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**Boomerangs over Lac Léman:  
Transnational Lobbying and Foreign Venue Shopping in WTO  
Dispute Settlement**

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**ABSTRACT** In this article, we explore the conditions under which firms engage in transnational lobbying and foreign venue shopping in the framework of WTO dispute settlement. Classical WTO dispute settlement cases mostly originate in domestic firms instigating their public authorities to bring a complaint against foreign trade barriers incompatible with WTO law. In recent years, however, we have witnessed the rise of WTO cases in which firms get a foreign government to file a case against its own authorities. By analysing transnational lobbying by EU firms in the WTO footwear case filed by China against the EU, and by US firms in the WTO gambling case Antigua brought against the US, we highlight the increasing resemblance between trade disputes and investment disputes

**Key words:** WTO, dispute settlement, trade policy, transnational lobbying, venue shopping, collective action

## **INTRODUCTION**

Transnational lobbying by firms has become a common feature in the political and economic environment in which firms operate in the global economy. Within the legal and political framework of the World Trade Organization (WTO), this can take the form of attempts at influencing multilateral negotiation outcomes, as well as to co-shape WTO dispute settlement outcomes. The role of firms in WTO dispute settlement cases has received increasing attention in the literature in recent years. However, the focus so far has been solely on the domestic politics of dispute initiation and litigation. That is, most authors portray WTO dispute settlement cases in the following manner (Bown, 2009; Davis, 2012; Shaffer, 2003). Complainant governments bring WTO dispute settlement cases as a result of political pressure by domestic exporting industries interested in foreign market access. On the defendant side, import-competing groups that benefit from the disputed trade barriers engage in reactive lobbying and want their government to resist the lifting of these barriers. Although this logic probably holds for most WTO dispute settlement cases, a different dynamic is emerging in a growing number of cases. Increasingly, firms are engaging in transnational lobbying, whereby domestic firms lobby a foreign government in order to persuade it to bring a WTO case against its own government.

Transnational lobbying has been the subject of an important series of studies, especially with regard to the negotiation and creation of new international rules in particular issue areas – both trade and non trade (Destler and Odell, 1987; Hilmann and Ursprung, 1988; Keck and Sikkink, 1998; Risse-Kappen, 1995; Risse, 2002; Tallberg, 2008; Young, 2012;). Considerable attention has also been paid to transnational lobbying in the context of judicial or quasi-judicial institutions, such as international dispute settlement or arbitration, especially in investment treaty dispute settlement and arbitration (Schultz and Dupont, 2014). In this context, firms engage in getting their investment rights under bilateral investment treaties

enforced through legal proceedings with the help of international arbitrators. Yet, because of the regime complexity of the many overlapping bilateral investment treaties, firms sometimes also engage in strategic venue shopping by setting up foreign affiliates in countries with which an investment host country has concluded a bilateral investment treaty.

The topic of investigation in this article bears a resemblance to these transnational political activities by firms in the context of bilateral investment treaties. Transnational lobbying activity by firms in the framework of WTO dispute settlement, however, has a distinctive quality in that it is states, not firms, which engage in WTO inter-state dispute settlement. Yet, increasingly, internationally active firms do not just instigate their home governmental authorities to file a WTO complaint on their behalf, but sometimes also push foreign governments to file a WTO complaint against policies of their own home government. Whereas in most WTO dispute settlement cases the lobbying originates in firms targeting their home government in order to induce a foreign government to eliminate WTO-incompatible barriers to trade, sometimes firms also target *foreign* governments and try to persuade them to enforce WTO market-opening commitments within their own home country. As we explore below, firms engaging in this type of transnational lobbying and foreign venue shopping are generally multinational firms sourcing from abroad or firms with foreign subsidiaries, that are confronted with an unresponsive home government and use the opportunities of the multiple venues available within the institutions of the multilateral trading system to try and obtain policies favourable to themselves.

Our purpose is to find out what conditions and motives might lead firms to adopt this strategy, as well as to show how such political dynamics played out in two prominent WTO dispute settlement cases. While a number of conditions apparently have to be fulfilled for firms to be able and willing to engage in transnational lobbying of foreign governments to bring a case against their home government, what turns out to be key are the reasons for the

home government's unresponsiveness to firms' demands. Based on original interview data with key actors involved in WTO dispute settlement cases involving transnational lobbying and foreign venue shopping, we present two case studies. One is a case study of transnational lobbying by European Union (EU) firms in a WTO dispute settlement case about footwear filed by China against the EU, and the other looks at transnational lobbying by United States (US) firms in a WTO case brought by the Antigua authorities against US gambling laws.

We structure the article as follows. In the next section, we review existing scholarship on firms' usage of WTO dispute settlement, which has so far focused pre-dominantly on domestic lobbying. We then explore the conditions and motives that might lead firms to engage in transnational lobbying and foreign venue shopping, taking advantage of inter-state WTO dispute settlement. We go on to provide a detailed empirical analysis of two cases that are emblematic of transnational lobbying and foreign venue shopping. We conclude with a discussion of the results and some remarks on avenues for further research.

## **DOMESTIC LOBBYING FOR WTO DISPUTE SETTLEMENT**

During its nearly 20 years of existence, a significant literature on WTO dispute settlement has developed (for an overview, see Bernauer et al, 2012). The part of that literature that has focused on firms' involvement in the political process has hitherto focussed on domestic lobbying.

One important strand of this literature has looked at the legal status of firms in WTO law, concluding that, legally, firms have few direct rights in WTO dispute settlement cases and that trade disputes are primarily an inter-governmental affair. Only governments can bring claims and, also during a case, the official legal role of firms remains limited. Firms do have two forms of legal rights. First, they have the right to information during dispute settlement cases and the possibility to submit so-called *amicus curiae*, i.e. to provide briefs to

the court. Second, in some WTO members, firms have the option to petition their home government to initiate trade disputes, e.g., under the Section 301 procedure in the US and the Trade Barriers Regulation (TBR) procedure in the EU. These studies have raised the question whether firms should acquire legal standing in WTO dispute settlement proceedings and what the possible implications of such a step would be (Catabagan, 2009; Mavroidis et al., 1998; Trachtman, 2003; Trachtman and Moremen, 2003). Although there is some disagreement among the authors of these studies about the desirability and exact effect of a change in legal status for firms in dispute settlement, most plead for more legal rights for business. According to Catabagan (2009), for instance, giving non-state actors in developing countries the opportunity to bring a claim against WTO members could ensure greater equality in WTO dispute resolution.

Others have traced the origins of the aforementioned legal mechanisms for business participation in WTO dispute settlement and ask whether firms make use of these tools (Sherman and Eliasson, 2006; Hernandez-Lopez, 2001). Firms are found to make infrequent use of the option of submitting *amicus curiae* briefs and of the formal petition procedures that are put in place to allow firms to request the initiation of a WTO dispute by their government. Also, in their comparative study on the Section 301 in the US and the TBR in the EU, Sherman and Eliasson (2006) conclude that only a very small percentage of the hundreds of disputes launched by the US and, especially, by the EU are initiated through a Section 301 or TBR petition by private parties.

Notwithstanding the useful insights obtained from an often normative literature on the limited legal standing of firms in WTO law and the relatively infrequent use of the legal mechanisms for private participation in WTO dispute settlement, this literature neglects an important aspect of business involvement in trade policy disputes: the many informal channels available through which firms can influence trade policy-making. Some scholars

have looked into the more informal process of government–business interactions in the context of WTO dispute settlement, focussing on domestic lobbying. A couple of early WTO dispute settlement cases stand out in this respect: the so-called Kodak-Fuji case, the case filed by the US against the EU’s discriminatory banana import regime, and the Airbus-Boeing disputes between the EU and the US. In an analysis of the “Japan Film” case, Dunoff (1998) shows how the US-based firm Kodak mobilized politically, convinced the US government to file a WTO case, and used all means available to enhance its market access to the protected Japanese film market. The Japanese firm Fuji, afraid of losing a great deal of its domestic market share and of being affected by possible US sanctions, engaged in reactive lobbying during the unfolding of the case. In other words, Kodak and Fuji operated as the *de facto* complainant and defendant in the Japan film dispute, as the US and Japanese governments turned out to be extremely responsive to the demands of these large firms with political clout. This is reflected in the habit of analysts to refer to the case as the Kodak-Fuji case, instead of the US-Japan case on Photographic Film and Paper. The banana saga on the other hand involved an untypically large number of complainant countries and dragged on for an untypically long time (Alter and Meunier, 2006; Poletti and De Bièvre, 2014; Fattore and Allison, 2013). Yet the banana case would seem to bear a resemblance to the new type of transnational lobbying driven WTO dispute settlement cases that we explore in this paper. Indeed, the most important and most tenacious of the complainants against the EU’s discriminatory banana import regime turned out to be the US government, and not the Latin-American banana- producing countries that suffered export losses as a result of the EU’s policies. The lobbying dynamic, however, was of the traditional domestic pressure type, as the chief executive officer of Chiquita, Lindner, instigated the US government to help rescue his tropical fruit distribution multinational, when it was threatened with bankruptcy, in exchange for election campaign contributions to US politicians (Fattore and Allison, 2013).

A similar, but somewhat more systematic analysis is put forward by Shaffer (2003; 2006) and colleagues (Shaffer et al., 2008). This analysis describes the vital role played by, what Shaffer calls, public–private networks in WTO litigation involving the EU, US and Brazil. Within these networks, decision-makers and industry representatives come together on an *ad hoc*, i.e. case by case, basis to (a) evaluate the costs and benefits of bringing a WTO claim and, if a case is brought, (b) cooperate during the litigation process. The establishment of these public–private partnerships is, Shaffer argues, in large part due to resource interdependencies. In WTO dispute settlement, industry is dependent on public actors primarily for access to the WTO litigation process, as only WTO members may bring a claim before the WTO Dispute Settlement Body, whereas public actors are dependent on industry for financial, informational, political and organizational resources. As resources are limited and deploying them is a costly affair, public and private actors also make their decision to participate in a WTO dispute on the basis of the relative stakes in the outcome of the dispute in question. These stakes are taken to be a function of the per capita benefits and (informational and organizational) costs of participating.

What the aforementioned literature shows us is that domestic decision-makers rely upon industry to inform them about foreign trade barriers and that WTO litigation typically involves public–private partnerships in which demands from industry are the usual starting point. What remains under-researched, however, is what type of firms and industries become involved in WTO dispute settlement cases and under what circumstances they mobilize politically. Bown (2009) takes an important first step in shedding light on these issues. He starts from the observation that, given the formidable costs of WTO enforcement, not all firms can and will engage in pushing their government towards WTO litigation. In any country, only a relatively small fraction of all firms is able to do so. In particular, firms from advanced industrialized WTO members, operating in consolidated sectors, are able to sustain such a

prolonged collective action effort all the way up to the sought-after prize of a panel ruling in their favour (Bown, 2009; Bown and Hoekman, 2005). In order to assess the costs of WTO enforcement and identify which firms are able to afford these costs, Bown (2009) distinguishes three phases – pre-litigation, litigation and post-litigation – each of which imposes large costs on firms wanting to pursue WTO rule enforcement. He concludes that the driving forces behind most WTO trade disputes are large and highly-productive exporting firms, which use WTO litigation to (self)enforce access to foreign markets.

A final noteworthy contribution to the study of firms in WTO dispute settlement is the recent book by Davis (2012). Davis starts from the observation that many WTO-inconsistent policies are not challenged, but are either ignored or addressed in other venues. The central question Davis addresses is why countries in some cases choose to file a WTO complaint to solve a trade dispute, whereas on other occasions they deal with it outside the realm of the WTO. Her argument is as follows. If domestic exporters expect their government to be too soft on foreign trade partners in negotiating market access, or when there is uncertainty about the willingness of foreign governments to give in to these demands of market opening, the export industry is likely to be less inclined to offer political contributions or other kinds of political support. As a result of this credibility problem, a government will bring a WTO complaint to show its commitment to the domestic interest group. At the same time, the import-competing industry in the defendant country will push its government not to settle the dispute during the consultation stage. As the defendant government also wants to demonstrate its commitment to the domestic industry, it will give in to the demands of the industry and opt for litigation. In other words, “interest group pressure on both sides of a trade dispute pushes politicized trade topics into dispute adjudication” (Davis, 2012: 21).

The existing literature has thus provided us with important insights into the state–society nexus driving WTO dispute settlement, showing that in classic WTO cases,

complainant governments try to satisfy the demands of domestic export-oriented firms lobbying in favour of market access abroad, while defendant governments try and satisfy the demands of import-competing firms. In recent years, however, an increasing number of WTO cases have been driven by transnational lobbying and foreign venue shopping by domestic firms in order to challenge WTO-inconsistent measures in their own home country.

## **TRANSNATIONAL LOBBYING AS FOREIGN VENUE SHOPPING IN WTO LITIGATION**

The literature on venue (or ‘forum’) shopping in international politics has recently begun to explore the systematic conditions under which societal actors and non-governmental organizations (NGOs), as well as business actors, adopt this strategy (e.g. Alter and Meunier, 2009; De Bièvre et al., 2014; Mahoney and Baumgartner, 2008; for an excellent recent literature overview, see Murphy and Kellow, 2013). One finding is that regime complexity can affect choices available to societal actors and may provide actors with opportunities to target particular international organizations or the institutions these actors deem most favourably disposed towards their policy preferences. Such international venue shopping, however, is geared towards the negotiation of new rules, not towards litigation on and enforcement of existing ones. When societal actors engage in such transnational lobbying activities they can also choose to target a foreign government directly (Moravcsik, 1993) in order to create a boomerang effect for an initially unresponsive domestic government (Keck and Sikkink, 1998). Such strategies may be employed in the framework of international economic negotiations such as G8 summits, WTO Ministerial Conferences, the International Climate Conferences, or within specialized committees within the United Nations system, where state representatives convene to establish new global rules in the form of primary or secondary international law. These strategies may also prove beneficial to them in a litigation

context if they choose the most favourable judicial venue to obtain compliance with already existing rules, as is often the case in investment dispute settlement. Another such judicial route is to mobilize governments to file a complaint with the WTO Dispute Settlement Body, convening on the banks of Lac Léman in Geneva.

A decision by firms to convince a foreign government to bring a WTO dispute settlement case against its own domestic government, could be driven by a number of distinct reasons and motives. We argue that the key precondition to trigger the kind of firm behaviour that interests us here is the lack of responsiveness of the domestic government. That is, going transnational by targeting a foreign government becomes an option only if the domestic government is unresponsive to particular political-economic demands of a firm. A government may be unresponsive to the demands of its own domestic firms for a wide variety of reasons.

One such reason is that the firms in favour of the domestic trade barriers may have more domestic political clout than those facing losses as a result of the trade restrictions. The firm or firms suffering from the trade-restrictive measures may thus find themselves in a marginal domestic political position. They may be operating in sectors that do not have a clear and immediately visible positive economic impact on the domestic economy. This applies, for example, where production takes place abroad and hence the sector concerned does not contribute significantly to direct employment – which means that domestic decision-makers have no real incentives to take their interests into account. What is more, they may provide services or produce politically sensitive or controversial products (e.g. products with possible negative effects on people's health or the environment), which means that domestic politicians may see it as a political risk to give in to their demands. Whatever the exact reason for their marginal political position, such firms remain domestically impotent, even if they are able to mobilize politically. When this happens, the firms can either decide simply to accept

the domestic trade barriers or they can engage in a form of international venue shopping and try to convince a foreign government to bring a WTO case against their home state. The latter option is not feasible for all societal interests and will only become a likely scenario under the same type of conditions that the existing literature on domestic lobbying for WTO dispute settlement has identified. These include overcoming collective action problems in order to proceed to the precise identification of the *domestic* WTO-inconsistent policy. Moreover, firms wanting to engage in transnational lobbying and foreign venue shopping have to estimate – both for themselves and for the foreign government – the economic benefits of removing the WTO-inconsistent policy, and they have to gain access to the policy-making process in the foreign country. This whole process is very time consuming and costly.<sup>1</sup>

Transnational lobbying targeted at a foreign government to convince it to bring a WTO complaint is thus even more demanding of time and resources than domestic lobbying for WTO dispute settlement. Thus the precondition of being a consolidated, well-endowed and well-organized sector becomes even more important if firms are to be able to mobilize politically and keep investing in producing the collective good of detailed information the foreign government can use in the process of WTO litigation. A particularly tricky hurdle that a firm (or group of firms) wanting to engage in transnational lobbying and foreign venue shopping has to overcome is to convince the foreign government that it is in its best interest to bring the foreign firm's case to the WTO. Such a congruence of interests of this firm or these firms and the government of a foreign WTO member can take the form of employment and

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<sup>1</sup> A point that we do not explicitly address here, but that is nevertheless important, is that lobbying against their own national government may be politically costly for the firms in question. After all, if a government finds out that a particular WTO case has been brought as a result of lobbying from a domestic firm (or group of firms), this may further decrease its political clout. Firms will therefore only consider transnational lobbying if they have a very strong incentive to do so and they will usually do everything they can to keep it a secret that they were behind a WTO case.

investment opportunities that would arise, exactly the type of resource the firm would be lacking in its home country. Moreover, they must generate and/or contribute to winning policy coalitions in order to influence decision-making in the desired direction – i.e. convincing the foreign government to pursue the case at the WTO. Finally, once they have managed to convince the foreign government to file and pursue the legal case in Geneva, they have to continue to come up with convincing legal and economic evidence in support of the case.

Taken together, the elements outlined above would seem to constitute necessary conditions for firms to engage in transnational lobbying and foreign venue shopping in the framework of WTO litigation. Below, we exemplify whether and the extent to which these motives and preconditions play out in an empirical treatment of two prominent cases of transnational lobbying and foreign venue shopping for WTO dispute settlement: a case in which EU firms in the footwear sector instigated the Chinese government to bring a WTO case against the EU, and a case in which US gambling firms instigated the Antiguan government to bring a WTO complaint against the US government.

## **TRANSNATIONAL LOBBYING AND FOREIGN VENUE SHOPPING IN TWO WTO DISPUTE SETTLEMENT CASES**

We went about selecting our cases in the following way. We first obtained the complete list of all WTO dispute settlement cases as they are listed systematically in existing databases.<sup>2</sup> We limited the time period by focusing on episodes that took place in the last 10 years, as qualitative, in-depth interview evidence is more comprehensively and reliably obtainable for

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<sup>2</sup> For a full list of cases see: [http://www.wto.org/english/tratop\\_e/dispu\\_e/dispu\\_e.htm#disputes](http://www.wto.org/english/tratop_e/dispu_e/dispu_e.htm#disputes) and WorldTradeLaw.net.

more recent patterns of lobbying.<sup>3</sup> Third, we gathered as much information as possible on all the potential cases to determine whether transnational or domestic lobbying lay at the origin of the WTO complaints. Given the closed-door nature of the WTO dispute settlement process, this is not *a priori* obvious. We gathered the information by looking at primary and secondary sources, as well as by conducting a series of interviews<sup>4</sup> with WTO dispute settlement experts and observers on the role of firms during the initiation of the cases. In this way, we arrived at a set of WTO dispute settlement cases that were likely to have been spurred by transnational lobbying. This allowed us to discard obvious cases of domestic lobbying leading a home government to file a WTO complaint, as in the Kodak- Fuji case or the numerous banana cases.

Based on this analysis, we identified four possible case studies. First, international tobacco firms engaged in a lobbying effort and convinced the governments of several WTO members, namely Cuba, the Dominican Republic, Honduras, Indonesia and Ukraine to file a WTO complaint against Australia's rules on plain packaging for tobacco products. Second, the alleged involvement of US and EU importers of solar panels in WTO complaints filed by China against (a) US import duties on solar panels; and (b) Greece and Italy regarding certain measures affecting the renewable energy generation sector. Third, we found a grouping of American gambling and betting firms to be at the origin of the WTO complaint brought by Antigua and Barbuda against the US regarding measures affecting the cross-border supply of gambling and betting services. Fourth, we identified European footwear associations to be at the origin of China's WTO complaint against EU anti-dumping measures on imports of footwear from China.

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<sup>3</sup> A full list of all our interviewees is available upon request.

<sup>4</sup> These interviews with WTO experts and observers were conducted in Brussels, Geneva and by phone on 8 January 2010, 18 February 2010, 25 March 2010, 7 April 2010 and 25 March 2013.

We decided to focus our in-depth analysis on the last two cases mentioned (i.e. the Antigua–US gambling case and the China–EU footwear case) for the following reasons. First, both policy processes were already finished when we started our investigations; this made it easier to collect evidence, especially interview information, and obtain a comprehensive overview of all aspects of the case. Moreover, these cases were aimed at the EU and the US, which remain the most important participants in the world trading system in terms of share of world trade, and are relatively transparent political systems, because of their democratic nature. It is certainly no coincidence that we find cases of transnational lobbying and foreign venue shopping in WTO dispute settlement in these jurisdictions, since firms in these two WTO members display a high degree of internationalism.

In what follows, we trace the process of transnational lobbying and foreign venue shopping in the two cases selected. Our evidence is based on a set of semi-structured interviews conducted by the authors, as well as a careful study of primary and secondary sources.

*US gambling firms and transnational lobbying through Antigua: a business “boomerang” against a US ban on Internet sports betting (2003–2013)*

During the 1990s, as the Internet quickly grew in popularity and “governments, businesses, and media outlets raced to get themselves online, acquiring domain names and setting up Web sites,” gaming became one of the “most immediately proliferating online industries” (Schwartz, 2005: 176–77). From the very beginning, there was a fierce political debate in the US as to whether online gaming in general and Internet gambling in particular could and should be prohibited. Under pressure from traditional gambling industries (e.g. casinos), religious groups and professional sports leagues in the US – which had all set up intensive lobby campaigns against Internet gambling in general and sports betting operations on the

Internet in particular – around 2001 some US states (i.e. Louisiana, Massachusetts, South Dakota and Utah) and the Federal Government adopted (or altered) several laws in order to restrict online gambling on sport events.<sup>5</sup> However, Internet betting offered by some US-based companies on horse races (like Youbet.com and Xpressbet.com) – as well as lotteries and other games in some US states – was still allowed under these new laws, while the supply of betting services from companies based (or partly based) in other WTO members to the US on a cross-border basis was prohibited entirely (Thayer, 2004; Washington Post, 2006).

In response to the discriminatory and thus WTO-incompatible nature of these laws, Antigua and Barbuda – a twin-island nation located in the middle of the Leeward Islands in the Eastern Caribbean – brought a WTO dispute settlement case against the US<sup>6</sup> arguing that US policy violated the principle of "national treatment" (see Kilby, 2008; Blustein, 2009).<sup>7</sup> Preventing companies located in Antigua from entering the US market was also a violation of promises made a few years earlier by the US. When Antigua started to introduce laws aimed at attracting online betting operators in the 1990s, Antiguan officials interacted closely with US officials and in these talks it was made clear to the Antiguan Officials that the online gambling scheme was not in violation of any US laws. Yet, a few years later, the US adopted the aforementioned laws, which made it practically impossible for Antigua-based companies to enter the US market.<sup>8</sup> What is more, Washington had pledged in a trade treaty to open the US market in "recreational, cultural and sporting services" to global competition (Washington Post, 2006). Transnational lobbying by US Internet gambling companies, which were (partly)

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<sup>5</sup> The three US federal laws of interest here were the Wire Act, the Travel Act and the Illegal Gambling Business Act.

<sup>6</sup> See: [http://www.wto.org/english/tratop\\_e/dispu\\_e/cases\\_e/ds285\\_e.htm](http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds285_e.htm), last retrieved 20 July 2014.

<sup>7</sup> That is, the principle that requires a government to treat goods and services produced in or supplied by companies located abroad the same as domestic ones.

<sup>8</sup> Telephone interview, 25 March 2013.

based in Antigua, played a pivotal role in the decision of the Antiguan government to file a WTO dispute settlement case against the US. In this section we trace the causes and effects of this case of transnational lobbying and foreign venue shopping by US online betting firms. However, before we turn to our analysis on transnational lobbying, a few words on why we treat these Antigua-based betting firms as US companies rather than Antiguan ones are warranted. It is widely acknowledged that, as a result of the borderlessness and anonymity of online gambling, it is very difficult to regulate the sector (Whol, 2009). It is equally difficult, for the same reasons, to determine the exact nationality of online gaming operators. There are three reasons why we believe it is plausible to treat the Antigua-based companies as US firms.

First, the majority of the betting companies have US owners and managers. As a result of the very favourable infrastructure that supported online gambling and betting services,<sup>9</sup> which was set up by the Antiguan government in the 1990s (Schwarz, 2005), the number of licensed Internet gambling and betting operations in Antigua grew from almost none at the beginning of the 1990s to more than 100 around 2000.<sup>10</sup> As a result, the island became one of the key global centres of online gambling. Although it is difficult to find reliable figures about ownership of these companies, interviews<sup>11</sup> and other sources (see e.g. Schwarz, 2005) confirm that most of the firms in question have US owners and that, at the very least, the companies that were behind the lobbying campaign we describe in this article are almost all owned by American citizens.

Second, the vast majority of their customers are based in the US. Although, again, figures are hard to come by, it is clear that the percentage of revenues generated by the US

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<sup>9</sup> In the words of Schwarz (2005: 178) “Antigua created a free-trade zone in which cross-border betting operators could take bets without paying corporate taxes, though they did pay licensing fees and were subject to regulation.”

<sup>10</sup> Source: [http://www.antiguawto.com/WTO\\_Economic\\_gambling\\_data.html](http://www.antiguawto.com/WTO_Economic_gambling_data.html), last retrieved 1 October 2014.

<sup>11</sup> Telephone interview, 25 March 2013.

customers of these Antigua-based companies is very high. For instance, in 2000, World Sports Exchange Ltd, – at that time the biggest Internet gambling web site located in Antigua – “accepted \$200 million in sports wagers, 95% of which came from bettors in the US” (Businessweek, 2000). Similar figures are mentioned by our interview partners for other firms.<sup>12</sup> Small wonder that after the US adopted its restrictive laws from 2001 onwards – which made it much more difficult for the companies to serve their US customers – the number of companies in Antigua decreased drastically (from more than 100 in 2000 to only 30 in 2007 and still fewer today) and total revenue dropped from well over \$2 billion in 2000 (that is 61% of total global online gambling) to way below \$1 billion in 2007 (or less than 7% of total global online gambling).<sup>13</sup>

Third, in the US itself the firms in question were treated as US firms. For instance in a legal case against World Sports Exchange (WSE) (see below for more details), US prosecutors spend a great deal of time proving that WSE was a US firm. As Schwarz (2005: 205) points out, in his very detailed account of the court case, the US prosecutors referred to the large number of US customers, the fact that their advertising strategy was fully aimed at the US market and in light of this that “the [WSE] retained American advertising and public relations firms to increase its business in the United States.”

Now let us turn to the transnational lobby campaign of the US Internet gambling firms based in Antigua, which was obviously triggered first and foremost by the imposition of the aforementioned protectionist measures by the US government. The introduction of these restrictive laws came as a big surprise to the companies in question. After all, a few years earlier the US authorities had assured them that there was no legal problem with the Antiguan

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<sup>12</sup> Telephone interview, 29 July 2014.

<sup>13</sup> Source: [http://www.antiguawto.com/WTO\\_Economic\\_gambling\\_data.html](http://www.antiguawto.com/WTO_Economic_gambling_data.html), last retrieved 1 October 2014. See also: <http://www.forbes.com/sites/markgibbs/2013/01/29/pirates-of-the-caribbean-antigua-and-barbuda-turn-from-internet-gambling-to-legalized-piracy/>, last retrieved 1 October 2014.

gambling scheme, so “the US betting operators had every reason to believe that they could safely move their operations to Antigua.”<sup>14</sup> After the introduction of the protectionist US laws, the gambling firms tried to convince the US authorities to lift the barriers, but the US government was unresponsive to these demands. That the US authorities were indeed unwilling to take into account the demands of the US online betting companies in Antigua was clear from the outset. The gambling firms pushed for the removal of the restrictive and protectionist measures, yet state and federal Governments tried time and again to adopt ever more far-reaching laws to restrict online betting operations. When it became clear that US Congress was not able to pass a bill to ban Internet betting entirely, they tried to crack down on the US betting companies by means of prosecuting Internet gambling operators. Legal action was aimed in particular at those firms with overseas branches and/or servers in countries like Antigua (Schwarz, 2005).

Although legal action was taken at both federal and state level, the most active were state attorneys general. The strategy used by the latter was to prosecute US betting firms from all over the country in those states where betting was illegal (in particular Missouri). Schwarz (2005: 201) explains the legal rationale behind this strategy: “[w]ith the determination that the betting activity took place at the site of the bettor, not at the gaming site, attorneys general gained free rein to prosecute out-of-state operators that permitted state residents to bet.” As the majority of the US firms with branches in Antigua were US-owned, they also faced these civil and criminal proceedings. The most famous of these cases was the lawsuit against Jay Cohen, one of the American owners of the Antigua-based company World Sports Exchange Ltd. Cohen “became the first person to be convicted on federal charges of running an illegal offshore Internet sports gambling operation...[and] was sentenced to nearly two years in prison” for its alleged illegal Internet gambling business activities in Antigua (The New York

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<sup>14</sup> Telephone interview, 29 July 2014.

Times, 2000).

US authorities could afford to be unresponsive to the demands of the US online gambling firms because of their lack of domestic political clout. Also, the addictive and health risks of gambling in general and the possible negative consequences as a result of sports betting (e.g. match fixing) in particular, meant that it was politically risky for US policy-makers to give in to the demands of the online betting operators. In addition, these betting firms operated from abroad (i.e. from Antigua) and contributed very little to the US economy in terms of employment and tax revenues.<sup>15</sup> Finally, the online betting firms were confronted with powerful counter-lobbies of three distinct groups of opponents of Internet betting. The first of these groups consisted of casinos, racetracks and other more traditional betting/gambling industries, as they were afraid of the competition. The second were religious groups, as well as the social conservatives who “were appalled at the moral decay that would doubtless follow if every pc could be used as a slot machine.” The third group comprised professional sports leagues in the US, which fiercely objected to Internet gambling, as it stimulated betting on games, which they opposed (Schwarz, 2005: 187).

Since the US authorities were unresponsive to the demands of the US online betting operators in Antigua and these firms were almost wholly dependent on US consumers they had a very strong incentive to turn to another venue to make their voice heard: the government of Antigua. The Antiguan government provided them with access to the global governance structure of WTO dispute settlement. In order to convince the authorities in Antigua to bring a WTO case against the US, the gambling firms in question set up a widespread lobby campaign.

US gambling companies based in Antigua were able to engage in this act of transnational lobbying and foreign venue shopping because a number of crucial preconditions

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<sup>15</sup> Telephone interview, 25 March 2013.

for transnational lobbying, as presented above, were met.<sup>16</sup> For one, collective action costs were relatively low. The concentration ratio of US companies in Antigua was high: a small number of big companies dominated the market. In addition, the firms in question were geographically concentrated, as their branches were all located on a very small strip of land on the island of Antigua. What is more, the online betting firms had little problem in identifying the WTO-illegal trade practices of the US, as a) they were all directly or indirectly hurt by the strict US laws, which severely restricted their access to the US market and b) as they were well-endowed, the betting firms could afford to hire a team of lawyers to work almost full time on preparing the WTO case. Finally, the US Internet gambling companies were able to form a coalition of like-minded firms and to establish an ad-hoc interest group, the Antigua Online Gaming Association (AOGA), to enable them to coordinate and streamline all their political and legal activities. The headquarters of the AOGA, which consisted of 50 online betting operators, was set up in the US (El Paso, Texas) and was registered at the same address as the law firm of Mark Mendel, the American attorney representing the US companies based in Antigua (The Boston Globe, 2006).

Our interview partners clearly confirmed that the efforts of the AOGA were crucial in instigating the Antiguan authorities to bring the WTO dispute settlement case against the restrictive US gambling policies. It was the AOGA lawyer, Mark Mendel, who came up with the idea to file a WTO complaint. After the AOGA members had agreed to the idea, a team of AOGA representatives then tried to persuade the Antiguan government. To this end, they organized meetings with Sir Ronald Sanders, who was then Antigua's ambassador to Britain and the WTO, as well as the Prime Minister of Antigua.<sup>17</sup> One interviewee recalls that it “was surprisingly easy to convince the Antiguan authorities to pursue with the WTO case against

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<sup>16</sup> This section is based on interviews, by phone, 25 March 2013 and 29 July 2014.

<sup>17</sup> Telephone interview, 29 July 2014.

the US.”<sup>18</sup> Three factors were pivotal for the decision by the Antiguan authorities to go ahead with the case. First, the betting industry was of enormous importance for the Antiguan economy<sup>19</sup> and the US protectionist policies had led to a severe economic downturn in the gambling and betting services. WTO ambassador, Ronald Sanders, declared later in an interview about the decision to bring the case: “[d]id we not have a duty to our citizens to protect their jobs?” (quoted in Blustein, 2009: 167). The second factor that played a key role in the decision of the Antiguan government to file the WTO complaint was that the AOGA “agreed to fund all the third party legal costs during the entire case” and offered the services of Mr Mendel (the AOGA lawyer) to represent Antigua during the WTO case.<sup>20</sup> Finally, the Antiguan authorities had not forgotten about the “insulting amount of development aid [\$20.000] the US had given them in the aftermath of a hurricane that had hit the island 2 years earlier.”<sup>21</sup>

At beginning of 2003, Antigua and Barbuda thus filed their request at the WTO for consultations with the US about the alleged WTO-inconsistency of US policy regarding the cross-border supply of gambling and betting services.<sup>22</sup> Throughout the case there was close cooperation between the firms, the Antigua Online Gaming Association (AOGA), the legal team in Texas and the government of Antigua and Barbuda, and their efforts paid off.<sup>23</sup>

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<sup>18</sup> Ibid.

<sup>19</sup> In those days more than 4000 people (out of a population of 80,000) worked in the betting industry, making it the islands’ second-largest employer, after tourism.

<sup>20</sup> Telephone interview, 29 July 2014.

<sup>21</sup> Ibid.

<sup>22</sup> United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services, WT/DS285/1, S/L/110, Request for Consultations by Antigua and Barbuda, see for more details: [http://www.wto.org/english/tratop\\_e/dispu\\_e/cases\\_e/ds285\\_e.htm](http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds285_e.htm), last retrieved 22 April 2014.

<sup>23</sup> Telephone interview, 25 March 2013.

Although Antigua had brought the legal case in a somewhat clumsy way by merely listing 93 US laws, instead of presenting a detailed list of WTO-illegal measures (Munin, 2011), the WTO panel –established in June 2003, after consultations between the US and Antigua had failed – ruled against the US to everyone’s surprise, in November 2004. The trade body gave the US one year to comply with its ruling. That deadline passed with a short statement from the US that, after a review of its laws, it had decided that it had been in compliance with WTO rules all along (The New York Times, 2007a; 2007b).<sup>24</sup> The case then went to the arbitration body of the WTO (a so-called Article 21.5 panel), charged with assessing damages as a result of non-compliance with WTO rulings. In March 2007, the panel concluded that the United States had failed to comply with the recommendations and rulings of the Dispute Settlement Body (DSB) and gave Antigua the right to take countermeasures.<sup>25</sup> However, given that Antigua's economy is so tiny, few US companies would notice any (traditional) trade-restrictive measures against the US on the part of Antigua. The Antiguan government therefore decided to start negotiations with the US in order to arrive at a mutually satisfactory solution. As these negotiations dragged on for years without any real result, the Antiguan side finally (in 2013) made an unexpected move and asked the WTO for the right to impose sanctions that would hurt the US, namely, permission to copy and export US-made DVDs, CDs and similar material – i.e. cross-retaliation by suspending obligations under the WTO Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS). On 28 January 2013, the DSB agreed to grant authorization to suspend concessions and obligations to the US in respect of intellectual property rights.<sup>26</sup> In fact, if it had not been for the involvement of transnational firms, such creativity in crafting retaliatory measures would have been barely

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<sup>24</sup> The Bush administration had tried to secure legislation "clarifying" that all forms of online betting are illegal, but the horse racing industry in the US was able to block such efforts on Capitol Hill (Washington Post, 2006).

<sup>25</sup> See: [http://www.wto.org/english/tratop\\_e/dispu\\_e/cases\\_e/ds285\\_e.htm](http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds285_e.htm), last retrieved 22 April 2014.

<sup>26</sup> Ibid.

conceivable.

The unresponsiveness of the American government to the demands of its gambling industry boomeranged back at them when these firms turned to another venue, which also potentially provided them with access to the global governance structure of WTO dispute settlement, namely, the Antigua government. Suffering from the negative consequences of US policies just like some American firms, the Antigua government agreed to back these firms' efforts and successfully challenged the legality of American policies. The firms in question were able to sustain their considerable lobbying coordination effort over a number of years, as their legal case was quite straightforward, they were not hampered by large collective action problems, and the WTO dispute settlement rules provided them with a retaliation that no small WTO member had hitherto dared to actually use: the threat to start copying American films and DVDs by suspending its obligations under the WTO TRIPS Agreement.

*EU footwear multinationals and transnational lobbying through China: an anti-dumping "boomerang" at the WTO (2006–2012)*

At the beginning of 2005, the EU lifted its quotas on Chinese footwear imports. The removal of these quotas, which had been in place for decades, immediately resulted in a vast increase in imports of Chinese shoes into the EU market. In response to this situation, import-competing EU footwear producers in countries such as Italy, Spain, Portugal and Poland, spurred their European umbrella organization – the European Confederation of the Footwear Industry (CEC) – to file an anti-dumping (AD) complaint against China with the Directorate for Trade Defence of the European Commission. The Directorate for Trade Defence did indeed decide to impose anti-dumping duties on Chinese footwear products in 2006 and also agreed with an extension of the duties in 2009 (Eckhardt, 2011). After the decision of the EU

to extend the duties, the Chinese government brought a WTO dispute settlement case against the EU, claiming that the duties were WTO-inconsistent.<sup>27</sup> Whereas domestic European producers competing with Chinese imports had been at the origin of the EU anti-dumping measures, transnational lobbying by EU footwear multinationals dependent on Chinese footwear imports played a decisive role in the Chinese authorities' decision to challenge these measures through a WTO dispute settlement case. In what follows, we trace the causes and effects of this instance of transnational lobbying and foreign venue shopping by EU footwear multinationals.

First and foremost, these EU firms were crucially dependent on Chinese footwear imports and found themselves confronted with unresponsive domestic EU authorities. This incited them to engage in transnational lobbying to try and convince the Chinese government to challenge the imposition and extension of anti-dumping duties that were limiting Chinese footwear imports into the EU. The fact that the EU did not respond to the demands of EU footwear importers was not the result of unclear policy preferences or a lack of lobbying activity. On the contrary, the demands of these firms were crystal clear: no imposition of AD duties. Moreover, they were very vocal and politically active during the entire anti-dumping case. That is, the firms in question put constant and heavy political pressure on both national- and EU-level officials to convince them to abstain from putting the duties in place. In order to coordinate their lobbying activities, the footwear importers even established two ad-hoc interest groups with the sole purpose of blocking this particular AD case: the European Footwear Alliance (EFA) and the Footwear Association of Importers and Retail chains (FAIR) (Eckhardt, 2011).<sup>28</sup>

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<sup>27</sup> See: [http://www.wto.org/english/tratop\\_e/dispu\\_e/cases\\_e/ds405\\_e.htm](http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds405_e.htm).

<sup>28</sup> The EFA was a joint initiative of the Federation of the European Sporting Goods Industry (FESI) – which represents the interests of big European sport shoe producers (e.g. Adidas, Asics, Diadora, Fila, Lotto, Puma,

Yet, despite all these efforts, the EU did impose initial anti-dumping measures (in 2006) and agreed to an extension of the duties a few years later (2009). This lack of responsiveness to the demands of this group of firms clearly boiled down to a lack of political clout.<sup>29</sup> The political ties between import-competing shoe producers (i.e. the complainants in this case) and national and EU officials go back a long way and are very strong, while footwear importers and retailers in most countries, and in particular at the EU level, lack these historical political connections. As one interviewee, who was deeply involved in the case, declared:

“There was a lot of coordination between the European Commission and the European Confederation of the Footwear Industry (CEC) and its lawyers during the entire process, which appeared to be very important for the final outcome of the case. This link between the Commission and the industry is something natural and without such strong ties you are lost...footwear retailers and other importers lack this close relationship and therefore it’s much more difficult for them to weigh on the decision-making process.”<sup>30</sup>

What is more, policy-makers generally consider import-dependent firms and in particular retailers to add less value to the EU economy than other types of firms. Their political clout in

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Reebok) as well as national sports industry federations from across the EU – and The European Branded Footwear Coalition (EBFC) consisting of big branded marketers of so called high-quality dress shoes (e.g. ECCO, Timberland, Caterpillar, Merrell, Hush Puppies, Uggs, Tevan, Simple, New Balance Kickers, Speedo, Ellesse and KangaROOS). FAIR, on the other hand, was an initiative of some very big footwear retailers such as Deichmann and Wortmann and footwear companies such as Columbia, Clarcks, and Skechers.

<sup>29</sup> Interviews, Brussels, 8 January, 18 February, 25 March and 7 April 2010.

<sup>30</sup> Interview, Brussels, 25 March 2010.

terms of employment and investment is thus considered weaker than that of the producers, who supported the trade-restrictive measures. The concerns of firms that produce and sell their shoes domestically are taken more seriously than those of importers, given their supposedly bigger (historical) contribution to employment. Also the concerns of exporters are usually more visible on the political radar screen than those of importers.<sup>31</sup> EU policy-makers, in the words of an interviewee, “believe that benefits from trade come mainly from exports, while imports are regarded as costs...as a result there is a distinguished political bias against importers and in particular retailers...footwear and other retailers are often seen as middle man that basically just charge a fee for matching foreign production with domestic consumption, something that is considered to be unnecessary or not having any particular value.”<sup>32</sup>

The European Commission thus showed itself unresponsive to demands from the European footwear-importing firms, both during the initial AD cases and the expiry review. The firms in question were very unhappy with this result and feared that there would be yet another review, and a likely extension, of the duties. As there was also little hope that another round of lobbying in EU Member State capitals and in Brussels would result in a decision to lift the AD measures, the firms expanded their approach and together with their Chinese suppliers approached the Chinese authorities in order to convince them to bring a WTO case against the EU challenging the questionable aspects of EU anti-dumping measures against Chinese footwear products.<sup>33</sup> “The ultimate goal of the European footwear importers and their Chinese suppliers was broader than just preventing further extensions of the anti-dumping

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<sup>31</sup> For a more in-depth discussion on the political role and influence of firms in EU anti-dumping policy see De Bièvre and Eckhardt (2011) and Eckhardt (2013).

<sup>32</sup> Interview, Brussels, 18 February 2010.

<sup>33</sup> Interviews, Brussels, 7 April 2010 and 10 April 2013.

measures in force at the time...rather, they hoped to also preclude future EU trade cases in the sector.”<sup>34</sup>

There were clearly a number of reasons why these EU footwear importers and retailers were able to engage in transnational lobbying for WTO litigation. Apart from being well endowed, these firms operate in a highly consolidated sector, face relatively low collective action costs, and were already well organized politically. These preconditions had already enabled them to establish ad-hoc interest groups in order to coordinate and streamline their lobbying efforts during the initial anti-dumping case at home and now also facilitated the setting up of a lobby campaign in China and enabled them to hire an impressive team of trade and WTO lawyers – which in turn meant that they had a strong ability to identify the WTO-illegal trade practices.

The lobby campaign, which was set up by the EU firms dependent on Chinese imports and their representatives, consisted of two crucial and well-planned steps.<sup>35</sup> The first step was for the EU footwear firms in question to approach their Chinese suppliers and convince them to form an alliance in order to put pressure on Chinese decision-makers to bring a WTO case against the EU’s AD measures. One of the interviewees recalls that, although it took some time to convince the Chinese suppliers, “there was in the end a lot of support from the Chinese industry for this WTO case.”<sup>36</sup> Support came in particular from individual firms, as well as the Chinese Chamber of Commerce.<sup>37</sup> The next step was to convince the Chinese

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<sup>34</sup> Interview, Brussels, 10 April 2013.

<sup>35</sup> The evidence presented in this section stems from interviews with people who were deeply involved in the case. Interviews took place in Brussels on 7 April 2010 and 10 April 2013.

<sup>36</sup> Interview, Brussels, 10 April 2013.

<sup>37</sup> As a reason for this particular domestic coalition, an interviewee suggests the following: “like in most sectors, the Chinese footwear industry is not very well organized politically on a sectoral level, so political pressure had

leadership to file the WTO complaint. To this end, the EU firms – and their Chinese counterparts – hired a law firm to engage in a very thorough analysis of all the crucial aspects of the potential WTO case, and a group of representatives of EU and Chinese firms paid several visits to high-level Chinese decision-makers. It appeared to be a challenging task to convince the Chinese leadership to bring the WTO case. In general, countries do not start a WTO case unless they know they have a very good chance of winning. This was (and is) especially true for China, which joined the WTO only recently and did not want to lose face and/or run the risk of starting a trade war over an issue that is not of pivotal importance to them and their domestic industry. Since China had only brought one other WTO case against the EU at that time, it was crucial for the Chinese government to know from the European importers and their Chinese suppliers whether (a) the EU was really violating WTO law, (b) what the (domestic) economic effects of winning the case for China would be, (c) whether the Chinese industry was also in favour of a WTO case, and (d) whether the legal case was strong enough to result in a positive panel ruling.

Despite their initial hesitation, the Chinese authorities did decide in the end to bring the WTO dispute settlement case against the EU's anti-dumping measures on footwear from China. Our interview partners clearly confirm<sup>38</sup> that the lobby efforts by EU footwear importers (supported by Chinese exporters) were crucial in convincing the Chinese government to instigate the case. Particularly important was that the EU footwear importers, together with their Chinese suppliers, managed to convince the authorities in China that pursuing an international litigation procedure would also create enhanced opportunities for Chinese footwear exports. At the beginning of 2010, a crucial meeting took place between the

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to come from big individual companies and the Chamber of commerce rather than sector specific umbrella organizations,” Interview, Brussels, 10 April 2013.

<sup>38</sup> Interviews, Brussels, 7 April 2010 and 10 April 2013.

EU firms, representatives of the Chinese business associations and the Chinese Minister of Trade, in this regard. During this meeting, the Minister of Trade took the decision that China would bring a WTO complaint against the EU.<sup>39</sup> Shortly afterwards, on 4 February 2010, China requested WTO consultations with the EU concerning EU measures in connection with the imposition of anti-dumping duties on imports of footwear from China. The consultations between the two parties failed to resolve the dispute, so China requested the establishment of a panel in July 2010. The Chinese government immediately hired the same legal team that had assisted the EU footwear importers during the EU AD case. It took the panel much longer than anticipated to finish its report. Although most of the claims of the Chinese were rejected, the panel did rule in favour of China on some crucial points (see Dunoff and Moore, 2014).<sup>40</sup> Although the WTO case is still not entirely resolved, the European footwear importers obtained what they wanted. On 16 March 2011, the Commission published the following statement: “[...] the Commission gives notice that the anti-dumping measure [on footwear with uppers of leather originating in the People's Republic of China and Vietnam] will shortly expire.”<sup>41</sup> As a result, the EU's anti-dumping duties on shoes from China expired on April 1, 2011.

Just as the US's unresponsiveness led US gambling firms to engage in transnational lobbying and venue shopping via Antigua, the Chinese authorities were the venue of choice for EU footwear-importing firms to bring down the boomerang of a Chinese WTO complaint against the EU.

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<sup>39</sup> Interview, Brussels, 10 April 2013

<sup>40</sup> See also: [http://www.wto.org/english/tratop\\_e/dispu\\_e/cases\\_e/ds405\\_e.htm](http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds405_e.htm).

<sup>41</sup> Official Journal of the European Union C82/4, 16 March 2011.

## **CONCLUDING REMARKS**

In this article, we have explored the preconditions for transnational lobbying by firms in WTO litigation. By providing an extensive overview of the literature on the involvement of private industry in WTO dispute settlement, we have shown how this literature has mainly looked at traditional WTO cases in which firms engage in domestic lobbying targeting their own home governments. The main actors in such cases are domestic export-dependent firms (on the complainant side) and import-competing firms (on the defendant side).

In this article, however, we have highlighted the potential growing importance of a different dynamic characterizing some WTO dispute settlement cases. Instead of lobbying their own government, firms try and convince a foreign government to bring a case against the home country of the firms in question. We argue that the starting point of such a dynamic is that firms are confronted with losses in revenue as a result of trade barriers imposed by their domestic government and, when lobbying in favour of lifting these protectionist measures, they find that same domestic government to be unresponsive to their political demands. If this happens, the firms in question can take advantage of the multiplicity of opportunities available within the multilateral trading system by instigating a foreign government to file a WTO complaint on the firms' behalf against these firms' own domestic government.

Although an unresponsive domestic government is the key trigger for firms to consider transnational lobbying and foreign venue shopping, firms participating in such an effort must first overcome several obstacles. They have to overcome collective action problems, monitor and collect information about domestic WTO-illegal trade practices, assess the costs and benefits of abolishing them (for themselves and the foreign government) and gain access to and influence foreign decision-makers. The findings in this article indicate that only internationally active firms in well-endowed sectors with a high concentration ratio, and an already high mobilization rate are able to pull off the trick of political mobilization and

maintaining the investment in producing the collective good of detailed information needed by foreign governments in the process of WTO litigation.

In the two WTO cases studied in this article – the US–Antigua gambling case and the EU–China footwear case – US gambling firms and EU footwear producers did indeed face domestic trade barriers and unresponsive governments. The rejection of these firms’ demands by the US and the EU caused these to return to them as boomerangs, when the firms in question shifted their lobbying efforts to the authorities of their host countries and convinced them to challenge the EU and US protectionist measures through a formal WTO dispute settlement complaint by a foreign government. US gambling firms aimed their transnational lobbying efforts and foreign venue shopping at Antigua and Barbuda, while EU footwear firms chose the Chinese government as the venue to obtain the filing of a WTO complaint against the trade barriers in question. Both the US gambling firms and the EU footwear firms were able to mobilize politically and to set up a costly, intensive and time-consuming transnational lobby campaign because they faced relatively few impediments to collective action, had the legal, political and financial means to identify WTO-inconsistent trade practices, found their domestic government to be unresponsive to their demands to lift the trade barriers, and found a foreign WTO member willing to file the WTO case.

Although we have illustrated the cogency of our argument explaining transnational lobbying and foreign venue shopping by relying on empirical evidence regarding two particular WTO disputes, we have no reason to believe that the logic described in this article is not also applicable to WTO dispute settlement cases concerning other countries and/or other sectors. We found (initial) evidence that transnational lobbying has also driven other recent WTO cases, such as the WTO complaint brought by a group of countries against Australia’s rules on the plain packaging of tobacco products, as well the solar panel cases brought by China against the US and the EU. It would be worthwhile to explore these cases

and others in more detail to see if our argument still holds and to get a better idea as to how often transnational lobbying takes place in the context of WTO litigation. The WTO observers and experts we interviewed for this article do see a clear trend towards more transnational lobbying. One of our interviewees – an eminent WTO expert – put it as follows: “nowadays I see several [WTO dispute settlement] cases a year which clearly seem to be driven by transnational lobbying...it is obvious that in the current political and economic context firms no longer solely lobby their own government, but increasingly go to other governments than its own to bring a case to the WTO.” According to this expert a “particular good place to look for transnational lobbying are multi-complainant cases.”<sup>42</sup> It is therefore reasonable to expect that, in the years ahead, we will see an increasing number of WTO disputes being driven by transnational lobbying and foreign venue shopping rather than traditional domestic lobbying. As the globalization of production and services in general, and the emergence of global value chains and global production networks in particular, is on the rise, the inter-state dispute settlement mechanism of the WTO may also be set for a gradual transformation towards more transnational enforcement of the market access commitments its members entered into.

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<sup>42</sup> Telephone interview, 25 March 2013.

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