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The Impact of Law Firm Litigation in International Trade Disputes

Robert S. Sandoval[†]

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Abstract. International trade law has developed impressively around the World Trade Organization's dispute settlement understanding. Member states can bring claims for anything from unfair tariff rates to a violation of agreements on services, intellectual property, or food safety. Whereas wealthier member states like the United States have a domestic legal counsel to manage their caseloads, developing countries rely instead on private international law firms. This paper reviews private law firm's role in the WTO, and analyzes some practitioner testimony from the International Immersion Program—Switzerland on the effect of law firms on developing international trade law precedent. It concludes by proposing ways to align firm incentives with their client states and the WTO.

INTRODUCTION

A body of scholarship has developed around the role of private actors in international trade law, but the focus is primarily on NGOs or corporations rather than private international law firms.¹ Customary international law,² human rights

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¹ Joel P. Trachtman and Philip M. Moremen, Costs and Benefits of Private Participation in WTO Dispute Settlement: Whose Right Is It Anyway?, 44 Harv. Intl. L. J. 221 (2003).

² See Jack L. Goldsmith and Eric A. Posner, A Theory of Customary International Law, 66 U. Chi. L. Rev. 1113, 1132 (1999) (“we deny the claim that CIL is an exogenous influence on states' behavior.”). For a discussion on the opposing view see Mark A. Chinen, Game Theory and Customary International Law: A Response to Professors Goldsmith and Posner, 23 Mich. J. Int'l L. 143, 160 (2001).

law,³ and humanitarian law⁴ are not particularly effective at influencing the actions of states and their officials. In contrast, international trade law has been empirically connected to changing state policies through the World Trade Organization (“WTO”) dispute settlement understanding.⁵

WTO litigation involves both rich and poor countries with drastically different interests over trade disputes worth millions. Yet most member states do not have their own domestic legal counsel to manage and argue their caseloads.⁶ Introducing private law firms into the litigation process inevitably includes distinct interests into the WTO system. Particularly for poorer member states, who have little choice but to utilize private law firms, understanding the relationship between public and private

³ See Eric A. Posner, The Twilight of Human Rights Law (2014) (arguing that purposefully unenforceable human rights treaties contribute to the world’s failure to address human rights violations effectively).

⁴ See Xavier Philippe, Sanctions for Violations of International Humanitarian Law: The Problem of the Division of Competences Between National Authorities and Between National and International Authorities, 90 Intl Rev. of the Red Cross, 359, 360 (2008) (“ineffectiveness of sanctions for serious violations of international humanitarian law is due to...the incapacity of the bodies responsible for the control of international humanitarian law to discharge their task.”).

⁵ See Kara Leitner and Simon Lester, WTO Dispute Settlement 1995-2013: A Statistical Analysis, 17 J. Int’l Econ. L. 191 (2014) (examining complaints and decisions, and connecting these measures with compliance with international trade law); Andrew T. Guzman and Beth Simmons, To Settle or Empanel? An Empirical Analysis of Litigation and Settlement at the WTO, 31 J. Leg. Stud. S205 (2002) (identifies factors that cause disputes to move from negotiation to panel stage); Marc L. Busch and Eric Reinhardt, Bargaining in the Shadow of the Law: Early Settlement in GATT/WTO Disputes, 24 Fordham Int’l L.J. 158 (2000) (arguing that the “point here is not that the institution is ineffective, but rather that...whatever positive effect it has on a defendant’s willingness to liberalize occurs prior to rulings, in the form of early settlement.”).

⁶ World Trade Organization, Developing Countries, https://www.wto.org/english/thewto_e/whatis_e/tif_e/utw_chap6_e.pdf (displaying that about two thirds of the WTO’s members are developing countries); see also Trade and Development Center, Establishing the Advisory Center on WTO Law, www.itd.org/links/acwladvis.htm; DSU, Art. 27, para. 2 (enabling all least developed countries are automatically eligible for free legal advice from the Secretariat).

interests in the context of WTO litigation is important. Thus, this paper looks specifically at international law firms as private actors and their impact on international trade disputes.

International law firms are profit maximizing and this inevitably has an influence on the shape of international trade law as it develops a distinguished body of precedent. This paper argues that international law firms operate counter to the goals of the WTO—namely, to support a more globalized society with reduced trade barriers and economic integration. Part I provides a short review of the WTO and the role of private actors, including international law firms. Part II examines research findings from IIP—Switzerland. Part III analyzes the findings and proposes some burden-shifting changes that might help align law firm incentives with the interests of the WTO. The paper concludes that further research must be done to determine the significance of law firm-driven litigation and whether it has an observable impact on compliance with international trade law or modifies the behavior of states in furtherance of WTO interests.

I. REVIEW OF THE WTO, PRIVATE ACTORS, AND INTERNATIONAL LAW FIRMS

World Trade Organization. The WTO publicly holds the position that it is an organization for liberalizing trade, a forum for governments to negotiate trade agreements, and a place to settle trade disputes.⁷ It has effectively reduced

⁷ World Trade Organization, What is the World Trade Organization?, https://www.wto.org/english/thewto_e/whatis_e/tif_e/fact1_e.htm; see also Marrakesh Agreement Establishing the World Trade Organization, 15 April 1994, 1867 UNTS 154, 33 ILM 1144 (1994).

transaction costs in the long run by applying agreed upon rules and channeling dispute resolution through legitimate avenues.⁸ With more states applying for membership each year, the WTO is continuing to develop a legitimate and strong body of case law to enforce future international trade disputes.⁹ As many international institutions hope to accomplish, the WTO has become the leading global governance institution for international trade, providing rule-making and rule-implementation on a global scale.¹⁰

As a hard law institution, the WTO has distinct effects on the role of private actors in international trade.¹¹ It systematically keeps the formal dispute settlement system closed to private actors.¹² But because the WTO functions as a series of self-enforcing agreements, private actors play a vital role. For poorer member states in particular, cooperation and interdependence with private actors is vital to achieving the same levels of enforcement. Generally, however, both poorer and wealthier member states no longer are the sole players within the WTO's structure. Countries cooperate with

⁸ Alan M. Rugman and Alain Verbeke, Towards a Theory of Regional Multinationals: A Transaction Cost Economics Approach, 45 *Mgmt. Int'l. Rev.* 5, 7 (2005) (discussing the organic nature of economic integration in regional clusters, and attributing the decrease in transaction costs to businesses operating within the structure of the WTO rather than strategic intentions of state governments).

⁹ World Trade Organization, Members and Observers, https://www.wto.org/english/thewto_e/whatis_e/tif_e/org6_e.htm (displaying the date of membership for all 160 members of the WTO).

¹⁰ Andreas Georg Scherer, Guido Palazzo, and Dorothee Baumann, Global Rules and Private Actors – Towards a New Role of the Transactional Corporation in Global Governance, 16 *Bus. Ethics Q.* 505, 510 (2006).

¹¹ Kenneth W. Abbott and Duncan Snidal, Hard and Soft Law in International Governance, 54 *Int'l Org.* 421, 430 (2000).

¹² Christina Knahr, Participation of Non-State Actors in the Dispute Settlement System of the WTO: Benefit or Burden? 63 (2007) (discussing the current debate on whether private actors can participate in the dispute resolution process by submitting amicus curiae briefs).

private actors at different stages of the dispute settlement process to effectively operate within the system.¹³

Private Actors in General. Large transnational corporations and other private actors have not always been recognized for their contributions to international law. Recently their activities have been connected to important peace-keeping functions, social and environmental policy implementation, and human rights standards.¹⁴ In the field of international trade law, private actors provide a unique information sharing function.¹⁵ Private actors can provide legal, economic, scientific, or other expertise that serves as the basis for state claims in the WTO.¹⁶ While scholarship focuses on NGOs or private business participation, this paper is mostly concerned with private law firms and their incentive structure while operating as counsel to members within the WTO dispute settlement process.

¹³ Inge Kaul, Pedro Conceição, Katell Le Goulven, and Ronald U. Mendoza, Providing Global Public Goods: Managing Globalization (2003) (discussing the concept of Global Public Goods and the influence of private actors in creating global externalities).

¹⁴ David Kinley and Junko Tadaki, From Talk to Walk: The Emergence of Human Rights Responsibilities for Corporations at International Law, 44 Va. J. Int'l L. 931, 983 (2004) (discussing private actors and their efforts to protect human rights); Thomas W. Dunfee and Timothy L. Fort, Corporate Hypergoals, Sustainable Peace, and the Adapted Firm, 36 Vand. J. Transnat'l L. 563 (2003) (discussing private actors and their peacekeeping functions); Andreas Georg Scherer and Marc Smid, The Downward Spiral and the U.S. Model Business Principles. Why MNEs Should Take Responsibility for the Improvement of World-wide Social and Environmental Conditions, 40 Mgmt. Int'l. Rev. 351 (2000) (discussing private actors and their impact on social and environmental policies).

¹⁵ Chad P. Bown and Bernard M. Hoekman, WTO Dispute Settlement and the Missing Developing Country Cases: Engaging the Private Sector, 8 J. of Int'l Econ. Law. 861, 869 (2005).

¹⁶ Andreas Georg Scherer, Guido Palazzo, and Dorothee Baumann, Global Rules and Private Actors – Towards a New Role of the Transactional Corporation in Global Governance, 16 Bus. Ethics Q. 505 (2006).

Private International Law Firms. Fairly early in WTO history, with Bananas III in 1997, the appellate body recognized that member states could be represented by private law firms in oral arguments.¹⁷ Bananas III involved a request from the government of Saint Lucia to allow two private legal counsel to represent the country in appellate oral arguments.¹⁸ The Marrakesh Agreement Establishing the WTO, the Dispute Settlement Understanding, nor pre-existing customary international law explicitly denied countries the ability to utilize private legal counsel.¹⁹ The panel and appellate body recognized that besides oral arguments, member states regularly used private law firms for assistance with preparing documents, writing responses to questions from the panel, or preparing arguments.²⁰ In their report, the appellate body summarily stated that “representation by counsel of a government’s own choice may well be a matter of particular significance – especially for developing-country Members – to enable them to participate fully in dispute settlement proceedings.”²¹

The appellate body must have seen private law firm participation as a positive for the poorer member states given its brief and confident statement that private legal counsel could be used.²² This position is even more convincing considering the WTO’s

¹⁷ European Communities-Regime for the Importation, Sale and Distribution of Bananas, Appellate Body Report adopted on 17 November 1997, WTO Document WT/DS27/AB/R, 6, paras 10-12 (“Bananas III”).

¹⁸ Bananas III, at 6, paras 10-12.

¹⁹ Id.

²⁰ Id.

²¹ Id.

²² See Anne Marie Slaughter Burley and Walter Mattli, Europe before the Court: A Political Theory of Legal Integration 47 Int.Org. 41, 58-62 (1993) (arguing that “self-interest” binds state and private actors and that “opportunities” offered by the legal system create personal incentives for individual litigants and their lawyers).

dedication to a fair dispute resolution process for all members.²³ While wealthier member states can afford to use domestic legal counsel and still contract with private firms to lighten the preparatory work, this is not a realistic option for poorer member states. Still, it is less obvious that the appellate body balanced the benefit to poorer member states with the costs that private law firms might impose on the WTO system as a whole.

Opportunities for Private Actor Participation. The litigation process for WTO disputes involves pre-litigation, litigation, and post-litigation opportunities for state and private actor involvement.²⁴ The pre-litigation period depends on private businesses or injured parties identifying and reporting to their government a policy that is inconsistent with international trade law. This is an area where private actors; economists, NGOs, businesses, law firms, etc., can participate in international trade law the most. Because of the extremely high costs of litigation in this area, it tends to be the role of private actors to convince their government of the merits of their claim, as well as the benefits that the country can gain through litigation.²⁵ In the pre-litigation process, once states agree to take on the case, the same private actors also have the opportunity to develop legal arguments and help prepare to address the panel. The key difference between countries with domestic legal counsel versus

²³ Understanding on Rules and Procedures Governing the Settlement of Disputes, Apr. 15, 1994, WTO Agreement, Annex 2, Legal Instruments—Results of the Uruguay Round vol. 31, 33 ILM 1226 (1994).

²⁴ Chad P. Bown and Bernard M. Hoekman, WTO Dispute Settlement and the Missing Developing Country Cases: Engaging the Private Sector, 8 J. of Intl Econ. Law. 861, 869 (2005).

²⁵ Id.

private international legal counsel is the level of control over the litigation. Countries with their own legal counsel can ultimately withhold certain arguments while poorer member states are in less of a position to challenge the expertise of their counsel.

During the litigation process, states can have legal counsel that manages the case entirely, produces briefs, acquires evidence, and develops strategies and arguments.²⁶ Often they contract with private law firms to complete the preparatory work related to the panel proceedings. Poorer member states turn to private international law firms for this function and often do not have the resources to manage their caseloads through domestic legal counsel. This period of the litigation process is possibly where the incentives of private law firms and member states is most widely misaligned.

If the costs of litigating within the WTO are too high then poorer member states may not have a reason to litigate their issues in court, even if the issue has merit.²⁷ Moreover, wealthier member states may know they can raise the cost of litigation for the poorer members and de facto win the dispute. In order to avoid external acts of retribution, the WTO does provide legal services to poorer members.²⁸ However, as argued later in this paper, the goal should be a movement towards member states having their own domestic legal counsel with incentives that align with their client.

²⁶ *Id.* at 869.

²⁷ *Id.* at 868.

²⁸ See Trade and Development Center, Establishing the Advisory Center on WTO Law, www.itd.org/links/acwladvis.htm; DSU, Art. 27, para. 2 (“Secretariat shall make available a qualified legal expert from the WTO technical cooperation services to any developing country Member which so requests.”).

After the case is decided, there is still the need to remove any policy found in violation of international trade laws at home, or to observe its removal abroad. Private actors can help induce compliance with the rulings, and businesses specifically can inform members whether anything has changed.²⁹ For law firms, this post-litigation period is less significant when discussing incentives.

II. IIP—SWITZERLAND RESEARCH FINDINGS

Legal practitioners in Geneva are in agreement about the important role law firms play in international trade law today. A schism appears when discussing the implications of an international dispute resolution system driven by private law firms rather than independent state bodies and their domestic legal counsel. This paper analyzes commentary made by legal practitioners working in international trade law. The following information provides insight into the current state of international trade law and about its future in relation to the prevalence of private law firms. These statements represent some of the talking points concerning the effect that private law firms may have on the system.

Practitioner 1. The WTO is focused on creating long term systematic changes to facilitate international trade among member states. This means creating and enforcing an international trade law regime that is consistently applied to all member states. Countries that engage in the dispute resolution process act in one sense to win cases, but in another to avoid creating dangerous precedents. In particular, state

²⁹ Supra note 15 at 870.

legal counsels tend to act conservatively when determining legal arguments to present to the panel or appellate body. Their decisions reflect on the political positions of their country and may introduce legal precedents that can be used against them in the future.

Law firms are distinct from state legal counsel because they act strategically to increase payoffs. While states would prefer shorter litigation as repeat players that internalize the costs, firms hired primarily by developing countries are focused on maximizing profits. This translates to a widely different set of incentives focused on winning the case at hand and making as much money as possible in the process. As a result, more time is spent litigating and more complex legal issues are brought in front of the panel without regard to their consequences for the client or the WTO in the future.

Private international law firms with radically different interests in the litigation may threaten to counteract the international legal goals of the WTO. Whereas state legal counsel support a simplified set of precedents and a succinct body of international trade law, private law firms question existing precedents and dig deeper into procedural aspects of cases. WTO rules and standards have become more complex, and law firms are burdening the panel with their profit maximizing behavior.

Practitioner 2. It is not immediately obvious to me that private law firms are harmful to the WTO when developing countries only bring about twenty-five percent of the claims. Private law firms are good for developing countries who cannot afford

to hire their own domestic citizens to represent them as legal counsel. They also increase the quality of legal representation for the developing country and support actual competition of ideas in litigation against the more developed countries. Private law firms do bring more complex cases and more procedural cases, but this could be an effect of the natural sophistication of the law, which is a good thing. Private law firms are not necessarily bad because even if they are arguing more complex procedural issues in order to maximize their own profits, the appellate body can decide the case and develop a more legitimate legal institution.

III. ALIGNING PRIVATE LAW FIRM INCENTIVES WITH WTO AND STATE INTERESTS

The role of private actors should be aligned with the goals of the WTO and the functions it upholds.³⁰ While private businesses or NGOs are lobbying member states through Doha Rounds to set the stage for the WTO in the future, they currently have the greatest opportunity to make an impact in the dispute resolution system through the pre-litigation process.³¹ In contrast, private law firms are currently in a better position to make an impact on the dispute resolution process at every stage.³² Therefore, whether or not law firms share the same incentives as their clients and as

³⁰ Supra note 7.

³¹ See Chad P. Bown and Bernard M. Hoekman, WTO Dispute Settlement and the Missing Developing Country Cases: Engaging the Private Sector, 8 J. of Intl Econ. Law. 861, 869 (2005) (discussing the scope of involvement that private actors can have during the dispute resolution process); see also Marc L. Busch and Eric Reinhardt, Bargaining in the Shadow of the Law: Early Settlement in GATT/WTO Disputes, 24 Fordham Int'l L.J. 158 (2000) (arguing that the “point here is not that the institution is ineffective, but rather that...whatever positive effect it has on a defendant’s willingness to liberalize occurs prior to rulings, in the form of early settlement.”).

³² Supra note 15.

the WTO may have measurable effects on the direction that international trade law develops in. A perverse set of incentives may impact the implementation of the WTO's major functions. If we are concerned with the incentives of private law firms as Practitioner 1 is, and think that they are unduly burdening the system, there are several burden-shifting solutions available. Alternatively, as Practitioner 2 suggests, law firms may not be the issue and may simply reflect the WTO's increasing sophistication.

Placing the Burden on Firms. Currently there are minimal burdens placed on the extent or role of private law firms while participating in the litigation process for dispute resolution in the WTO.³³ As Practitioner 1 discussed, this seems to make case outcomes needlessly complex due to the different incentives that firms have compared to their clients. The WTO could shift the burden on law firms themselves and establish flat limits on pay or type of pay, limits on billable hours, or limits on discovery to try and align incentives.

The issue with placing the burden on firms themselves, however, is that they can also shift these transaction costs to their clients. In theory, placing any burden on firms will lead to undesirable results for poorer member states and create greater problems than it solves. Any type of pay limit on international legal counsel would create a massive regulatory regime with clear enforcement issues. It would significantly reduce the quality of representation for poorer member states. If they

³³ See Bananas III.

are willing to pay more for better legal service they would not be permitted to meet the higher rates. Perhaps this would drive law firms to take on cases in a pro bono capacity. In any event, the poorer clients would not have to pay, but would be worse off if the quality of legal counsel decreases. An alternative might be prohibiting a specific form of payment to begin with; but more research must be done on payment arrangements and whether this is viable for international trade law disputes.

Regulating billable hours internationally would be an extreme approach to this issue. Billable hour limits run into the same issues with enforcement and regulation as the flat pay limits do.³⁴ Firms would need to voluntarily establish these types of limits, and hope that it signals to their client that they value the quality over the quantity of legal work and firm revenues.³⁵ This might be possible considering perceived affects that billable hours have on firm culture or performance.³⁶ But as with other burden shifting solutions, firms could shift the cost to their clients and simply charge more for less time. More cynically, a billable hour limit might create

³⁴ See Carrie Menkel-Meadow, Culture Clash in the Quality of Life in the Law: Changes in the Economics, Diversification and Organization of Lawyering, 44 Case W. Res. L. Rev. 621, 658 n.171 (1994) (discussing the difficulties of regulating the number of hours worked in the legal profession, but proposing that it offers cultural benefits to the firm); Susan Saab Fortney, Soul for Sale: An Empirical Study of Associate Satisfaction, Law Firm Culture, and the Effects of Billable Hour Requirements, 69 UMKC L. Rev. 239, 297 n.344 (2000) (discussing how the legal profession is a distinctly difficult regulatory framework compared to medicine or health).

³⁵ See Susan Saab Fortney, Soul for Sale: An Empirical Study of Associate Satisfaction, Law Firm Culture, and the Effects of Billable Hour Requirements, 69 UMKC L. Rev. 239, 297 (2000).

³⁶ See Jonathan T. Molot, What's Wrong With Law Firms? A Corporate Finance Solution to Law Firm Short-Termism, 88 S. Cal. L. Rev. 1 (2014) (discussing the wide recognition among partners, associates, and clients that law firms need a structural change to address their shared discontent with the legal profession).

less transparency in the system by driving payment under the table or incentivizing firms to obfuscate their billable hour information.

There has already been discussions on discovery limits in the United States that can inform a similar change to the WTO. On one hand, limits on the evidence that a party can provide for their case will deny firms the opportunity to engage in significantly burdensome “information inflation” during the discovery process.³⁷ But on the other hand, a limit on the discovery process could make it more difficult for firms to win the case for their client.³⁸ For example, a simple unfair tariff case would need less evidence to show a violation of most favored nation treatment than a case involving anti-dumping duties. United States judges and academics are already concerned about how e-discovery inflates courts with information and drives up the costs of litigation, but the remedy is left to the judiciary.³⁹ Similarly, if the WTO wanted to establish discovery limits, it should create precedents and directly speak to the minimum or maximum set of documents that legal counsel needs to argue their case for a given issue.

³⁷ See Jason R. Baron, Law in the Age of Exabytes: Some Further Thoughts on ‘Information Inflation’ and Current Issues in E-Discovery Search, 17 Rich. J.L. & Tech. 9 (2011) (discussing problems with discovery in the context of e-discovery).

³⁸ Id.

³⁹ See Pension Comm. Of Univ. of Montreal Pension Plan v. Banc of Am. Sec., LLC, 685 F. Supp. 2d 456, 461 (S.D.N.Y. 2010) (discussing the concern for rising costs of litigation); Jason R. Baron, Law in the Age of Exabytes: Some Further Thoughts on ‘Information Inflation’ and Current Issues in E-Discovery Search, 17 Rich. J.L. & Tech. 9, 4[5] (2011) (arguing that when litigation has experienced abuse in the discovery process, courts find the remedy themselves).

It is also important to consider a concern about the premise of these burden shifting solutions. As Practitioner 2 speaks to, it is not clear that a different set of incentives for law firms is a bad thing. The domestic United States legal system is familiar with the law firm's profit maximizing behavior, and responds in extreme cases through judicially applied enforcement mechanisms.⁴⁰ This suggests that any solution to misaligned incentives should be internalized by the WTO panel or appellate body.

Placing the Burden on the WTO. As discussed above, placing the burden on law firms to change their incentives harms their client member states in a way that might not be ideal given the WTO's goals. Instead the WTO could consider institutional or procedural changes to the panel or appellate body. Placing a larger proportion of funds into the WTO Secretariat to represent poorer member states seems like a stop-gap solution.⁴¹ If the WTO had the capacity to fully represent any dispute taking place in the WTO, poorer member states might switch to this service. But more likely, increasing funds would lead to minor changes. If member states value better quality legal service over the marginal cost of litigation, then a qualitative change to the Secretariat would need to occur to justify the transition.

⁴⁰ See Eli Wald, Should Judges Regulate Lawyers?, 42 McGeorge L. Rev. 149 (2010) (addressing the issue of regulating attorney conduct by analyzing best practices); see also Christopher J. Whelan and Neta Ziv, Privatizing Professionalism: Client Control of Lawyers' Ethics, 80 Fordham L. Rev. 2577, 2580 (2012) (discussing legal enforcement mechanisms through the dichotomy of state judicial system versus self-regulation).

⁴¹ See Trade and Development Center, Establishing the Advisory Center on WTO Law, www.itd.org/links/acwladvis.htm; DSU, Art. 27, para. 2 ("the Secretariat shall make available a qualified legal expert from the WTO technical cooperation services to any developing country Member which so requests.").

Another solution is imposing a strict word or page limit on official documents. This institutional change would limit the complexity of panel decisions by forcing them to address the legal issues more concisely. Judges already have this in mind, however, and a strict limit may decrease the interpretability of their decisions for some of the more complex cases. Furthermore, a page or word limit does not directly take away the law firm's incentives to over bill their client and overburden the panel with evidence during discovery.

IV. CONCLUSION

The WTO is the global governance institution for international trade law; it successfully lowers transaction costs and enforces international trade law on a global scale. Law firms are one of the only private actors operating in the dispute resolution process directly and fully. The IIP—Switzerland Practitioner responses suggest there are opposing views about the effect that law firms have, both on their clients and on the precedent created through the WTO appellate body. The concern about incentives brings interesting issues to light, but whether or not law firms make a measurably significant impact on the law remains to be seen. Further research must be done to determine questions such as whether law firms actually benefit their poorer member state clients, whether they do bring more complex or procedural legal arguments to the appellate body, and whether their effects can be connected to compliance or changing member state behavior in furtherance of WTO interests.