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Why Settle for Less?
An Analysis of Settlement in WTO Disputes

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Abstract

This paper examines the negotiated settlement of disputes in the WTO according to the trade agreement in question and the terms of settlement. It argues that vague provisions in the disputed agreement can produce settlements that are incongruent with Members' original commitments. The risks of settlement may be amplified where disputants face power and capacity constraints to successful use of the DSM. Under conditions of legal uncertainty and power asymmetry, litigation rather than settlement offers an opportunity for clarity. In knowing the rules, Members can pursue development policies with confidence, reinforcing the security and predictability of the world trade system.

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Introduction

The international trade system has become increasingly legalized with the establishment of the World Trade Organization (WTO). In addition to an expansion in the scope of trade regulation, the WTO has enhanced the enforcement of these rules through an adjudicative Dispute Settlement Mechanism (DSM). Legalization of dispute settlement aims to treat all WTO Members equally before the law, adding security and predictability to the manner in which rules are applied and mitigating the effects of power asymmetries (Abbott, et al, 2000). Previous studies of the DSM demonstrate that despite legalization, developing countries still face power and capacity constraints to effective dispute resolution. These constraints shape the DSM even before the litigation stage, in "pre-trial" negotiations known as consultations. This is particularly relevant given that over half of all disputes are settled in consultations (Busch and Reinhardt, 2000: 160).

During the consultation phase, Members exchange their positions on disputed trade measures in an attempt to reach a negotiated settlement. In fact, the DSM favors negotiated settlement to a litigated resolution (DSU, 1994: Article 3.7). However, the trade agreements of the WTO are not always well defined. Without authoritative legal interpretation by a panel and or the Appellate Body (AB), rights and obligations set forth in ambiguous agreements remain imprecise. In the presence of legal uncertainty, there is a risk that settlements will not conform to the law. These settlements may take the form of resolutions that limit WTO-compatible policies or permit WTO-inconsistent measures. This erosion of policy space is especially significant for developing countries seeking to implement a full range of strategies for catch-up development. The risk that settlement will impede legal clarity is significant for the WTO membership as a whole. However, when vague agreements converge with the power and capacity constraints of developing countries, the risk of unsound settlements in unduly high. Where settlements prevent authoritative legal clarity, they weaken the predictability with which the agreements are applied and the security in knowing the rules of the system. Security and predictability are essential functions of the DSM. The persistence of these types of settlement could undermine the very benefits entailed in legalization of the WTO.

This paper will examine the likelihood of a WTO dispute reaching a negotiated settlement according to the trade agreement cited in the complaint. The purpose of this analysis is to determine whether differing rates of settlement are related to varying degrees of clarity across three types of trade agreements: the multilateral agreements on goods, services, and intellectual property rights. The paper will also examine the terms of these settlements to explore the degree to which settlements conform to the law or are governed by diplomatic factors. This analysis employs a mixed methodology. Descriptive statistics are used to determine the rates of settlement according to each trade agreement. A content analysis of the settlement agreements illustrates on whose terms these cases are settled. The data shows that cases citing the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) have the highest rate of settlement, with TRIPS Articles 27, 65, and 70 most frequently invoked in negotiated settlements. The terms of the settlements typically favor the complainant, however there are settlements that appear to favor neither the complainant nor the defendant. The latter may reflect uncertainty about which party would "win" litigation given ambiguities in the treaty text. A case study of *Brazil-Patent Protection* shows that there is uncertainty around the legality of local working requirements and that negotiated settlement has placed procedural restrictions on this potentially permissible policy. In sum, where settlement impedes legal clarity, it impairs the security and predictability of the DSM, a critical function of the system. Settlement under these conditions has less to offer than litigation, not only for the immediate parties to the dispute, but also for the entirety of the WTO.

Section one evaluates the functioning of the DSM and the risks associated with settlement. Section two offers an analysis of settlements in the DSM, with attention to the rates of settlement, the terms of the settlements, and frequently disputed provisions. Additionally, this analysis includes a case study *Brazil-Patent Protection* and the uncertainty surrounding local working requirements. In light of the risks associated with settlement, section three suggests litigation strategies for developing countries and proposals for DSM reform. Section four concludes this study.

I. Evaluating the DSM

The DSM settles trade disputes between Members and brings security and predictability to the world trade system (Jackson, 2004: 117). Although developing countries face power and capacity constraints to using the DSM, the legalized system offers the advantage of knowing the rules of trade and having confidence in the way the rules are applied. However, the bulk of WTO disputes are settled before they reach the legalistic phases of dispute settlement. The risk that settlements may contradict WTO agreements or reflect power asymmetries, serves to undermine the very value of a legalized DSM.

I.1 Security and Predictability of the System

The DSM is designed to resolve trade disputes between Members of the WTO. When a country issues a complaint against another for the violation of a trade agreement, the disputants first enter into negotiations known as consultations (DSU, 1994: Article 4). Consultations, both bilateral and plurilateral, are confidential (DSU, 1994: Article 4.11). After 60 days of negotiations, the complainant may request the establishment of a panel; a board of third party officials who adjudicate the case. However, consultations can continue in tandem with later stages of litigation, offering the potential for negotiated settlement throughout the process. Settlements arise from consultations in the form of a mutually agreed solution (MAS) or the withdrawal of a dispute (Lester, et al, 2012). Parties must notify the WTO of a MAS, but in practice many cases linger in consultations, abandoned or settled without notification (DSU, 1994: Article 3.6; Reynolds, 2007:192-193). Even when settlements are notified they vary in detail, leaving the terms of some settlements unclear. Consultations are little more than "bargaining in the shadow of the law," and remain a diplomatic step in what has become an increasingly legalized process (Bononcini, 1998: 206-207; Busch and Reinhardt, 2000; Steinberg, 2002). The lack of transparency in "out-of-court" settlements means that even when they succeed in resolving the immediate dispute, they often fail to provide security and predictability to the system.

The language of the Dispute Settlement Understanding (DSU), which outlines the rules and procedures of the DSM, gives clear priority to negotiated settlement (DSU, 1994: Article 3.7). However, dispute resolution is not the only goal of the DSM. The DSU states that the process is designed to bring "security and predictability" to multilateral

trade (DSU, 1994: Article 3.2). Security and predictability come from knowing the rules of the system and the manner in which they will be applied. Clear rules allow Members to pursue a range of economic policies without fear of retaliation from trade partners. Confidence in the rules bolsters stability of the system. Nevertheless, scholars still debate whether the primary objective of the DSM is "to solve the instant dispute" or "to promote certain longer term systemic goals such as predictability and stability in interpretations of treaty text" (Jackson, 1997:134). Carmody (2011) suggests that there is a duty to settle in the WTO and even litigation emphasizes cooperation over adversalism (170). Pauwelyn (2003) laments "the dwindling number of settlements as a result of the legalization of the panel process" and advocates greater opportunities for negotiated settlement (139-140). Alilovic (2000) argues that when it comes to dispute settlement "litigation ranks a poor second to an agreement reached through consultation" (284). Theses scholars echo the DSU in favoring settlement to litigation. However, an unqualified preference for negotiated settlement fails to consider the nature of such settlements and the systemic gains from litigation.

In regard to the nature of settlements, there is no monitoring or enforcement mechanism to ensure that settlement agreements are implemented or that the settlements are in conformity with WTO law. In practice, differing interpretations of the settlement agreement can contribute to inadequate implementation of the settlement by one or both parties (Baroncini, 1998: 219). Although settlements are required to conform to WTO law, the limited transparency of the consultation phase makes it difficult to enforce their WTO-compatibility (DSU, 1994: Article 3.5). The absence of legal interpretation by a panel or the AB, adds difficulty in determining whether settlements are truly consistent with WTO agreements. In the absence of third party adjudication, disputants have an incentive to interpret the legal texts in their favor. Horlick and Coleman (2007) cite *US-Lumber* and *US-Steel Bars* as examples of "sleazy settlements" which only create the illusion of compliance (146). Both settlements that allow illegal trade measures and those that prevent permissible policies diminish confidence in the way trade rules are applied.

In addition to the risk of settlements that skirt the law, are settlements that impede legal clarity. Alschner (2013) calls these "*bilateral* solutions in a *multilateral* system" because they limit informational gains to the immediate disputants (3). Third parties typically benefit from litigation given the precedent setting effect of a panel or AB ruling,

which serves to clarify WTO rules (Jackson, 1997: 137). Developing countries in particular benefit from "legal band-wagoning," a low-cost strategy in which Members join a case as a co-complainant or third party in hopes of reaping the rewards of litigation (Davis, 2006b: 225). Conversely, concessions are usually limited to the immediate parties in negotiated settlements (Agius, 2012: 145). There is a risk that a bilateral solution will reach an inaccurate interpretation of a trade agreement and limit a Member's policy space beyond their initial commitments. Incomplete or imprecise agreements will undoubtedly lead to a proliferation of future disputes. However, the clarification of WTO law can be achieved through litigation and legal interpretation. With greater legal clarity, Members can better predict the manner in which the law will be applied and feel more secure in pursuing trade strategies. While the immediate resolution of disputes remains the stated aim of the DSM, security and predictability are of the upmost importance for stability and success of the WTO.

I.2 Power and Capacity Constraints

Developing countries' use of the DSM is on the rise (Francois, Horn and Kaunitz, 2010: 29; Leitner and Lester, 2006: 222). Complaints by developing countries first outnumbered those of developed countries in 2000, and developing countries "win" panel and AB rulings at a similar rate to developed countries (Park and Panizzon, 2002: 227; Busch and Reinhardt, 2002). Nevertheless, developing countries' face "constraints of law, money and politics" to successful use of the DSM (Shaffer, 2006: 177). Power constraints, or the inability of politically weak countries to file complaints for fear of retaliation, have little effect in practice, but capacity constraints, or the "lack of financial, human, or institutional capital," have a strong effect on developing country participation (Guzman and Simons, 2005: 557-558). Capacity constraints include an inability to retaliate or induce compliance, limited financial resources to pursue litigation, and limited legal expertise.

With regard to retaliation, smaller, poorer countries lack the capacity to implement countermeasures that have a significant effect on large economies. Consequently, for developing countries, retaliation is a poor tool to enforce compliance (Dam, 1970: 368). Blonigen and Bown (2001) show that a limited ability to retaliate may even make developing countries the target of WTO inconsistent policies (21). Furthermore, the evidence suggests that a Members' ability to retaliate influences its decision to implement

WTO consistent policies (Bown, 2004c: 288; Bown, 2002: 314). In cases where an industry has the capacity to retaliate independently, trade disputes may side step the DSM altogether (Bown, 2005b: 551-552). However, scholars differ in their perspectives over whether weakness in retaliatory capacity deters developing countries from using the system. Horn, et al (1999) find that retaliation constraints and legal capacity matter, but it is relative market size, diversity and the value of trade that best explain differential use of the DSM (26). On the other hand, Bown (2004b) suggests that "successful economic resolution of disputes is influenced by a concern for retaliation," which may deter initial participation (822). Bown (2004a) further argues that developing countries have recognized the central role retaliation plays in the DSM and are now strategically selecting cases based on defendants who are susceptible to retaliation threats (61). This strategy is fundamentally linked to another limitation on developing country participation, financial constraints.

Litigation is more expensive for developing countries in both relative and absolute terms, reflecting costs as a proportion of GDP and the economies of scale profiting repeat players (Shaffer, 2006: 186). The inability of smaller economies to enforce the outcome of litigation, even with the potential for a favorable ruling, may outweigh the cost of adjudication altogether (Dam, 1970: 368; Bown, 2005b: 551). Some developing countries have managed to become repeat players in the system, which has lowered the relative costs of litigation and reduced the third constraint on developing countries; legal capacity (Santos, 2012).

According to the Trade and Development Centre, developing countries are "less sophisticated buyers of legal advice" (Busch and Reinhardt, 2000: 172). They lack the in-house legal expertise to identify breaches of WTO law and to successfully litigate cases (Shaffer 2006: 177). Busch, Reinhardt and Shaffer (2009) argue that legal capacity is the main constraint for developing countries in the DSM (576). The Advisory Centre on WTO Law (ACWL) attempts to ameliorate this issue by offering low cost legal advice to developing countries (ACWL, 1999). Financial and legal resources can often be made available to developing countries if significant commercial interests are at stake. However, it is possible that "the aims of government and industry diverge, with one opting for a settlement where the [trade] barrier is addressed while the other insists on the advantages of a legal ruling" (Abbott, 2007: 15). There is a natural inclination towards

settlement if the disputed barrier is removed. However, as Horn, et al (1999) explain, "today it can be very difficult, even for legal experts, to evaluate whether a trade or trade-related measure is actually a breach of the WTO Agreement, and if so whether other international laws take precedence" (14). If this is the case, Members lacking quality legal expertise may be persuaded to settle and alter or remove a contested trade policy that is legally permissible. In this manner, legal ambiguity is amplified by power and capacity constraints, with the potential to erode policy space for developing countries.

I.3 Deconstructing Settlement

The study of settlements is essential to evaluating the DSM because a majority of cases are concluded in consultations. Thus far, no one variable can fully explain the likelihood of settlement. However, the trade agreement in dispute may serve as an explanatory variable, with more ambiguous agreements raising the prospect of settlement. The settlement of disputes citing vague agreements only impedes valuable legal interpretation. Without legal clarity, settlement risks perpetuating confusion over the rules of trade, disadvantaging less powerful actors and undermining stability of the WTO at large.

The Centrality of Consultations

Consultations are important because "parties exchange information, assess the strengths and weaknesses of their respective cases, narrow the scope of the differences between them and, in many cases, reach a mutually agreed solution" (*Mexico-Corn Syrup*, 2001: paragraph 54). The relevance of consultations is amplified by the fact that over half of all WTO disputes never reach the panel stage (Busch and Reinhardt, 2000: 160). The majority of complaints are settled, withdrawn, or left pending in consultations. Even when a panel is established, consultations can remain ongoing, with three-fifths of all disputes resolved before a panel decision (Busch and Reinhardt, 2000: 158). "Settlement and the withdrawal of cases are thus the norm, not the exception" (Busch and Reinhardt, 2000: 161). Nevertheless, the majority of the empirical analyses on the DSM focus on constraints to participation and enforcement of panel and AB rulings (Bagwell and Staiger, 2004; Bown, 2005a; Davis and Bermeo, 2009; Holmes et al, 2003; Mavroidis, 2000;

Mattoo and Subramanian, 2004; Lacarte-Muro and Gappah, 2000). However, the volume of activity in consultations necessitates further analysis of negotiated settlements.[1]

Factors Contributing to Settlement

A Members' political and economic strength alone cannot predict the likelihood of settlement. Parlin (2000) finds that "no one category of dispute- developed versus developed Member, developed versus developing Member, developing versus developed Member, or developing versus developing Member- appears to have a markedly different rate of settlement" (569). The fact that settlement by a developing country respondent is not significantly more likely than by a developed country respondent indicates that lack of resources and economic power are not wholly explanatory in a Member's decision to settle. The political science literature examines regime type on the likelihood of settlement. Pairs of highly democratic states are more likely to settle than non-democratic pairs, making the greatest concessions in the consultation phase (Guzman and Simmons, 2002: S222-S224; Busch and Reinhardt, 2000: 168-172; Busch, 2000: 422). It is suggested that confidentiality of consultations allows for greater leeway in negotiations, while transparency in panel proceedings can illicit pressures from domestic constituencies, which is especially relevant for democracies. Drawing similar conclusions about the role of transparency on transaction costs, Guzman and Simmons (2005) hypothesize that disputes over continuous policy variables, such as tariffs or quotas, are more likely to be settled than those over discontinuous policy variables, such as health regulations or intellectual property rights. However, the evidence does not support such a straightforward correlation (Guzman and Simmons, 2005: S213-S216). Others suggest that third party participation influences the likelihood of settlement and judicial economy by opening negotiations to a wider range of interests and increasing bargaining costs (Busch and Reinhardt, 2006: 448; Stasavage, 2004: 682, Busch and Pelc, 2010: 257). However, recent work by Johns and Pelc (2012) suggests that most Members are not particularly active as third parties, even when a substantial trade interest is at stake (1). Given limited third party participation and the inability of economic power, regime type, or transaction costs to fully explain the likelihood of settlement, other variables must be considered.

[1] For more detail on the consultation phase, see Horlick (1998), Schuchhardt (2005) and Wethington (2000).

The trade agreement under dispute may influence the likelihood of settlement based on the clarity of the legal text. Different types of trade agreements are invoked with varying degrees of frequency by developed and developing countries. Horn and Mavroidis (2003) find that G3 countries are the main complainants of TRIPS and TRIMS (Agreement on Trade-Related Investment Measures) violations, while developing countries are the net complainants in every WTO agreement other than TRIPS, TRIMS and Customs Valuation (16). These findings and the differences in clarity across WTO agreements, make the agreement in dispute a useful variable for exploring settlement.

I predict that disputes citing traditional trade issues, such as trade in goods agreements, are less likely to reach negotiated settlement than cases citing newer trade issues, such as services and intellectual property rights. Although the General Agreement on Tariffs and Trade (GATT) from 1994 is not identical to GATT 1947, regulation of trade in goods has a long history and a considerable amount of case law offering legal clarity. Consequently, Members are less likely to initiate a losing complaint on traditional trade issues and thus, less likely to settle when they do forward a complaint. On the other hand, the newer trade issues have limited case law and Members may be uncertain of their rights and obligations under these agreements. Given uncertainty about the rules, both complainants and respondents will be more likely to settle in order to avoid a potentially unfavorable precedent setting decision. Under these new trade agreements, a complainant may allege a trade violation, but in consultations become less certain that their complaint will be successful. Without precedent to inform their litigation strategy, parties in this situation may settle for less than they could actually gain with a panel or AB ruling. It is in this manner that legal clarity, plays a critical role in the probability and nature of settlement.

The Value of Legal Interpretation

The WTO agreements limit the range of policies permitted for development, but nevertheless benefit developing countries by laying out the rules of the world trade system to provide predictability amid power asymmetries (Shadlen, 2009: 6). However, ambiguities in the rules themselves inhibit their predictability function. Only authoritative

legal interpretation can clarify the rules in support of security and predictability of the system.[2]

The WTO agreements are not uniformly clear in outlining Members' commitments and disputes arise over genuine differences in interpretation (Schwartz and Sykes, 2002: S201; Ginsburg, 2005: 28). As Horn and Mavroidis (2006) explain:

> "There will be a very large number of measures that fall in a grey zone between what is clearly allowed and what is clearly illegal. The decision of where to draw the boundary cannot be done with any degree of scientific precision and it would therefore be tempting for the parties to interpret the scope of the agreement with an eye to only their own interests. The potential for this kind of moral hazard problem suggests that adjudication should be compulsory..." (9).

Panel and AB reports ensure that the agreements are interpreted with an eye towards the legal text rather than unilateral interests. These reports both clarify ambiguities and fill gaps in the existing agreements (Goldstein and Steinberg, 2006: 1; Ceva and Fracasso, 2010: 482). Article 3.2 of the DSU (1994) explicitly grants panels and the AB the ability to "clarify the existing provisions." In light of the prevailing ambiguities, this sort of textual clarification is essential.[3]

Legal interpretation in the WTO also sets precedent.[4] According to Bhala (1999), the AB practices de facto *stare decisis* because AB rulings apply to the resolution of future disputes. In fact, nearly all panel and AB reports cite previous cases in their chain of legal reasoning (Bhala, 1999: 8-9). However, the practice of setting precedent requires transparency and thus cannot emerge from settlement in consultations (Bhala, 1999: 7). There are concerns that the AB has been overly "activist" in making precedent setting decisions (Bronkers, 1999: 547; Barfield, 2001: 411; Raustiala, 2000: 406-407; Ragosta, et al, 2003: 698; Greenwald, 2003: 123). The Chair of the Senate Finance Committee, US Sen Max Baucus has said that WTO panels are "making up rules that the US never

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[2] In addition to legal interpretation, WTO declarations, such as the Doha Declaration on the TRIPS Agreement and Public Health (Doha Declaration), have been used in special cases to clarify permissible policies.

[3] Some scholars argue that treaty ambiguity is intentional, because it allows parties to reach an agreement that more detailed provisions prohibit (Farber, 2002; Greenwald and Fox, 2007). Still others suggest that if WTO law is too stringent, Members may seek to resolve their disputes elsewhere (Porges 2002: 531; Davis, 2006a: 37-38). Pauwelyn (2006) elaborates on this debate, arguing for a balance between flexibility and enforcement in international law.

[4] Precedent does not have to be strictly binding nor simply persuasive, but allows for the "acceptance of previous decisions with a continuing potential for variation" (Fischer-Lescano and Teubner, 2004: 1044).

negotiated, that Congress never approved, and I suspect, that Congress would never approve" (*Bridges Weekly*, 2002). However, most scholars note that fears of judicial lawmaking by the AB are overblown and that both panel and AB rulings are soundly based on the underlying agreements (Bartels, 2004: 894; Esserman and Howse, 2003:133; Hudec, 2002: 212; Steger, 2002a: 567; Steger, 2004b: 495). In practice, the use of precedent may be the only way to apply the covered agreements in a fair and consistent manner (Bhala, 1999: 150; Gerhart and Kella, 2005: 564-565).[5]

The clarity of the policy options and constraints that comes with legal precedent is a substantial benefit for Members striving for development. As Bhala (2001) writes:

> "…In any game, better rules can make for better games and, one hopes, better outcomes. The doctrine [of *stare decisis*] has the potential to provide a better playing field on which to play the game of trade, better in the sense of knowing the terrain and having confidence in it and, therefore, being more willing and able to run hard and fast. To change metaphors, while not necessary, and certainly not sufficient, the doctrine can be an important ingredient in the recipe for trade growth and development" (937).

Agius (2012) advances this argument, suggesting, "regular interpretive operations could fill the language of the law with more development-friendly content" (155). As negotiations in the Doha Round remain stalled, judicial lawmaking seems to offer a new process of trade law development (Goldstein and Steinberg, 2006:12). However, even for those who oppose a judiciary that fills the gaps within the law, clarifying the current agreements is a necessary part of the DSM. In making successive legal interpretations, the DSM draws on a system of precedent. The use of precedent strengthens the rule of law and increases predictability of the system.

The Risks of Settlement

Settlement carries the risk of allowing power asymmetries between parties to govern dispute resolution and of impeding public clarification of the law. Many scholars have argued against settlement within a domestic legal context (Fiss, 1984; Delgado, et al., 1985; Luban, 1995; McMunigal, 1990; Yeazell, 1994). Fiss (1984) addresses the fallacy that settlement is simply a function of disputants' predictions about the outcome of litigation. He explains that settlement is a function of the resources available to each

[5] For a review of judicial lawmaking in the WTO see Steinberg (2004)

party, the legal expertise to accurately predict the outcome of litigation, and the costs inherent in litigation (1076). This holds true in the WTO where developing countries' relative lack of resources suggest that they may not be able to accurately predict the outcome or afford the costs of litigation, making them more willing to accept a settlement that has less to offer than panel or AB decision.

Additionally, settlements may lead to an "erosion of the public realm," by failing to clarify rules or set precedent (Luban, 1995: 2622). Moffitt (2009) argues that there is "such a proliferation of written judicial opinions that one is almost certain to find at least some support for almost any legal proposition" (2009: 1208). However, this is not the situation in the WTO, where the case law, though extensive for an international adjudicative body, is nevertheless limited. Transition periods for developing countries to implement certain WTO provisions have only recently expired and the case law on those provisions is particularly sparse. In situations where there is a lack of precedent, "settlement is likely to be based on the uncertainty of knowing the legal result" (Menkel-Meadow, 1995: 2680-2681). A proliferation of settlements in this context will only serve to entrench the problem, as it will inhibit authoritative legal interpretation. To be clear, this is not an argument against settlement at large. Under the right conditions, settlement can be valuable tool for cooperative dispute resolution. Although under conditions of legal ambiguity and power asymmetry, settlement carries the risk of impeding clarification of the law, allowing power relations to dominate the terms of the settlement, and destabilizing the DSM.

I.4 Conclusion

The security and predictability of the DSM relies on legal interpretation and precedent to clarify rules and outline permissible policies. When settlements are made in consultations, they inhibit authoritative legal interpretation, with the potential to entrench illegal trade measures and block legal policies. This carries risk for all Members, but especially for developing countries for which the security and predictability of the system helps mitigate the effects of power asymmetries. Furthermore, developing countries' power and capacity constraints within the DSM place them at a greater risk of accepting settlements that erode policy space. An analysis of settlements in consultations will illustrate whether persistent ambiguities in the legal texts are a fundamental problem for the DSM.

II. An Analysis of Settlement in the DSM

This section explores patterns of settlement in the DSM according to the agreements in dispute. Descriptive statistics indicate that disputes under the TRIPS Agreement have the highest rate of settlement, with General Agreement on Trade in Services (GATS) following closely behind. Content analysis demonstrates that most settlements favor the complainant, but the terms of many settlements remain unclear. A qualitative review of the cases settled under TRIPS shows that Articles 27, 65, and 70 are cited with relative frequency. A case study of *Brazil-Patent Protection* indicates that these indeterminate settlements and the high rate of settlement under TRIPS may be linked to ambiguities in the treaty text.

II.1 Methodology

This analysis employs a mixed methodology of descriptive statistics, content analysis, qualitative review and case study. For the purposes of this study, settlement refers specifically to the negotiated resolution of disputes in the consultation phase. This study includes all DSM cases since the creation of the WTO though case DS462, with the exclusion of four cases that only cite the plurilateral Agreement on Government Procurement (DS73, DS88, DS95, and DS163). In an effort to assess whether varying degrees of legal clarity across the trade agreements influence the likelihood of settlement, the agreements are broken into three broad categories: multilateral agreements on trade in goods, services, and intellectual property rights. These agreements are embodied in Annex 1A, 1B, and 1C to the Agreement Establishing the WTO (WTO Agreement). Annex 1A covers the multilateral agreements on trade in goods, while Annex 1B, or GATS, covers services and Annex 1C, or TRIPS, covers intellectual property rights. Annex 2 and 3 are not included in this study as they are largely procedural rather than substantive agreements. Annex 4 agreements are also excluded because they do not include all WTO members (WTO Agreement, 1994: Article 2.3). Traditionally, complaints by multiple disputants regarding the same trade measure are aggregated, but for this study they are counted individually, since each Member may reach a separate settlement with the respondent (Busch and Reinhardt, 2002). All data for this analysis has been retrieved from WTO documents and specific references can be found in Appendix II.

The rates of settlement as shown in Table 1 are based on descriptive statistics. The number of disputes settled which cite Annex 1A are taken as a percentage of all disputes that cite agreements under Annex 1A. The same calculation is made for Annex 1B and 1C. If a case cites agreements under two of the relevant annexes, it is included in the calculation for both annexes. There are no cases that cite agreements under all three annexes.

The terms of settlement found in Tables 2-4 are estimated using content analysis. I review the settlement agreement for every case resolved in consultations and employ an objective coding scheme to place the settlement in one of three categories: settlements that favor the complainant, settlements that favor the respondent, and other settlements. Cases in which the disputed measure or measures were removed, altered, or new legislation was proposed to bring the measure into conformity, are coded in favor of the complainant. This applies to cases in which a MAS specifies that the respondent will make changes to the contested measure. This category also applies to cases in which the respondent independently brought the disputed measure into conformity and the complainant has withdrawn the case. Cases are coded in favor of the respondent if the complaint was withdrawn or terminated with no apparent changes to the contested measure, if a MAS was reached that does not indicate any changes on the part of the respondent, or if the authority of the panel or consultations have lapsed and the case is recorded as terminated. The final category includes cases in which the settlement appears to genuinely favor both parties or the terms of the settlement are unclear. This category, labeled “other”, includes any MAS in which both parties make alterations to existing measures or in which the respondent is required to change some, but not all, of the contested measures. Cases in which a MAS is recorded, but no details are given are also coded as “other”. Any MAS that creates a new bilateral or plurilateral agreement or involves continuous negotiations as a central tenant of the settlement are also placed in the “other” category. Finally, cases that are terminated to continue dispute resolution in an alternate venue are also classified as “other.”

Given that the TRIPS agreement is found to have the highest rate of settlement, Table 5 employs a qualitative review of the complaint for every case settled under TRIPS to find the specific articles cited in the complaint. Despite their similarly high rate of settlement, TRIPS rather than GATS cases are selected for further analysis. This selection is based on the fact that GATS commitments are not prescriptive, each Member can

choose its own level of commitments made under GATS (GATS, 1994: Article 20). The TRIPS Agreement on the other hand, applies to all Members in equal measure (excluding the transitional periods afforded to developing countries). Therefore, a review of the specific articles repeatedly cited in TRIPS settlements offers a better indicator of whether Members have divergent interpretations of the commitments entailed in the agreement.

Finally, *Brazil-Patent Protection* is examined as a case study to determine whether the settlement in this instance was based soundly on WTO law or legal ambiguity. This case is selected because it cites the TRIPS Agreement, which has the highest rate of settlement. The case study is intended to investigate what underlies the likelihood of settlement in TRIPS disputes. Furthermore, the terms of this settlement require ongoing consultations between the disputants, favoring neither the complainant nor the respondent. Cases of this nature are of particular interest since the complainant did not achieve all its demands in consultations, but still chose a MAS rather than litigation. Consequently, this case should illuminate the factors that encourage Members to settle despite the possibility of "winning" a panel or AB ruling. Finally, as the most recent settlement of this nature citing TRIPS Article 27, any ambiguity that exists in the law should be exhibited in this case. This case study cannot, and does not, aim to represent all WTO disputes. However, it does indicate whether settlements may be influenced by legal ambiguity and power asymmetry.

II.2 Limitations

The limitations to this study are typical of any investigation involving descriptive statistics, content analysis, or case study. Descriptive statistics fail to account for underlying differences between the variables in discussion. In this case, the rate of settlement does not account for differences in economic structure, political power, market size, or frequency in use of the DSM among the disputants. Additionally, the categories of Annex 1A, 1B, and 1C are not entirely equal, as 1A includes multiple trade agreements while 1B and 1C are simply GATS and TRIPS respectively. However, a more granular look at the rates of settlement under Annex 1A, shows that the rates of settlement do not change substantially. Aside from the Agreement in Import Licensing, which has a settlement rate of 44%, the other multilateral agreements on trade in goods have comparatively low rates of settlement with Agriculture at 23%, Sanitary and Phytosanitary

Measures at 28%, Technical Barriers to Trade at 28%, TRIMS at 16%, Rules of Origin at 29%, Subsidies and Countervailing Measures at 5% and Safeguards at 7%. To date, no complaints have invoked the Agreement on Pre-shipment Inspection. Despite the weaknesses inherent in descriptive statistics and the slight variation across the agreements on trade in goods, the literature and a more nuanced assessment of Annex 1A indicate that the results are still relevant.

Even with an objective coding scheme, the risk of subjectivity is intrinsic to content analysis. Furthermore, cases are only considered settled if the WTO officially reports their current status as "settled or terminated (withdrawn, mutually agreed solution)" (Dispute Settlement, 2013). This method may exclude cases that have been settled but appear to have been abandoned, if the settlements have not been officially reported to the WTO (Reynolds, 2009). Finally, the bargain outlined in the settlement agreement, no matter how detailed, may never actually be implemented. There is no way to determine whether the settlement agreements have been fulfilled other than an independent review of every Members' trade policy. Therefore the terms of the settlement in the content analysis do not always reflect the genuine terms of the settlement upon implementation.

In regards to the high rate of settlement under TRIPS and the frequency with which certain Articles are invoked, the settlement agreement does not always address all articles cited in the complaint. Though uncommon, some cases address provisions in the settlement agreement that were not originally invoked in the complaint.

Finally, as a single case study, *Brazil-Patent Protection* cannot be representative of all WTO disputes nor indicate systemic trends. Even among developing country participants, Brazil is an anomaly as a repeat player in the DSM with relatively strong legal capacity (Santos, 2012). Nevertheless, "in-depth knowledge of a single case [can] help us to understand and act more intelligently in other potentially different cases" (Donmoyer, 2000: 54). Furthermore, if legal ambiguity compels Brazil to accept an unsound settlement, then the risk should be present, if not greater, for the least developed countries.[6]

[6] Donmoyer (2000), Flyybjerg (2006) and George and Bennett (2005) outline the merits of a single case study.

II.3 Rates of Settlement by Annexed Agreement

Table 1
Rate of Settlement According to the Annexed Agreements

Covered Agreements	Total Number of Cases	Cases Settled in Consultations	Rate of Settlement in Consultations
Annex 1A	429	76	18%
Annex 1B (GATS)	22	9	41%
Annex 1C (TRIPS)	32	14	44%

Table 1 indicates that disputes involving trade in goods are less likely to be settled than disputes involving GATS or TRIPS. In understanding what lies behind these differing rates of settlement, it is important to consider on whose terms these settlements are negotiated. Do settlements favor the complainant or the respondent? Are the terms of the settlement straightforward or unclear? And ultimately, do the settlements appear to reflect the rule of law or a power-based bargain? The following section will advance this analysis and assess the terms of each settlement.

II.4 Settlement on Whose Terms?

Table 2
Settlements Citing Annex 1A

Case Information			Terms of the Settlement		
Case Number	Complainant	Respondent	Favors Complainant	Favors Respondent	Other
DS391	Canada	Korea	x		
DS374	Indonesia	South Africa	x		
DS364	Panama	EC			x
DS361	Colombia	EC			x
DS359	Mexico	China			x
DS358	US	China			x
DS354	EC	Canada	x		
DS348	Panama	Colombia	x		
DS344	Mexico	US	x		
DS329	Mexico	Panama	x		
DS327	Pakistan	Egypt			x
DS326	Chile	EC	x		
DS323	Korea	Japan			x
DS313	India	EC	x		
DS311	Canada	US			x
DS309	US	China	x		
DS306	Bangladesh	India	x		
DS305	US	Egypt	x		
DS298	Guatemala	Mexico			x
DS297	Hungary	Croatia			x
DS293	Argentina	EC			x

Table 2 Continued

Case Number	Complainant	Respondent	Favors Complainant	Favors Respondent	Other
DS292	Canada	EC			x
DS287	EC	Australia			x
DS284	Nicaragua	Mexico			x
DS281	Mexico	US			x
DS261	Chile	Uruguay		x	
DS255	Chile	Peru	x		
DS250	Brazil	US	x		
DS247	Canada	US			x
DS240	Hungary	Romania	x		
DS237	Ecuador	Turkey	x		
DS235	Poland	Slovak Republic			x
DS232	Chile	Mexico			x
DS228	Colombia	Chile		x	
DS227	Chile	Peru	x		
DS210	US	Belgium	x		
DS199	US	Brazil			x
DS198	US	Romania	x		
DS193	EC	Chile			x
DS190	Brazil	Argentina	x		
DS181	Thailand	Colombia	x		
DS158	Guatemala, Honduras, US, Panama, Mexico	EC			x
DS151	EC	US	x		
DS119	Switzerland	Australia	x		
DS106	US	Australia	x		
DS105	Panama	EC			x
DS102	US	Philippines	x		
DS96	EC	India	x		
DS94	Switzerland	India	x		
DS93	New Zealand	India	x		
DS92	Canada	India	x		
DS91	Australia	India	x		
DS89	Korea	US	x		
DS85	EC	US			x
DS77	EC	Argentina		x	
DS74	US	Philippines	x		
DS72	New Zealand	EC	x		
DS43	US	Turkey	x		
DS40	EC	Korea			x
DS39	EC	US		x	
DS38	EC	US		x	
DS35	Australia, Thailand, Argentina, Canada, New Zealand, US	Hungary			x

Table 2 Continued

Case Number	Complainant	Respondent	Favors Complainant	Favors Respondent	Other
DS32	India	US	x		
DS27	Ecuador, Mexico, Guatemala, Honduras, US	EC			x
DS23	Mexico	Venezuela	x		
DS21	US	Australia	x		
DS20	Canada	Korea	x		
DS19	India	Poland	x		
DS16	Guatemala, US, Honduras, Mexico	EC			x
DS14	Chile	EC	x		
DS13	US	EC	x		
DS12	Peru	EC	x		
DS7	Canada	EC	x		
DS6	Japan	US		x	
DS5	US	Korea	x		
DS1	Singapore	Malaysia	x		
		Totals	44	6	26

Table 3
Settlements Citing Annex 1B (GATS)

Case Information			Terms of the Settlement		
Case Number	Complainant	Respondent	Favors Complainant	Favors Respondent	Other
DS378	Canada	China	x		
DS373	US	China	x		
DS372	EC	China	x		
DS309	US	China	x		
DS237	Ecuador	Turkey	x		
DS105	Panama	EC			x
DS38	EC	US		x	
DS27	Ecuador, Guatemala, Honduras, Mexico, US	EC			x
DS16	Guatemala, Honduras, Mexico, US	EC			x
		Totals	5	1	3

Table 4
Settlements Citing Annex 1C (TRIPS)

Case Information			Terms of the Settlement		
Case Number	Complainant	Respondent	Favors Complainant	Favors Respondent	Other
DS 372	EC	China	x		
DS 199	US	Brazil			x
DS 196	US	Argentina			x
DS 171	US	Argentina			x
DS 125	US	Greece	x		
DS 124	US	EC	x		
DS 115	US	EC	x		
DS 86	US	Sweden	x		
DS 83	US	Denmark	x		
DS 82	US	Ireland	x		
DS 42	EC	Japan	x		
DS 37	US	Portugal	x		
DS 36	US	Pakistan	x		
DS 28	US	Japan	x		
		Totals	11	0	3

Tables 2-4 show that the majority of settlements favor the complainant, as is expected if complaints are based on clear WTO violations. In such a scenario, it is likely that the respondent will recognize the violation and bring the contested measure into conformity to avoid a "loss" through litigation. Cases in which the settlements favor the respondents are few, but they may represent a determination, after the exchange of information in consultations, that a litigated outcome would favor the respondent. It is also possible the complainants in this category choose to withdraw cases in order to avoid damaging a political or economic relationship with the respondent. The data shows that the US is a respondent in four out of seven such cases; potentially suggesting that political and economic clout may aid a respondent in reaching a favorable settlement.

The most striking trend lies in Table 4, where either the US or the European Communities (EC) is the complainant in every settlement citing the TRIPS Agreement. Specifically the US is the complainant in 12 out of 14 cases. It is possible that Table 4 simply represents the role of the US as an intellectual property exporter, explaining its repeat status as a complainant in TRIPS cases. However, in analyzing patterns of settlement in consultations, it is worth noting that out of 17 complaints in which the US has invoked the TRIPS Agreement, it has settled 12 cases in consultations. Thus, not only

is the US a frequent complainant, but it favors negotiated settlement. It is possible that economic and political power play a role, and the US is able achieve its aims of dispute resolution without litigation. However, if that were the case, we would expect to see this trend demonstrated equally across agreements, not solely in cases disputing the TRIPS Agreement. In favoring negotiated settlement, the complainant must expect to achieve a more or equally favorable outcome in consultations relative to litigation. I argue that the vague language of specific provisions of the TRIPS Agreement have contributed to the high rate of settlement under Annex 1C, by making both complainants and respondents uncertain of a litigated outcome and consequently, eager to settle.

II.5 High Rates of Settlement and the TRIPS Agreement

Table 5
Articles Cited in TRIPS Disputes Settled in Consultations

Case Number	Complainant	Respondent	Settlement on Whose Terms?	Articles Cited in the Complaint
DS 372	EC	China	Complainant	39.2
DS 199	US	Brazil	Other	27, 27.1, 28, 28.1
DS 196	US	Argentina	Other	27, 28, 31, 34, 39, 50, 62, 65, 70
DS 171	US	Argentina	Other	27, 39.2, 65, 70
DS 125	US	Greece	Complainant	41, 61
DS 124	US	EC	Complainant	41, 61
DS 115	US	EC	Complainant	9-14, 41-48, 65, 70
DS 86	US	Sweden	Complainant	50, 63, 65
DS 83	US	Denmark	Complainant	50, 63, 65
DS 82	US	Ireland	Complainant	9-14, 41-48, 61, 63, 65, 70
DS 42	EC	Japan	Complainant	14.6, 70.2
DS 37	US	Portugal	Complainant	33, 65, 70
DS 36	US	Pakistan	Complainant	27, 65, 70
DS 28	US	Japan	Complainant	3, 4, 14, 61, 65, 70

Table 5 indicates that TRIPS Articles 27, 65, and 70 are cited relatively frequently in cases that have been settled. Article 65 on the Transitional Arrangements is cited in 9 out of 14 cases and Article 70 on the Protection of Existing Subject Matter is cited in 8 out of 14 cases (TRIPS, 1994). Although only cited in 4 of the settled cases, Article 27 on Patentable Subject Matter is cited in all settled cases where the terms of the settlement are indeterminate. Interestingly, the language of Article 27 invokes both Articles 65 and 70:

> "Subject to the provisions of paragraphs 2 and 3, patents shall be available for any inventions, whether products or processes, in all fields of

> technology, provided that they are new, involve an inventive step and are capable of industrial application. Subject to paragraph 4 of Article 65, paragraph 8 of Article 70 and paragraph 3 of this Article, patents shall be available and patent rights enjoyable without discrimination as to the place of invention, the field of technology and whether products are imported or locally produced." (TRIPS, 1994: Article 27.1)

Paragraph 4 of TRIPS Article 65 grants developing countries an extra 5 years to extend patents rights on areas of technology not previously patentable. Paragraph 8 of TRIPS Article 70 requires, in cases in which patents are not immediately extended to all fields of technology, that applications for patents under these new fields may still be filed. The TRIPS Agreement defines the terms "inventive step" and "capable of industrial production" as "non-obvious" and "useful" respectively (1994: note 5). Nevertheless, there is still a great deal of interpretive space in these provisions. The high rate of settlement under the TRIPS may reflect uncertainty about the policies that are legally permissible, specifically under Article 27.

II.6 A Case Study of *Brazil-Patent Protection*

In May of 2000, shortly after the expiration of the transitional period for developing countries to adopt remaining TRIPS, the US launched a complaint against Brazil. The complaint challenged Article 68 of Brazil's 1996 Industrial Property Law, which established a local working requirement for patent holders (*Brazil- Patent Protection*, 2000). The law requires patent holders in Brazil to manufacture the patented product domestically or the Brazilian government may issue a compulsory license (CL) granting other producers the right to "work" the patent. The US alleges this is a violation of Article 27 of the TRIPS Agreement.

Read in isolation, TRIPS Article 27 seems to prohibit local working requirements, stating, "patents shall be available and patent rights enjoyable without discrimination as to…whether products are *imported or locally produced*" (1994: Article 27.1). However, TRIPS Articles 30 and 31 outline exceptions to the exclusive rights conferred by a patent and conditions for CLs. In fact the language of Article 31 permits local working requirements by failing to limit the grounds on which a CL can be issued. There is disagreement between Members who consider local working requirements to be prohibited under Article 27 and those that view them as permissible. The US stands strongly with the

former, while Brazil and many developing countries tend towards the latter. The debate stems from whether Articles 30 and 31 can govern Article 27 (Champ and Attaran, 2002: 368; Nowak 2005: 905-913). Here the WTO jurisprudence is unclear. In *Canada-Pharmaceutical Patents*, a panel ruled that it is "acknowledged fact" that Article 27 is absolute and exceptions afforded under Article 30 are still subject to the non-discrimination of production location articulated in Article 27.1 (*Canada-Pharmaceutical Patents*, 2000: paragraph 7.91). In this case, the Panel acknowledged that the treaty text does not explicitly state the dominance of Article 27 over 30 and 31, but nevertheless asserted the supremacy of Article 27 based on popular interpretation (Champ and Attaran, 2002: 368). Later TRIPS adjudication contradicts the legal reasoning by this Panel, namely in its deference to popular belief over treaty text. The AB in *India- Patents (US)* states:

> "The legitimate expectations of the parties to a treaty are reflected in the language of the treaty itself. The duty of a treaty interpreter is to examine the words of the treaty to determine the intentions of the parties. This should be done in accordance with the principles of treaty interpretation set out in Article 31 of the Vienna Convention. But these principles of interpretation neither require nor condone the imputation into a treaty of words that are not there or the importation into a treaty of concepts that were not intended." (1997: paragraph 45).

In reference to the intention of the TRIPS Agreement negotiators, it is far from clear that a uniform agreement on local working requirements was ever reached, perhaps explaining the inconclusive language of the final text (Champ and Attaran: 373-380). Some legal scholars have interpreted the explicit incorporation of TRIPS Articles 65.4 and 70.8 into Article 27.1 as an indication that Article 27 is "only subject to the enumerated provisions" (Mercurio and Tayagi, 2010: 287). On the other hand, principles of international law suggest that when general rules and specific rules are in conflict, the specific provisions should take precedence; in this case Article 31 (Champ and Attaran: 367). Until the DSM makes an authoritative legal interpretation[7], the applicability of Articles 30 and 31 as exceptions to Article 27 will remain unknown.

Other interpretations that favor the legality of local working requirements feature the Paris Convention. The incorporation of the Paris Convention into the TRIPS Agreement under Article 2.2 is cited as a defense of local working requirements (Mercurio

[7] The interpretations issued in *Canada- Pharmaceutical Patents* and *India- Patents* have built a foundation for understanding Article 27, but not local working requirements in particular.

and Tyagi, 2010: 285; Abbott, 2009: 7; Halewood, 1997: 260; Shanker, 2006: 24-26). Article 5(A)(2) of the Paris Convention outlines "the right to take legislative measures providing for the grant of compulsory licenses to prevent abuses which might result from exercise of exclusive rights conferred by the patent, for example, failure to work." Mercurio and Tyagi (2010) argue that with regard to TRIPS and the Paris Convention "rights have taken on the language of obligations" and thus the rights and obligations of both agreements must be taken "on equal footing" (291). Despite the strength of arguments in favor of local working requirements, until there is an official panel or AB interpretation, the legality of this policy will remain in question (Fischer-Lescano and Teubner, 2004: 1027).

In the MAS on Brazil's Industrial Property Law, Brazil maintained the position that, "Article 68 is fully compatible with the TRIPS Agreement" (2001: 1-2). Nevertheless, Brazil agreed to a consultative mechanism, whereby they enter into talks with the US before issuing CLs on any US held patents (2001: 2). The US states that it accepted this solution because Brazil had never used Article 68 to issue a compulsory license (2001: 2). However, the nature of compulsory licenses as crucial to the access to essential medicines debate[8], and the timing of the dispute in congruence with the United Nations AIDS Summit, suggest that politics and public image are at the heart of this MAS (Champ and Attaran, 2002: 381; Mercurio and Tyagi, 2010: 295; Shaffer, Ratton-Sanchez and Rosenberg, 2008: 465-466). As part of the MAS, the US "expect[s] Brazil not to proceed with further dispute settlement action regarding sections 204 and 209 of the US patent law" (2001: 2). In 2001 Brazil launched a counter-complaint alleging the inconsistency of the US Patent Code with the TRIPS Article 27 (*US-Patents Code*, 2001). However, in accordance with the MAS, the *US-Patents Code* dispute has been abandoned[9] (Fukunaga, 2008: 884).

What is troubling about this case is that "it demonstrates how a MAS can be used to tacitly agree on a non-exercise of rights amounting to a *de facto* acceptance of a violation" (Alshner, 2012: 42). The US benefits from the MAS by retaining its position on

[8] CLs provide a route to low-cost medicines and Brazil has been particularly successful in utilizing this policy to combat its AIDS epidemic. For more information on the access to essential medicines debate, see Sell (2002) and Shadlen (2004).

[9] *US- Patents Code* is not recorded as settled; therefore it is considered abandoned and not included in this study's statistical analysis of TRIPS settlements.

the illegality of local working requirements, deflecting a counter-complaint, and maintaining an image sympathetic to the fight against AIDS. Brazil benefits from the MAS in that it did not have to bear the costs of further litigation nor alter its stance on the legality of local working requirements. However, for Brazil there is the possibility that greater gains could have emerged through litigation if Article 68 of the Industrial Property Law had been ruled as TRIPS compliant. Brazil may have weighed the potential political costs of continuing the dispute to be too great, favoring negotiated settlement. However, it is certain that the system as a whole would have achieved more from litigation. Through litigation, other Members would finally know, with a degree of certainty, whether local working requirements are permissible and whether they would risk a trade dispute by implementing such policies. In the absence of litigation, a future conflict on this issue "seems almost inevitable" (Champ and Attaran, 2002: 366).

II.7 Conclusion

The evidence indicates that the likelihood of settlement varies across the covered agreements, with TRIPS disputes most likely to reach a settlement. Furthermore, the settlement agreements do not always clearly favor the complainant or the respondent, suggesting that uncertainty over the legality of certain trade measures may persist, despite the official settlement of a dispute. TRIPS Article 27 is most frequently cited in these indeterminate settlements. An analysis of *Brazil-Patent Protection* indicates that divergent interpretations on the permissibility of local working requirements was critical in inducing settlement, suggesting that legal ambiguity can play a role in settlement at the DSM. This case study does not definitively conclude that power or capacity constraints governed this MAS. Yet, a country with strong legal capacity and little fear of retaliation, may have been more likely to pursue litigation, with the potential to clarify the legal status of local working requirements. Clarity on this provision would benefit the WTO membership by offering a multilateral understanding of the TRIPS Agreement.

III. Policy Implications

Ambiguity in the trade agreements calls for a strategy that favors litigation. Additionally, a settlement review mechanism could shine a light on power and capacity constraints in the consultation phase. The following section will forward these strategies for litigation and reform of the DSM.

III.1 Litigation Strategies

In weighing the costs of litigation, countries must consider the value of precedent. Busch (2007) notes that most countries consider precedent when choosing a forum for dispute resolution. However, this value must be weighed not only by the complainant, but also by the defendant. When the law is unclear, the defendant may have a strong possibility of "winning" a case and reasserting its policy space. Precedent can also prevent repeat complaints over the same policies, a trend which places an undue burden on the DSM. Although litigation is costly and entails its own set of risks, it has more to offer than settlement in cases of legal ambiguity.

Multilateral negotiations at the WTO provide the opportunity to reaffirm policy space, just as the Doha Declaration clarified the permissibility of CLs for access to essential medicines. However, litigation can be complimentary to negotiations in delineating strategies necessary not only for humanitarian development, but also for industrial transformation (Santos, 2012; Shadlen, 2004: 101; Wade, 2003: 626). When negotiations reach deadlock, litigation offers a more feasible strategy for defending development policies. Litigation can build developing countries' bargaining power, where case-by-case victories advance the benchmark in multilateral negotiations (Agius, 2012). Active participation in DSM litigation also allows developing countries to reduce the cost per case by building legal capacity. Despite the risks inherent in litigation, under conditions of legal ambiguity and with essential policies at stake, developing countries should consider the value the litigation over settlement and pursue a "developmental legal strategy" (Santos, 2012).

III.2 Institutional Reform

Proposals for increased transparency within the WTO are popular. However, transparency of negotiations in the consultations stage may hinder the prospects of

settlement, especially for democracies facing demands from domestic constituents (Busch, 2000: 443). Although transparency could prevent WTO-inconsistent settlements, it is important that Members retain the ability to resolve disputes diplomatically, especially in situations such as *EC-Hormones* or the "*Bananas* saga", where litigation has failed to produce a resolution (Pauwelyn, 2003: 128). On the other hand, increased transparency could bring attention to the "development dimension of multilateral rules" (Hoekman and Mavroidis, 2000: 538-539). Steinbach (2009) argues for removal of the interim review process at the panel stage, as it could "impede the dispute settlement's evolution towards a more judicial-like procedure" (434). Yet, proposals need to consider "rule of law" in the consultations phase as well. Therefore, I propose a settlement review mechanism, akin to the Trade Policy Review Mechanism (TPRM). The mechanism would require a review of all settlements, within a year of their notification to the DSM. The review would focus on the provision of information[10] rather than enforcement and issue reports that detail progress on the implementation of settlement agreements and the WTO-compatibility of these settlements. The reports may also make non-authoritative legal interpretation, in order to assist countries in deciding whether to litigate similar trade issues in the future. Given that the TPRM already offers a review of national trade policies, a review of individual settlements is a feasible extension of this operation.

III.3 Conclusion

In pre-panel consultations there is often "not enough law" to ensure that settlements conform to a multilateral understanding of the WTO agreements (Pauwelyn 2003:126). In cases of legal ambiguity, countries should pursue a litigation strategy that reasserts developmental policy space and ensures that dispute resolution is based on rule of law, regardless of any diplomatic bargaining. As Weiler notes, "the persistence of diplomatic practices and habits in the context of a juridical framework might end up undermining the very rule of law and some of the benefits that the new DSU was meant to produce" (2001: 194). A settlement review mechanism would reveal whether those diplomatic practices that persist are nevertheless in line with the overarching legal agreements.

[10] Information provision is a central goal of international organizations and dispute resolution (Kaul, et al, 1999).

Conclusion

Legalization of the WTO is designed to hold all Members accountable to the same rules. In laying out the rules of trade, countries know which policies they can pursue without offending trade partners. It is by knowing the rules of the system and applying them in a consistent manner, that the DSM brings security and predictability to the multilateral trade order. Developing countries benefit in particular from legalization, given that they are more vulnerable to the unpredictability of asymmetric trade relations. However, in order for the benefits of legalization to be realized, trade agreements must be clear. This study demonstrates that ambiguity persists in WTO treaties and can encourage settlement, which only further inhibits clarity of the trade agreements.

Catch-up development entails risk-taking and when the law is ambiguous, the uncertainty of a litigated outcome carries risk (Shadlen, 2013). However, if policies for development are at stake, litigation is a risk developing countries should take. To settle for anything less is to forgo the value of a legalized trading system. Of course, neither litigation nor settlement is a panacea. When a dispute involves the removal of a straightforward trade barrier, settlement may produce the most successful resolution. However, when the permissibility of a trade policy is imprecise, litigation offers the opportunity for clarity. This study alone cannot reveal whether ambiguity in WTO agreements is a systemic problem, but it does demonstrate that legal uncertainty can influence settlement, tantamount to the renegotiation of Members original commitments. These settlements pose a risk for developing countries by limiting the policies available for development. This risk extends to the WTO as a whole, where legal ambiguity can compromise the value of legalization by undermining the security and predictability of the multilateral trading system.

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Appendix I
Acronyms, Abbreviations, Key Terms

AB	Appellate Body
ACWL	Advisory Centre on WTO Law
Annex 1A	The multilateral agreements on trade in goods
Annex 1B	General Agreement on Trade in Services (GATS)
Annex 1C	Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS)
CL	compulsory license
Doha Declaration	The Doha Declaration on the TRIPS Agreement and Public Health
DSM	Dispute Settlement Mechanism
DSU	Dispute Settlement Understanding
EC	European Communities
GATS	General Agreement on Trade in Services
GATT	General Agreement on Tariffs and Trade
MAS	Mutually Agreed Solution
policy space	A range of permissible policies
stare decisis	The legal principle of precedent
TPRM	Trade Policy Review Mechanism
TRIMS	Agreement on Trade-Related Investment Measures
TRIPS	Agreement on Trade-Related Aspects of Intellectual Property Rights
WTO	World Trade Organization
WTO Agreement	Agreement Establishing the World Trade Organization

Appendix II
Sources for the Data in Tables 1-5

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