perhaps the system works as it should. It seems only logical that the amount of participation be associated to the percentage of total trade that a member possesses. The capacity imbalance mentioned in Part III.A.2 also does not seem to be present in these statistics. If developing countries can win as often as developed countries, then it appears that having a team of dedicated WTO legal experts does not help developed countries succeed as defendants. Greater capacity, therefore, does not allow rich countries to escape their trade commitments.

Although the findings of Holmes, Rollo, and Young provide some interesting statistics about the frequency at which members use the system, there still remains the question of whether developing countries *should* participate. The power and capacity theories did not sufficiently explain why they would file complaints because those theories assume that the principal costs and gains from a dispute are economic or political. Similarly here, the statistics are founded on the economic concerns behind a DSB complaint—the larger the economy the bigger the desire to participate.

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*Adjudication*, 71 J. OF POL. 1033, 1033 (2009), available at [https://www.princeton.edu/~cldavis/files/who\\_files.pdf](https://www.princeton.edu/~cldavis/files/who_files.pdf). The United States and The European Union are the leading complainants. *Id.*

<sup>179</sup> Turk, *supra* note 16, at 393.

<sup>180</sup> HOLMES ET AL., *supra* note 16, at 21.

<sup>181</sup> The Banana disputes resulted in three different cases before the GATT and WTO dispute settlement systems that lasted for up to 20 years. *European Communities — Regime for the Importation, Sale and Distribution of Bananas*, WTO.ORG, [http://www.wto.org/english/tratop\\_e/dispu\\_e/cases\\_e/ds27\\_e.htm](http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds27_e.htm) (last visited Nov. 6, 2014). The case involved import restriction by the European Community on bananas coming from Latin American countries where U.S. companies dominated. *Id.* The Beef Hormones case was another case of import restrictions. Appellate Body Report, *European Communities—Measures Concerning Meat and Meat Products (Hormones)*, WT/DS26/AB/R (Jan. 16, 1996) (adopted Sept. 25, 2009). This time it was beef products from the United States and Canada that the European Commission blocked due to the use of hormones. *Id.*

<sup>182</sup> *Id.*

<sup>183</sup> *Id.*; see also Turk, *supra* note 16, at 386–87.

However, economic gains from winning complaints are minimal. After all, the consensus amongst economists seems to be that complainants rarely benefit economically from retaliation, and in many cases where the member is allowed to use retaliatory measures they refrain from doing so.<sup>184</sup> As the following Part discusses, reputation may be more significant to a country than economic gains. Thus, even if a developing country has only a small share of global trade, the country would benefit from bringing meritorious disputes to improve its reputation.

C. *The Reputation Factor: The Intangible Benefits of Using the Dispute Settlement System*

For a winner to truly be successful, they should in theory receive a net gain from winning a dispute. As mentioned in Part III.A, the high cost of litigation may be daunting to a developing country considering filing a complaint in the DSB.<sup>185</sup> Also, considering the statistics that demonstrate that the size of a member's share of global trade drives who participates, why should a small developing economy participate in the costly dispute settlement process? Economic gains from a dispute are likely to be minimal, so there must be a bigger motivator. The answer as to why a developing country should participate is to build its *reputation*.

Matthew Turk claims that reputational effects best explain why complainants tend to win.<sup>186</sup> His article seeks to explain why, unlike other forms of litigation that have a 50-50 win-lose rate, WTO cases win a remarkable 90% of the time.<sup>187</sup> Interestingly, this rate is persistent regardless of the type of matter under dispute or whether the complainant is a developed or developing country.<sup>188</sup> He concludes that WTO members litigate complaints only when they strongly believe that their particular case is clearly meritorious; hence, this is why most cases tend to win.<sup>189</sup> Furthermore, the principal concern of why countries only bring winnable complaints is two-fold: (1) countries that are found to have violated a previous trade commitment will lose their reputation as a dependable trading partner, and (2) countries that bring frivolous claims will gain a reputation of being uncooperative.<sup>190</sup>

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<sup>184</sup> Turk, *supra* note 16, at 388.

<sup>185</sup> *Supra* Part III.A.

<sup>186</sup> Turk, *supra* note 16, at 419.

<sup>187</sup> *Id.* at 387.

<sup>188</sup> *Id.*

<sup>189</sup> *Id.* at 387–88.

<sup>190</sup> *Id.* at 388.

Like any other cost-benefit analysis, a state must decide whether the costs of filing a complaint exceed the expected benefits.<sup>191</sup> Turk argues that reputation is a potential cost to both complainant and defendant if either loses. Reputation in the international law arena is important because it is the basis on which states are willing to negotiate agreement with each other.<sup>192</sup> For instance, a state's reputation for living up to its obligations affects its ability to enter into beneficial agreements with other states.<sup>193</sup>

In more general terms, reputation is how states predict how one state will act based on prior experience.<sup>194</sup> Therefore, a state that is known for breaking its agreements will lead other states to either refrain from making deals with it or to frame agreements with unfavorable stipulations meant to safeguard from the likelihood of a breach. Conversely, a state with a reputation, for example, of abiding by its trade agreements would then be considered a reliable trading partner.<sup>195</sup>

A state's decision of whether to pursue a trade dispute may, and perhaps should, rest heavily on reputational considerations. As mentioned previously, the economic benefits of winning a case may be negligible,<sup>196</sup> yet the reputational effects may be significant in the long term. However, concern over loss of reputation only deals with one side of a coin—the potential loss. If losing reputation is the primary risk in trade dispute settlement, then it follows that the ultimate gain would be an increased reputation.

If losing a case hurts a country's reputation among current or potential trading partners, a win should have the opposite effect. By bringing a meritorious complaint in the dispute settlement system, a developing country is demonstrating a desire to support the rule of law and the strength of trade agreements. Thus, a developing country who gains a reputation as a dependable trading partner should attract more and better trade agreements.

A reputational gain leads to other gains. Those developing countries that participate would gain valuable knowledge of international trade law, and as such they would be in stronger bargaining positions in future trade negotiations. Developing countries who are embroiled in a trade dispute that involves meritorious claims must seriously consider the potential long-term reputational gains that could result from litigating them before the DSB.

Reputational gains for developing countries have the very real possibility of benefitting rich countries as well. Just like businesses look for

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<sup>191</sup> *Id.* at 387.

<sup>192</sup> *Id.* at 415.

<sup>193</sup> *Id.*

<sup>194</sup> *Id.* at 416.

<sup>195</sup> *Id.*

<sup>196</sup> Meagher & Palmeter, *supra* note 2, at 1201.

reliable business partners to provide predictability, so would developed countries want to conduct business with other countries they know will abide by the rules. A state that seeks to enforce its rights under a trade agreement is one that is more likely to comply with other trade agreements. Additionally, by observing how and when these developing countries file complaints, they can predict what behavior will be permissible in the future and what will not. After all, as stated in the introduction to this Note, “provid[ing] security and predictability” among all trading partners is a primary goal of the WTO.<sup>197</sup>

Finally, and perhaps most importantly, greater participation by developing countries will provide more legitimacy to a system that is regularly getting criticized for being unfair. Below, the case study of Costa Rica provides an instance where experience in the system has resulted in developmental gains. The case of Costa Rica is meant to demonstrate that the reputational effects of participation in trade-related dispute settlement may be beneficial and thus should be followed by developing countries.

#### *D. Costa Rica’s Participation in the DSB: An Exception to the Rule?*

If only rich countries can benefit from bringing complaints in the DSB, why should smaller ones participate? Are those countries that do simply outliers? This Part analyzes the case of Costa Rica—a small country in the WTO who has brought a complaint against the United States and won—and attempts to explain what the effect of its involvement in the WTO, and the DSB specifically, has done for its development. After a brief background of the small Central American country, this Part demonstrates that although it is a developing country, its involvement in the DSB demonstrates a deliberate intention to use the system to further its development by enhancing its reputation. This involvement has led to further development opportunities such as an offer to join the Organization of Economic Cooperation and Development (OECD).

##### 1. A Brief History of Costa Rica

Costa Rica is a small nation of only 4.5 million people but with a long history of democratic governance, high investment in public education, progressive environmental policies, and universal health care for all of its citizens.<sup>198</sup> While civil wars, ruthless dictatorships, and stark wealth disparity have plagued much of Latin America’s history, Costa Rica has maintained a

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<sup>197</sup> McRae, *supra* note 5, at 4.

<sup>198</sup> OECD, *LATIN AMERICAN ECONOMIC OUTLOOK 2011: HOW MIDDLE-CLASS IS LATIN AMERICA?* (2011), available at [http://www.latameconomy.org/fileadmin/uploads/laeo/Documents/E-book\\_LEo2011-EN\\_entier.pdf](http://www.latameconomy.org/fileadmin/uploads/laeo/Documents/E-book_LEo2011-EN_entier.pdf).

stable democracy and a strong middle class.<sup>199</sup> In fact, in 1949, Costa Rica abolished its military at the end of a short civil war,<sup>200</sup> and as a result, Costa Rica has been able to focus a significant portion of its national budget on education<sup>201</sup>—spending 7% of its GDP in 2010.<sup>202</sup> It ranked second in Latin America for reading and scientific skills, and fourth in mathematics.<sup>203</sup> Consequently, by investing in education and enacting policies, the country has set up an effective framework to attract knowledge-intensive Foreign Direct Investment (FDI).

Costa Rica has had a long history with trade and FDI: since the 1600s, when it was still a Spanish colony, it exported cocoa to South America; then in the following two centuries it exported tobacco to other Central American countries; and by the 1800s it was exporting coffee to other parts of the world.<sup>204</sup> Bananas are what truly placed Costa Rica in the global market as a banana republic.<sup>205</sup> The establishment of large scale banana plantations by the United Fruit Company<sup>206</sup> ensured that Costa Rica was reliant on foreign revenue in exchange for agricultural goods. This initial FDI was more of an international development agreement intended to develop infrastructure, by building a railroad to transport the bananas to the ports, and resulting in the extraction of the country's natural resources.<sup>207</sup> For Costa Rica—like many developing countries in the 19th and 20th centuries—such exploitation FDI

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<sup>199</sup> MINISTERIO DE COMERCIO EXTERIOR, COSTA RICA: A NATURAL PARTNER FOR OECD (2012) [hereinafter COMEX] (on file with author).

<sup>200</sup> Tord Høivik & Solveig Aas, *Demilitarization in Costa Rica: A Farewell to Arms?* 18 J. PEACE RES. 333 (1981).

<sup>201</sup> GARY GEREFFI, PENNY BAMBER, STACEY FREDERICK, & KARINA FERNANDEZ-STARK, DUKE CTR. ON GLOBALIZATION, GOVERNANCE & COMPETITIVENESS, COSTA RICA IN GLOBAL VALUE CHAINS: AN UPGRADING ANALYSIS 12 (2013), available at [http://www.cggc.duke.edu/pdfs/2013\\_08\\_20\\_Ch1\\_Project\\_Introduction.pdf](http://www.cggc.duke.edu/pdfs/2013_08_20_Ch1_Project_Introduction.pdf).

<sup>202</sup> OECD, ATTRACTING KNOWLEDGE-INTENSIVE FDI TO COSTA RICA: CHALLENGES AND POLICY OPTIONS 15 (2012), available at <http://www.oecd.org/dev/americas/E-book%20FDI%20to%20Costa%20Rica.pdf>.

<sup>203</sup> COMEX, *supra* note 199, at 36.

<sup>204</sup> Jose Cordero & Eva Paus, *Foreign Investment and Economic Development in Costa Rica: The Unrealized Potential 2* (Working Group on Development and Environment in the Americas, Discussion Paper No. 13, 2008), available at [http://ase.tufts.edu/gdae/Pubs/rp/DP13Paus\\_CorderoApr08.pdf](http://ase.tufts.edu/gdae/Pubs/rp/DP13Paus_CorderoApr08.pdf).

<sup>205</sup> *Id.*

<sup>206</sup> The United Fruit Company was a large American banana producer, distributor, and marketer; infamous for supporting authoritarian regimes in Central and South America and encouraging the brutal repression of any labor movements. Marcelo Bucheli, *Multinational Corporations, Totalitarian Regimes and Economic Nationalism: United Fruit Company in Central America, 1899–1975*, 50 BUS. HIST. 433 (2008).

<sup>207</sup> Cordero & Paus, *supra* note 204, at 2.

resulted in a persistent reliance on agricultural exports such as coffee, bananas, and flowers.<sup>208</sup>

In recent decades, the country has taken a two-prong approach to development: attracting high-tech, export-oriented FDI and pursuing trade liberalization measures.<sup>209</sup> Policy decisions in the last few decades have led to a shift toward high-tech manufacturing and service industries.<sup>210</sup> While bananas and coffee are still significant export products, their share of total exports has dropped dramatically in recent years.<sup>211</sup> Furthermore, as opposed to the rest of Latin America, during the 1990s, increases in FDI were generally a result of large-scale privatization efforts, particularly utilities.<sup>212</sup> In contrast, Costa Rica focused most of the FDI promotion in the manufacturing sector.<sup>213</sup>

The arrival of Intel in 1996 is what put Costa Rica on the map as a great place for high-tech FDI. The large Multinational Enterprise (MNE) chose Costa Rica over Brazil, Chile, Indonesia, and Mexico as the location for its newest Pentium processor assembly and testing plant, despite being offered relatively few concessions.<sup>214</sup> The plant cost around \$300 million and employed over 2,000 local employees.<sup>215</sup> The government offered Intel exemptions from import duties on goods used for production; exemptions on export, sales, excise, and municipal taxes; and an exemption on corporate income taxes for eight years.<sup>216</sup> While offering to expand training in English and electronics, allow more foreign air carriers to fly into the country, and lower the cost of energy, the government offered the same to all other companies working in its Free Trade Zones (FTZs) and did not offer any direct subsidies to Intel.<sup>217</sup> In the end, although some critics downplay the direct economic benefits that the Intel FDI had for Costa Rica, the fact is that less than ten years later the country's exports have shifted from a majority of agricultural products to more high-tech exports.

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<sup>208</sup> COMEX, *supra* note 199, at 4.

<sup>209</sup> Cordero & Paus, *supra* note 204, at 1.

<sup>210</sup> GEREFFI ET AL., *supra* note 201, at 12.

<sup>211</sup> COMEX, *supra* note 199, at 4.

<sup>212</sup> Cordero & Paus, *supra* note 204, at 3.

<sup>213</sup> GEREFFI ET AL., *supra* note 201, at 12.

<sup>214</sup> Gordon H. Hanson, *Should Countries Promote Foreign Direct Investment?*, 9 G-24 DISCUSSION PAPER SERIES, at 21 (2001).

<sup>215</sup> *Id.* at 20–21.

<sup>216</sup> *Id.* at 21.

<sup>217</sup> *Id.*

## 2. Costa Rica and Trade

With respect to trade measures, the Costa Rican government has aggressively pursued Regional Trade Agreements (RTAs) and actively participates in the WTO.<sup>218</sup> It currently has RTAs with most of Central America and the Caribbean; with Chile and Peru in South America; with Canada, Mexico and the United States in North America; with the EU; and with China and Singapore in Asia; as well as currently undergoing trade negotiations with Colombia and South Korea.<sup>219</sup> Its participation in the WTO has grown significantly in the last few years. In fact, the Costa Rican Ambassador to the WTO, Ronald Saborio Soto, is the current Chairman of the Special Session of the DSB.<sup>220</sup>

Despite its small size, Costa Rica has participated in a number of disputes before the DSB.<sup>221</sup> Costa Rica has also been a complainant in five cases: one against the United States, two against the Dominican Republic, and two against Trinidad and Tobago.<sup>222</sup> Also as a third party, it has been involved in 15 cases to date—most notably, the well-known Bananas III case brought by the United States against the European Commission (EC) that concerned policies that affected the import of bananas into Europe from certain members.<sup>223</sup> In ten of the cases, the defendant was a G2 country.<sup>224</sup> Although this is certainly not a large number of cases in comparison to larger economies, they represent a desire to participate in the system.

The 1995 case against the United States regarding textiles is especially significant because it goes against the theory that the dispute settlement system dissuades developing countries from participating, and it was the first time a small country was willing to bring a complaint against the United States. The case involved quantity restrictions that the United States unilaterally imposed

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<sup>218</sup> GEREFFI ET AL., *supra* note 201, at 13.

<sup>219</sup> *Id.* at 13–14. Costa Rica currently participates in the Central American Common Market (CACM). Organization of American States, *General Treaty on Central American Economic Integration Between Guatemala, El Salvador, Honduras and Nicaragua Signed at Managua, on 13 December 1960*, SICE, <http://www.sice.oas.org/trade/camertoc.asp> (last visited Nov. 6, 2014).

<sup>220</sup> *Current WTO Chairpersons*, WTO, [http://www.wto.org/english/thewto\\_e/secre\\_e/current\\_chairs\\_e.htm](http://www.wto.org/english/thewto_e/secre_e/current_chairs_e.htm) (last visited Nov. 6, 2014).

<sup>221</sup> *Dispute Settlement: The Disputes, Disputes by Country/Territory*, WTO, [http://www.wto.org/english/tratop\\_e/dispu\\_e/dispu\\_by\\_country\\_e.htm](http://www.wto.org/english/tratop_e/dispu_e/dispu_by_country_e.htm) (last visited Nov. 6, 2014).

<sup>222</sup> *Id.*

<sup>223</sup> *Id.*

<sup>224</sup> The term “G2” refers to the United States and the EU. Turk, *supra* note 16, at 394. The significance of this is that the United States and EU are the most powerful economic and political entities in the WTO. *Id.*

on imports of cotton and man-made-fiber underwear from seven different countries, including Costa Rica.<sup>225</sup> The United States alleged that these underwear imports were damaging or threatening to actually damage its domestic underwear industry.<sup>226</sup>

After a series of consultations, all the other countries, aside from Costa Rica, had reached an agreement, Costa Rica filed its complaint before the DSB claiming that the United States was in violation of the Agreement on Textiles and Clothing (ATC).<sup>227</sup> The choice to file the complaint, however, was not free from internal dispute.<sup>228</sup>

Since the economic stakes seemed so low, the Costa Rican Ministry of Foreign Affairs and the Embassy in Washington opposed proceeding with the case for fear of retaliation from the United States.<sup>229</sup> However, the Ministry of Trade (COMEX), a relatively new agency,<sup>230</sup> believed the WTO's rule-based system was the key to a new development strategy, and that failing to take a stance early on in the DSB would have negative consequences for its future ability to participate.<sup>231</sup> Initially, members of the small agency hesitated to undertake the complaint without support from other countries, but ultimately the president of Costa Rica at the time, José María Figueres, a former member of COMEX, decided go ahead with the dispute.<sup>232</sup>

The legal team in COMEX—widely considered to be well-educated but inexperienced and young—ended up litigating the case, winning both a favorable panel decision and the subsequent appeal. As a result of the win, the United States removed its restrictive trade measures.<sup>233</sup> More importantly, Costa Rica increased the perception that small countries could benefit from WTO membership, and it gained valuable experience of the complex dispute settlement system.<sup>234</sup> Perhaps most significantly, the country strengthened its

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<sup>225</sup> John Breckenridge, *Costa Rica's Challenge to US Restrictions on the Import of Underwear*, in *MANAGING THE CHALLENGES OF WTO PARTICIPATION: CASE STUDY 12*, available at [http://www.wto.org/english/res\\_e/booksp\\_e/casestudies\\_e/case12\\_e.htm#outcome](http://www.wto.org/english/res_e/booksp_e/casestudies_e/case12_e.htm#outcome). The other countries were Colombia, Dominican Republic, El Salvador, Honduras, Thailand, and Turkey. *Id.*

<sup>226</sup> WORLD TRADE ORGANIZATION, *MANAGING THE CHALLENGES OF WTO PARTICIPATION: 45 CASE STUDIES 178* (Peter Gallagher, Patrick Low & Andrew Stoler eds., 2005).

<sup>227</sup> *Id.*

<sup>228</sup> *Id.* at 181.

<sup>229</sup> *Id.* at 181–82.

<sup>230</sup> The Ministry of Trade became a formal agency in the late 1980s. *Id.* at 182.

<sup>231</sup> Breckenridge, *supra* note 225.

<sup>232</sup> WORLD TRADE ORGANIZATION, *supra* note 226, at 182.

<sup>233</sup> *Id.* at 185.

<sup>234</sup> *Id.* at 186.

reputation among WTO members, particularly the United States.<sup>235</sup> Costa Rica, thus, sought to build its reputation as a leader in the WTO by demonstrating a willingness to assert its rights under the newly signed WTO agreement regardless of the size of its opponent.

These proactive steps to establish a visible presence in the WTO seems to have paid off: the Organization of Economic Cooperation and Development (OECD)<sup>236</sup> has recently offered Costa Rica membership into the elite organization. It would become only the fourth Latin American country—after Mexico, Chile, and Colombia—to be invited to join the group whose members generate nearly three fifths of the world's GDP.<sup>237</sup>

Being a part of the OECD should allow the country to accelerate its development since it will have access to the knowledge and experience other members of the OECD possess.<sup>238</sup> Furthermore, the accession process into the organization mandates that a candidate align its social and economic policies to those the OECD has determined will promote its development. Granted, Costa Rica's willingness to participate in a number of WTO disputes is not the only reason why it was offered membership. The progressive FDI policies named above, for example, also demonstrate to the OECD a desire to promote responsible development. However, the country's ability to gain a reputation as a reliable trading partner would seem invaluable.

Costa Rica's participation in the WTO and the dispute settlement system has demonstrated a desire to liberalize its trade and to take an active role in global development. Thus, in spite of its relatively small presence in the share of global trade, the country's participation in the system seems to have benefited its reputation.

It would follow that other smaller economies could stand to gain from following a similar method of development through the WTO. The amount of participation may at first be low, due to possessing a lower share of global

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<sup>235</sup> *Id.*

<sup>236</sup> The stated goal of the OECD is to “promote policies that will improve the economic and social well-being of people around the world.” *About*, OECD.ORG, <http://www.oecd.org/about/> (last visited Nov. 6, 2014). In the area of international trade, the OECD stands against protectionism, and argues that unnecessary trade barriers negatively affect the global economic welfare. *Insights: International Trade – Protectionism*, OECD.ORG, <http://www.oecd.org/insights/internationaltrade-protectionismtariffsandotherbarrierstotrade.htm> (last visited Nov. 6, 2014).

<sup>237</sup> *Organisation for Economic Co-operation and Development (OECD)*, REPUBLIC OF SLOVENIA GOV'T OFFICE FOR DEV. & EUROPEAN AFFAIRS, [http://www.arhiv.svrez.gov.si/en/areas\\_of\\_work/slovenia\\_member\\_of\\_the\\_oecd/organisation\\_for\\_economic\\_co\\_operation\\_and\\_development\\_oecd/](http://www.arhiv.svrez.gov.si/en/areas_of_work/slovenia_member_of_the_oecd/organisation_for_economic_co_operation_and_development_oecd/) (last visited Nov. 6, 2014); TCRN Staff, *Laura Chinchilla Excited About OECD Invitation for Costa Rica*, THE COSTA RICA NEWS (June 3, 2013), <http://thecostaricanews.com/laura-chinchilla-excited-about-oecd-invitation-for-costa-rica/15611>.

<sup>238</sup> *Organisation for Economic Co-operation and Development (OECD)*, *supra* note 237.

trade, yet as their reputations for being reliable trading partners grow, there is a greater likelihood of negotiating much more beneficial trade agreements that would spur development in the long run. Thus, developing countries with legitimate claims should not shy away from presenting trade disputes before the DSB for fear of retaliation; such claims may in fact raise their reputation and promote their development.

#### IV. CONCLUSION

The dispute settlement system of the WTO is perhaps one of the most interesting public international law fora for many reasons: it is one of the most active tribunals; it possesses characteristics, like compulsory jurisdiction and a permanent Appellate Body, which are unique among international courts; it has one of the highest plaintiff win rates of any court; and its binding decisions result in a significant level of compliance. Despite all these features, the system is often criticized for not fulfilling its role: that of “serv[ing] to preserve the rights and obligations of Members under the covered agreements and to clarify the existing provisions of those agreements.”<sup>239</sup>

The arguments are that it is too biased against developing countries or that the remedies it offers are largely ineffective. Although most commentators have admitted that the power imbalance between rich and poor countries—or the threat of political and economic retaliation—is not a true factor to determine the effectiveness of the system, many still argue that the disparity in capacity—the financial, human, and institutional resources needed to participate—still negatively impacts a smaller country’s ability to participate. Furthermore, there are those commentators who point out that the dispute settlement system is more widely used by the rich, but that does not explain why developing countries use it at all.

In the end, however, the fact remains that the WTO *is* the most active tribunal, and although the most frequent participants are the wealthiest economies, smaller countries still participate. As this Note contends, the one largely-ignored reason why WTO members participate is to gain one intangible asset—reputation. As Turk maintains, it is reputational cost and benefits that determines whether or not a member will file a complaint through to the end.<sup>240</sup>

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<sup>239</sup> McRae, *supra* note 5, at 4 (quoting Understanding on Rules and Procedures Governing the Settlement of Disputes art. 3.2, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, 33 I.L.M. 1126)

<sup>240</sup> See Turk, *supra* note 16.

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At the same time, gains in reputation come with their own benefits. If developing countries were to use the system as a method of establishing their presence as active participants in the global trading system, they would likely find other opportunities of development as a result.

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