

Practical Considerations in Managing Trade Disputes

ICTSD Programme on International Trade Law

1. Introduction

Dispute settlement at the World Trade Organization (WTO) can be critical for developing countries in defending their trading, and ultimately developmental rights and interests. Cases such as *EC - Sugar Subsidies (Australia, Brazil, and Thailand)*,¹ *Brazil - Retreaded Tyres (EC)*,² and *India - Anti-Dumping Measures on Batteries (Bangladesh)*³ illustrate the successful use of the system and its importance for trade-supported development strategies. The system has been essential in challenging harmful subsidy programmes, eliminating unfair anti-dumping duties, and ensuring that least-developed countries (LDCs) can pursue their strategies to diversify trade to create new employment and income opportunities, as the case of Bangladesh shows.

But, countries can take advantage of the rule of law only if they can effectively pursue their rights in this complex legal regime, which largely depends on having an adequate number of experienced legal, economic, and diplomatic staff and a well-informed and active private sector. Earlier research undertaken by the International Centre for Trade and Sustainable Development (ICTSD) has shown that, to varying degrees, developing countries continue to lack such strong legal capacity, which is reflected in numerous disputes that could be brought but remain unchallenged.⁴ To date, the WTO dispute settlement system has been dominated by developed country members, specifically the United States (US) and the European Union (EU). Even Brazil, the fourth most active and most frequent developing country user, until 2012 brought less than one-third of the cases brought by the US. Furthermore, only one LDC has ever brought a case, and no African country has ever initiated a formal dispute at the WTO.⁵

A lack of legal capacity impedes countries' ability to make full use of the options provided by the multilateral trading system - be it in dispute settlement, ongoing trade negotiations, or the implementation of WTO obligations. In fact, there is no single WTO activity that does not require strong legal capacity.



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1 *EC - Export Subsidies on Sugar*, WT/DS265/266/283 (2002).

2 *Brazil - Retreaded Tyres*, WT/DS332 (2005).

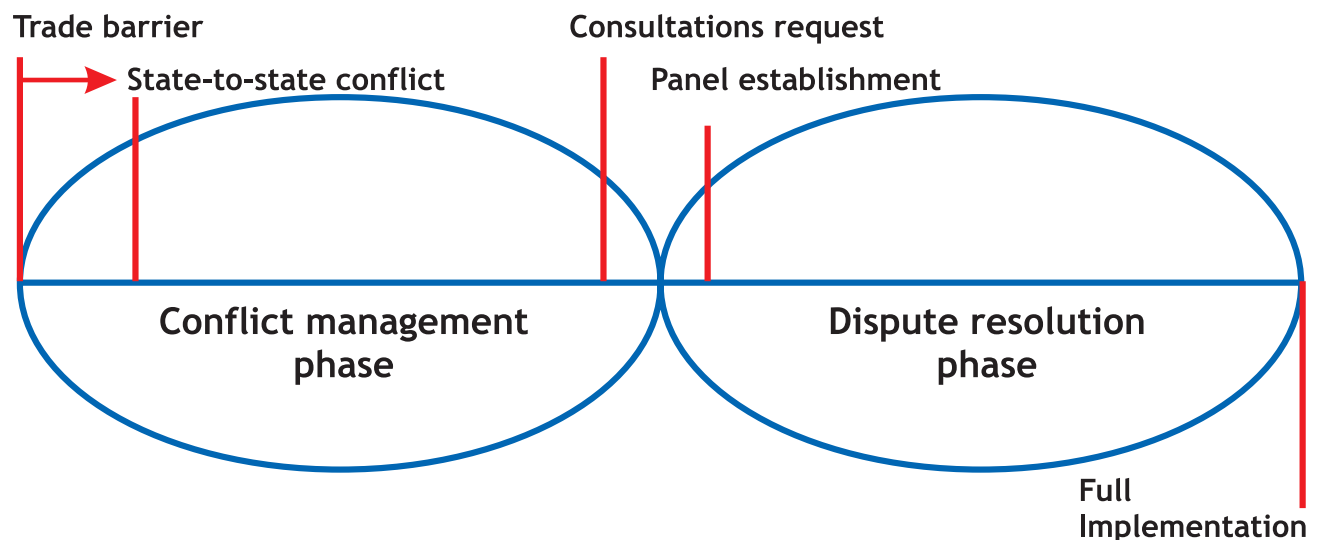
3 *India - Anti-Dumping Measure on Batteries*, WT/DS306 (2004).

4 Busch *et al*, *Does Legal Capacity Matter? Explaining Dispute Initiation and Antidumping Action in the WTO*, ICTSD Dispute Settlement Programme Series Issue Paper No. 4, (ICTSD, Geneva, 2008).

5 ICTSD, *Asian Participation in the WTO Dispute Settlement System*, International Centre for Trade and Sustainable Development Information Note, (ICTSD, Geneva, 2012).

Against this background, ICTSD, jointly with the WTO and the Advisory Centre on WTO Law (ACWL), recently facilitated a ‘South-South Dialogue on Managing Trade Disputes’, which focused on developing countries’ experiences with managing disputes at the domestic level, with the aim of jointly identifying lessons and best-practices.⁶ This information note presents the main findings

and recommendations from this dialogue in seven different sections, with each section focusing on a different phase or aspect of the extended WTO litigation process. The figure below provides a detailed overview of the full process through which a trade conflict and eventually a WTO dispute pass, often referred to as the ‘conflict continuum.’



Source: Roberto Echandi, see note 7

In line with this conflict continuum, the first section of this information note focuses on the very first step in managing trade barriers, that is conflict management and dispute prevention. The following section examines alternative fora available for trade litigation besides the WTO, followed by the third section, which considers how to prepare for litigation, specifically the three different types of assessments - legal, economic, and political - that should be completed prior to litigation.

Sections four and five then focus on managing trade litigation, examining how to coordinate both the actors inside and outside of the government. Following this is a discussion of effectively implementing WTO rulings and countermeasures once the litigation of a dispute has ended. Finally, the last section of this information note details general policies that developing countries can use to actively build their legal capacity.

2. Conflict Management and Dispute Prevention

It is an often-held belief that a trade row starts when a Member requests consultations at the WTO.⁷ However, when a state takes the political decision to invoke the dispute settlement procedures of the WTO, the underlying conflict has already been lingering unresolved for a long period. Instead of thinking of the request for consultations as the first step of a trade dispute, it is thus more appropriate to view disputes along the conflict continuum, displayed above, which consists of two stages:

- The conflict management phase
- The dispute-resolution phase

The conflict management phase begins with a trade barrier affecting the relationship between the industry of one country and the regulatory

6 *South-South Dialogue on Managing Trade Litigation*, International Centre for Trade and Sustainable Development, available at <http://ictsd.org/i/dsu/132831>.

7 This section is largely based on the background note by Roberto Echandi. See Roberto Echandi, *How to Successfully Manage Conflicts and Prevent Dispute Adjudication in International Trade*, ICTSD Programme on Dispute Settlement and Legal Aspects of International Trade, (ICTSD, Geneva, February 2013).

authorities of another country. If the problem remains unresolved, those affected may ask their home government for support. Where the home government chooses to support and sponsor the affected exporters or importers, this initially private trade-related problem is elevated to a state-to-state international trade conflict, which then allows for public amicable negotiation in the hopes of reaching a solution.

If no such solution is possible, however, the affected state may take the conflict to the next level by framing a claim in legal terms with the expectation of relief. This is the beginning of the dispute-resolution phase. Despite this formalization of the conflict in the form of a legal dispute, the parties still have a chance to resolve the dispute through consultations; however, adjudication will proceed in parallel.

In addition to adopting strategies for effective conflict management, some countries have taken steps to avoid conflicts from arising in the first place; i.e. they engage with their industry and with foreign authorities even before the stage of conflict management.

2.1. Conflict Prevention

Costa Rica is one example of a country that has taken strong measures aimed at preventing conflicts from arising. The Central American country has created a legislative affairs unit that helps prevent Congress from adopting laws that would breach Costa Rica's WTO obligations. This unit can notify the department of foreign affairs, which then moves into direct cooperation with legislators, Congress, or the presidential office when an issue is spotted. This mechanism has been crucial in helping Costa Rica avoid disputes, as the legislative authorities are often unaware of the exact WTO obligations and the consequences of a breach. Another tactic Costa Rica has implemented is requesting an advisory opinion from the ACWL on a legislative bill that could potentially be in breach of WTO commitments. These opinions have been very well respected by legislators and are seen with legitimacy before the constitutional court in Costa Rica, which has proven helpful as internal opinions might not always have the same weight.

Mexico has reported similar problems when dealing with laws passed by its legislative authorities.

Unlike in the case of Costa Rica, however, in earlier times when the Mexican Congress sought to pass a measure regardless of WTO inconsistency, a dispute settlement proceeding was actually seen as the best way to engage with Congress to have the measure changed. At times, allowing WTO-inconsistent legislation to pass was seen as a means for the Mexican Congress to evolve in its awareness of the WTO and to induce change without internal quarrels. In response to such instances, Congress now asks for legal opinions from relevant ministries before passing legislation affecting trade. Involving various ministries has been considered an ideal scenario, given the large number of laws passed each year and the small size of Mexico's trade office, which manages WTO disputes.

In both countries, conflict avoidance and management are thus separate from dispute management, with relevant ministries being engaged. This allows for effective burden sharing, while also allowing specialized ministries and agencies to make use of their contacts and networks to directly engage with multiple stakeholders within and outside the country.

2.2. Conflict Management

While preventing conflicts is a worthwhile and ascertainable goal at times, in certain cases, conflicts inevitably arise. In those instances, governments have three different forms of management at hand that do not involve adjudication. They can be solved according to power contests, the interests of the parties, or through rules-based negotiations without the intervention of a third party. Clearly, an amicable solution is to be preferred and especially developing countries might want to shy away from the option of resolving disputes on the basis of power. Though it should be noted that 'power' in this instance also includes power through public awareness, support, and empathy, which is an aspect that is increasingly becoming important and that should not be underestimated.

In order for states to be able to effectively make use of any of these options, effective communication between the affected or otherwise involved industry and its government is crucial. Success hinges on three basic criteria. First, the government must have a degree of empathy for the private sector's problem. Second, they must have mechanisms to communicate with each other

continually in order to conduct an exchange of information in an effective and efficient manner. Third, there may not be any competing or even opposing interests at the domestic level, as otherwise, the government might not be able to take up the issue. Whether or not a government decides to engage in non-adjudicative conflict management may also depend on the nature of the trade barrier. Depending on the public interests at stake, the visibility of the measure, the strength of the sector, the interest groups involved, and the relationship with the involved trading partner, some of the above-described types of conflict management may not be available.

Singapore's experience with chewing gum regulations provides an interesting perspective. While chewing gum was not technically banned for personal consumption, selling chewing gum was prohibited in Singapore. Even though Singapore's chewing gum market was not large, the issue became political in places like China and the US, with both countries publicly mentioning the possibility of bringing a WTO dispute. Singapore had no desire to participate in a WTO dispute, so Singapore took a proactive stance and directly approached the US to negotiate a solution outside of the WTO. The negotiations eventually led to an amicable solution: chewing gum could be used for pharmaceutical purposes with a prescription. As a result, the US addressed its political issue effectively (chewing gum could now be sold in Singapore), and the Singaporean government could claim that the spirit of its original chewing gum law had not been compromised, all without resorting to a formal dispute at the WTO.

Other examples include cases where the affected industry in the exporting country formed coalitions with the importing industry which then jointly lobbied for policy space. In particular, in cases of trade remedies this can be a viable option.

2.2.1. Managing larger trading partners

One issue that deserves particular attention in smaller and developing countries is the size and influence of the other party. No matter how minor the conflict at hand, for small developing nations it can be very difficult to attract the attention of

their trading partners and to have them engage in a process of negotiations. In many cases, this problem has eventually induced small countries to bring formal disputes to the WTO, though the issue could have easily been resolved through bilateral talks, as no concrete economic interests had given reason to the trade barrier.

One interesting strategy for dealing with this disparity is the mediation mechanism in the Association Agreement between the EU and the Central American countries, which operates independently from the formal dispute settlement procedures foreseen in the same agreement. The mediation mechanism covers non-tariff measures that adversely affect trade in goods between the parties. The reason for limiting the jurisdiction to trade in goods relates directly to the nature of the trade between the parties. Most Central American exports are primary products, and the usual trade problems relate to sanitary and phytosanitary measures (SPS).

By making mediation compulsory, the agreement aims to provide for a forum where Central American states can easily and quickly raise problems with their European partners, thereby avoiding formal disputes and providing quick redress, if possible. It should also be noted that many of the Central American countries' issues would not likely pass muster under the SPS Agreement. This mechanism thus also provides for a truly alternative forum that operates somewhat independently of the existing SPS rules, allowing for more flexibility and for situation-specific solutions.

2.2.2. Negotiating in the shadow of the law

Alternative dispute resolution (ADR) provides another manner in which conflicts can be managed without resorting to the dispute settlement mechanism. Although there is scepticism about ADR, it may be particularly useful for countries that cannot get the attention of a big importing country. Colombia, for example, has used ADR in a number of disputes and considers it a cornerstone of its trade policy. Its experience relates to negotiations that have led to mutually satisfactory solutions and are not exclusively conducted in conjunction with legal proceedings.

The *EC - Bananas* case, where Latin American exporters argued against the EU, was an interesting case with regard to ADR.⁸ Although in a majority of cases alternative mechanisms happen before litigation, *Bananas* was an exception because the legal proceedings had been ongoing since the early 1990s. This was not a simple conflict - it was a full blown international dispute that had been going on for a long time.

In 2006, Colombia initiated a new case against the EU (*Bananas IV*) but, for tactical reasons, waited for the outcome of compliance panels initiated by other WTO Members before proceeding with this dispute.⁹ After each panel ruled against the EU, Colombia enlisted the help of the ACWL, which suggested that it use Article 3.12 of the Dispute Settlement Understanding (DSU). This provision allows for the utilization of the good offices of the Director-General (DG) to help solve the dispute. Article 3.12 had never been used before, but Colombia went forward and called on the DG to use the good offices.

This was a tool with high visibility that served the purpose of bringing the EU to the negotiating table. Colombia was no longer interested in avoiding a dispute, but rather getting the other side - which had already lost numerous legal battles - to negotiate by using a high-level intermediary to negotiate compliance with previous rulings. Indeed, a part of the impetus for this strategy was that nothing else had worked to achieve compliance or resolve the trade problem.

The DG used a process of 'concentric circles' first to negotiate between only Colombia and the EU, and then later to bring in the interests of all the parties involved in the dispute. This included the progressive inclusion of new actors and those that asked to be involved in the process. About 30 meetings eventually helped turn legal proceedings into a full-fledged negotiation. Eventually, an agreement was reached as part of this process, but it was not signed as part of the Article 3.12 proceedings. The final Geneva Agreement agreed to later, however, included an agreed upon tariff, the rate of which did not differ from that reached under negotiations led by the DG.

The ADR mechanism was effective for Colombia for various reasons. Most important, the parties encountered a DG that was eager to do what was being asked of him and that was independent throughout the process. Also, the series of legal defeats suffered by the EU had taken a toll, and its reputation had suffered - the EU was sensitive to the issue by this time. Another factor was the convergence of Latin American countries on a number of key issues in the negotiation. Finally, the preferential exporters into the EU market also had interests that played a positive role in Colombia's negotiations.

Colombia was also involved in a non-WTO ADR dispute with Ecuador over the latter's safeguard measures related to its balance of payments and exchange rate, which together affected 38 percent of Colombia's exports into Ecuador. Colombia, while severely impacted by the measure, also recognized that Ecuador had serious problems regarding its trade balance. Also, it had great interest in preserving good relationships with Ecuador, and was thus faced with the question of whether to bring further legal action or to engage in bilateral negotiations with the aim of finding a compromise. It eventually opted for the latter with the aim of finding a solution that took into account both side's interests. After continuous negotiations, the two agreed to phase out the measures.

In this case, ADR was a successful tool for Colombia for three basic reasons. Mainly, it looked at long-term interests, and Colombia accepted short-term trade limitations in order to keep the market open in the long term. Also, neither party got carried away by the dynamics of legal proceedings. Last, there was political room to manoeuvre on both sides.

3. Alternate Fora for Trade Litigation

The WTO provides a well-known forum to litigate trade disputes; however, many countries may use alternative fora for these disputes.¹⁰ For example, disputes may be brought under certain international agreements, at the regional and national level, or through commercial arrangements. Against that background, one of the main issues with managing trade disputes is the selection of the

⁸ *EC - Regime for the Importation of Bananas*, WT/DS361 (2007).

⁹ *Ibid.*

¹⁰ This section is largely based on the background study by Arthur E. Appleton. See Arthur E. Appleton, *Forum Selection in Trade Litigation*, ICTSD International Trade Law Programme Issue Paper No. 12, (ICTSD, Geneva, 2013).

most effective forum for the resolution of the dispute. Therefore, it has become increasingly important to analyze alternative fora for trade dispute resolution carefully.

The possibility of forum selection between the WTO and other fora results from the substantive overlap existing between different agreements and the different fora available for the settlement of trade or trade-related disputes. The available fora for the resolution of trade disputes as an alternative to the WTO include those of other international organizations dealing with trade-related matters –e.g. the World Intellectual Property Organization (WIPO); regional trade agreements (RTAs), bilateral investment treaties (BITs), as well as domestic courts. There are differences among these alternative fora, including in terms of costs, participation, legal standing, transparency, expertise, speed, remedies, and enforcement. A number of disputes that have been heard at the WTO have also been litigated at other fora, some of which have involved developing countries. These included:

- i. *Chile - Swordfish (EC)* was pending simultaneously before the International Tribunal for the Law of the Sea (ITLOS) and the WTO.¹¹
- ii. Japan and the EC launched a dispute over US legislation that limited public procurement opportunities for persons doing business with Myanmar (Burma). At the same time, the International Labour Organization (ILO) was pursuing a complaint against Myanmar for violations of the Forced Labour Convention.¹²
- iii. The *Argentina - Poultry Anti-Dumping Duties (Brazil)* was first heard by a Southern Common Market (MERCOSUR) *ad hoc* arbitral tribunal.¹³
- iv. Mexico sought to have the *Mexico - Taxes on Soft Drinks (US)* dispute heard first by a North American Free-Trade Agreement (NAFTA) panel.¹⁴
- v. Portions of the *US - Softwood Lumber (Canada)* dispute were heard by both WTO and NAFTA panels.¹⁵
- vi. The US sought to have the 2011 *US - Tuna II (Mexico)* dispute heard by a NAFTA panel.¹⁶
- vii. The *EC - Seal Products (Canada, Norway)* controversy was first heard in the EU General Court and now is pending before a WTO panel.¹⁷
- viii. The legislation challenged in the *Australia - Tobacco Plain Packaging (Ukraine, Honduras, Dominican Republic)* has also been subject to domestic proceedings in Australia and is being challenged in an investment arbitration under United Nations Commission on International Trade Law (UNCITRAL) rules.¹⁸

Thus, from the perspective of developing countries, it is important to consider all relevant factors when choosing a particular forum, as well as the differences among the alternative fora available, particularly compared with the WTO.

3.1. The RTA Alternative

Regional trade agreements offer an alternative for regional parties to resolve their trade disputes. RTAs contain dispute settlement mechanisms, which are generally modelled on the WTO, but differ in some respects. They allow for consultations and include timeframes and remedies in the case of non-compliance, such as the suspension of benefits. The experiences of developing countries in forum selection and in disputes that have been pursued under both an RTA and the WTO provide important insights for other developing countries.

Mexico has been involved in two disputes litigated under both the NAFTA and the WTO (*Mexico - Taxes on Soft Drinks (US)* and *US - Tuna II (Mexico)*). The *Soft Drinks* dispute is an example of forum selection and its implications for developing countries. The

11 *Chile - Measures affecting the Transit and Importing of Swordfish*, WT/DS193 (2000).

12 *US - Measure Affecting Government Procurement*, WT/DS88 and DS95 (1997).

13 *Argentina - Definitive Anti-Dumping Duties on Poultry from Brazil*, WT/DS241 (2001).

14 *Mexico - Tax Measures on Soft Drinks and Other Beverages*, WT/DS308 (2004).

15 *US - Preliminary Determinations with Respect to Certain Softwood Lumber from Canada*, WT/DS236 (2001).

16 *US - Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products*, WT/DS381 (2008).

17 *EC - Measures Prohibiting the Importation and Marketing of Seal Products*, DS 400 and DS401 (2009).

18 *Australia - Certain Measures Concerning Trademarks and Other Plain Packaging Requirements Applicable to Tobacco Products and Packaging*, WT/DS434, DS435 and DS441 (2012).

dispute was heard before both the NAFTA (under the state-to-state and investor-state mechanisms) and the WTO. Mexico brought the case under the NAFTA state-to-state mechanism; however, the selection of panellists was blocked, owing to lack of agreement with the US on the roster of panellists. Mexico decided to apply counter-measures under international law. These measures were contested by the US government in the WTO and in parallel proceedings by US investors in three disputes under the NAFTA investor-state mechanism.

One important lesson that can be drawn from this Mexican experience under NAFTA is that flaws in RTAs can limit the effectiveness and, thus, availability of the regional mechanism as an alternative forum. This is a major problem when there is no alternative forum, because the dispute involves obligations that can be enforced only under the regional mechanism. Where RTAs are available as an alternative, there are some factors that may be considered in forum selection, such as costs (e.g. the government has to pay the panellists under many RTAs, but not the WTO); different timeframes (they can be shorter in RTAs, particularly in the phase of implementation); and the possibility of getting support (or not) from other WTO Members.

Argentina and Brazil are other examples of developing countries with experience in forum selection, as members of both the WTO and MERCOSUR.¹⁹ Thus far, two disputes have been heard in both MERCOSUR and the WTO (*Argentina - Poultry* and *Brazil - Retreaded Tyres*). *Argentina - Poultry (Brazil)* was first litigated through the regional mechanism and subsequently the WTO. At that time, the MERCOSUR Protocol of Olivos, which includes a forum selection clause,²⁰ had not yet entered into force, which allowed for this form of dual forum use. *Brazil - Tyres*, on the other hand, was first litigated under MERCOSUR, the ruling of which caused the EU to bring a dispute against Brazil at the WTO. In this case, the two parallel fora were less a matter of ‘forum shopping’ than of competing rulings and clashing courts.

Generally, it can be said that there is no particular trend in forum selection, since it depends on the

specific characteristics of the dispute and the measure at issue. Besides the costs, availability of experts and remedies, there are also political factors, which may play in favour of one forum or the other depending on the case.

3.2. Fora Available for Private Stakeholders: Investment Arbitration and Domestic Courts

3.2.1. Investment arbitration

The investor-state mechanisms under BITs and some RTAs provide an alternative forum for private stakeholders as they afford legal standing to private entities. These mechanisms are also attractive in terms of remedies available, since they offer the possibility to request monetary compensation (e.g. damages). The investment provisions under these agreements generally include ‘umbrella clauses’, which have a comprehensive scope and are frequently invoked by investors in investor-state disputes. Therefore, some trade or trade-related disputes may also be brought using investor-state mechanisms under BITs or RTAs.

A trade-related issue may become the subject of an investor-state dispute or a WTO dispute. One of the primary differences between the two fora is that investor-state dispute resolution is geared toward obtaining immediate relief, while in WTO state-state dispute resolution, Members also give consideration to the ripple effects that such a dispute may have and seek a more durable resolution to the dispute. Another key difference is the required preparation time. WTO disputes often result from problems that have persisted for a few years between the two disputing parties, meaning that the initiation of a dispute is often unsurprising. However, with investor-state arbitration, states do not have as much time to prepare for their disputes, because the decision-making process of whether to bring a dispute is less protracted.

An example of an investment dispute with trade implications relevant to forum selection is the recent *Australia - Tobacco Plain Packaging (Ukraine)* dispute. This dispute is now proceeding

19 Mercado Común del Sur (MERCOSUR) Members: Argentina, Brazil, Paraguay, and Uruguay.

20 According to this clause, the parties can choose whether to have a dispute heard before MERCOSUR or the WTO, but makes the first forum chosen the exclusive forum.

under three different fora, namely, the WTO, investor-state arbitrations under UNCITRAL, and in domestic courts in Australia. In this context, the case has important implications for developing countries, not least because it shows the possibility of conflicting decisions between international courts.

3.2.2. Domestic proceedings

There may also be some alternatives at the domestic level for the private sector to defend its trade interests. The experience of some developing countries is, however, that the private sector has not been an active user of domestic proceedings.

The Chinese experience may be illustrative in this respect. There are three mechanisms available in China.²¹ Under the Chinese Foreign Trade Barrier Investigation (modelled on US Section 301 and the EU Trade Barriers Regulation), there have only been two cases, while investigations on the imposition of trade remedies have resulted in at least 60 anti-dumping cases. With regard to foreign domestic systems, Chinese exporters participate as respondents in administrative investigations, particularly on trade remedies (mainly in the US and the EU). While some Chinese companies have been able to succeed in disputes initiated overseas, they are generally in a disadvantageous position, owing to the complexities of the legal processes and the heavy financial burden involved.

The main reason behind the limited use of domestic mechanisms may be that normally WTO law has no direct effect at the domestic level, and thus, it is not possible to file a case based on WTO law. Moreover, other possible reasons may include the lack of expertise in litigation in foreign countries and a lack of confidence in the domestic courts. China is developing efforts to create more awareness and to encourage the private sector to use the means available at the domestic level.

3.3. Concluding Remarks

One of the main conclusions on forum selection and alternative fora for trade litigation is that there seems to be no real substitute to the WTO.

While the WTO dispute settlement system suffers from shortcomings, particularly with regard to enforcement, overall it is more effective than other international dispute settlement mechanisms. The reason seems to be that the Members have an interest in the success of the WTO system, including its operation and preservation. There have been about eight disputes in which issues related to forum selection were raised; however, the possibilities of actual forum selection happening are low. The international fora remain an alternative mainly in disputes laying at the edge of the WTO system (e.g. investment or competition).

In those cases where an alternative exists, there are some factors that should be considered when assessing the effectiveness of a forum in resolving international trade disputes. They include costs, speed (including during the phase of implementation), the possibility of getting support from other Members (only available at the WTO) and remedies available in case of non-compliance. Only a few international fora offer legal standing to private entities, notably, the investor-state dispute settlement mechanisms under BITs and some RTAs. It would seem that in some cases regional schemes may result in lower costs than the WTO dispute settlement mechanism. The WTO, on the other hand, offers the advantage that Members do not have to bear the costs of the panellists, and developing Members may use the services of the ACWL at low cost, while no such entity exists to provide advice on disputes brought under RTAs or BITs. Finally, the importance of public awareness and greater global attention for disputes at the WTO should not be underestimated since it may play an important role as a way to induce a mutually agreeable solution or compliance.

4. Litigation Preparation - Legal, Economic, and Political Assessments

Once the WTO is chosen as the forum for dispute settlement, WTO Members are faced with questions in determining what types of information needs to be compiled to determine whether a dispute should

21 They are the Foreign Trade Barrier Investigation, petitions for the imposition of trade remedy measures and administrative cases against decisions adopted by Chinese government agencies.

actually be pursued. This section highlights three different assessments that should be completed before engaging in a formal WTO dispute: political, legal, and economic assessments. While these assessments are done at the outset, to the extent possible, they must anticipate every possible result for each phase of the dispute. In this regard, WTO Members must respond to three fundamental questions:

- (i) What are the chances of winning the dispute?;
- (ii) What if we win and the respondent Member does not comply?; and
- (iii) Are we willing to pursue the dispute to its 'retaliation' phase?

The discussion below is premised on the understanding that WTO Members continuously respond to these three fundamental questions when carrying out their assessments. Furthermore, countries need to be prepared to complete these assessments very early in the process.

For instance, in Thailand's experience, preparation has been the key to being able to bring a WTO dispute. When the EU illegal, unreported and unregulated (IUU) fishing regulation was passed into law, Thailand knew it was going to be passed and had completed the appropriate assessments so that it would be able to bring a formal dispute if necessary (although Thailand eventually decided against it). Thailand's preparatory work, however, eventually did lead to a successful WTO dispute in *US - Shrimp (Thailand)*.²²

4.1. Legal Assessment

All governments carry out legal assessments to determine whether to bring them before the WTO dispute settlement system. However, the extent of the legal assessment done differs among WTO Members. Of the different types of assessments, the one recommended is 'a neutral assessment'. Some governments refer to this as 'management by contention'. This means that regardless of whether the issue that has arisen affects the defensive or offensive interests of a

WTO Member, the issue must be examined from both perspectives. To do this, it is recommended that different departments or teams within the government prepare the two arguments on the issue. Having two teams work on the assessment serves as a checking mechanism. For developing country Members that may not have the capacity to staff both teams within the government, the ACWL exists as a potential resource for obtaining a second opinion on one's case before initiating a dispute at the WTO.

Moreover, and with specific regard to the disputes that are initiated at a national level before they proceed to the WTO, such as anti-dumping investigations, the collection of information and the legal assessment must begin at the national level. Thus, the extent of legal preparation required for disputes will vary according to the levels of dispute stages involved for each issue.

4.2. Economic Assessment

Economic assessments are not always required by law, yet they can constitute an important component in a trade dispute. For instance, in *Japan - Alcoholic Beverages II (Canada, EC, US)* and other alcohol cases, the parties and the panel referred to economic tests in determining likeness, with the discussions substantially influencing the final outcome of the dispute.²³ Moreover, in recent disputes such as the *US - COOL* case, for example, both parties presented economic evidence to underline their arguments.

In some cases, however, economic assessments are explicitly required. For instance, when determining 'adverse effects' under the Agreement on Subsidies and Countervailing Measures (SCM Agreement), a country needs to conduct an economic assessment. Brazil's experience in the *US - Upland Cotton (Brazil)* case is particularly notable in this regard, as it concerned a highly technical and extensive assessment, the conduct of which was highly problematic due to certain information not being available.²⁴ In the end, Brazil conducted a successful assessment, which contributed to its success in the case.

22 *US - Measures Relating to Shrimp from Thailand*, DS343 (2006).

23 *Japan - Taxes on Alcoholic Beverages*, WT/DS8/DS10/DS11 (1995).

24 *US - Subsidies on Upland Cotton*, WT/DS267 (2002).

Against this background, it can be said that there are two categories of economic assessment that a WTO Member may carry out before bringing a dispute to the WTO. The first category relates to the trade effects of a WTO violation. Typically, the industry in a WTO Member that is affected by an alleged WTO rule violation of another WTO Member will conduct this type of economic assessment. Indeed, with few exceptions, disputes are only brought to the WTO when there is a discernible injury or trade effect on the industry of a complaining WTO Member.

The second category relates to the use of economic analysis in proving the existence of certain elements of violations provided for under the covered agreements. This includes the use of economic analysis in instances such as determining 'adverse effects' under the SCM Agreement. With respect to the WTO Secretariat teams that assist panels, recent teams have included at least one economist. Such reliance on economic analysis may even the playing field, particularly for developing countries.

Although WTO Members inevitably carry out the first type of economic assessment, very few Members actually prepare for the second type of economic assessment before bringing their disputes to the WTO. This has proven to be a dangerous practice, given that once the panel process starts, it is conducted fairly quickly, which limits the time for additional preparation by the parties. Thus, even though the second type of economic assessment is not strictly necessary, prudence dictates that Members should still carry out these economic assessments in preparation for what they may encounter at the time-limited panel stage. Whether technically required or not, completing an economic analysis is prudent in nearly every type of WTO dispute.

4.3. Political Assessment

The political disposition of a government at any given time certainly also plays a role in whether that government decides to bring or even defend a WTO dispute as it may affect both the prospects of implementation and future trade relations. Argentina, Brazil, China, the EU, and the US are some of the major participants in the WTO

dispute settlement system for whom political considerations are weighed into the determination of whether or not to bring a dispute. But, also smaller countries face this difficult decision, in particular when cases are brought against larger trading partners and when fears related to political or even trade relations persist.

One of the most famous examples in this regard is the case of Antigua and Barbuda in *US - Gambling (Antigua and Barbuda)*.²⁵ Antigua and Barbuda faced significant political decisions and an extremely difficult process in which cabinet ministers had heated debates regarding whether to bring a case against the US. There was significant fear of backlash, especially since the island state receives aid from the US and is an importer of many products from the US. Furthermore, even if Antigua and Barbuda were to win the case, how would it retaliate in the face of non-compliance? Antigua and Barbuda also faced uncertainties with regard to properly representing the interests of the private sector and the impact bringing the case forward might have for future investors. Finally, Antigua and Barbuda considered that it might have to deal with the potential for overly exuberant litigators who might seek to bring the case for reasons that might not align with the proper stakeholders' interests.

Later in the dispute, when analyzing the challenges involved in implementing the authorized countermeasure, Antigua and Barbuda also dealt with the question of the public image of the country and the repercussions of its reputation on the level of foreign direct investment (FDI). Finally, Antigua and Barbuda was portrayed in several media outlets as carrying out a policy that encourages gambling and degradation of public morals. This, the country found, could discourage future investors seeking to invest in a transparent and democratic country which respects the principle of the rule of law. Also, in the highly religious population this portrait caused severe discomfort.

The case of Antigua and Barbuda in *US - Gambling* is by no means the only instance where a country faced such power asymmetries and thus decided to refrain from certain actions for purely political reasons. In fact, ICTSD has found that those

25 *US - Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, WT/DS285 (2003).

countries with little WTO dispute settlement experience tend to first engage in political assessments as they consider the potential of retaliation rather high.

5. Managing Litigation - the Internal Front

International trade litigation, similar to negotiations, has two basic fronts: internal and external.²⁶ The internal front is focused on managing the different ministries or agencies *within* a government (e.g. the departments of trade, agriculture, and foreign services). The external front, on the other hand, is focused on managing each of the different actors *outside* of the government – e.g. industry, non-governmental organizations (NGOs), and other countries. This section focuses on coordinating the different actors on the internal front, while the following section focuses on managing the different actors on the external front.

Countries tend to focus on the external front of litigation; this often results in an internal front that is less prepared for litigation. While countries generally have one agency in charge of litigation, many have failed to recognize that litigating a trade dispute often has quite large effects on a number of different ministries within one government. Furthermore, the ministries affected by the litigation often have diverging interests on the issue, which can make a single WTO dispute quite complicated. An agriculture ministry will, naturally, want to protect the farmers; an environment ministry, on the other hand, will seek to protect the environment; and a ministry for foreign services will be concerned with issues completely outside of the previous two ministries' scope. One can easily imagine how a single trade dispute can become quite complex.

To deal with these coordination problems, developing countries should implement a single mechanism to serve as a focal point and an inter-agency mechanism for decision-making throughout the process of litigation. Countries must also consider how to implement these strategies at the various stages of a WTO dispute.

5.1. Focal Point

There is an obvious need for governments to provide one clear voice in the litigation of a WTO dispute. However, this is made difficult by the amount of different interests that could possibly be relevant in a WTO dispute. In order to achieve this goal, there are three basic approaches to creating a focal point for WTO dispute settlement cases:

- A special WTO dispute settlement unit as a legal arm within the same agency that manages general WTO issues (e.g. trade or commerce ministry, or where applicable, the foreign affairs service).
- A separate legal unit from the agency that manages general WTO issues (e.g. a ministry of foreign affairs or the office of the attorney-general).
- A mix of the first two options, where the agency that manages general WTO issues would be jointly responsible for WTO disputes with the other agency's legal unit.

Developing countries have used varying approaches, and there is no one-size-fits-all solution to the problem of coordination. Argentina, Brazil, and China have all used the first approach; while Kenya, Malaysia, and Singapore have adopted the second approach. Furthermore, India and Thailand have adopted the third (mixed) approach. For developing countries attempting to implement a focal point, it is important to consider their specific needs when choosing between the approaches.

One important aspect of the focal point is the role of the government's office in Geneva. Representatives in Geneva serve as the outpost to gather information on the ground and report it back to the country's capital. They also provide a human touch to the actions of a government and provide the home government with a better understanding of the situation in Geneva.

One issue arising with representatives in the Geneva office is the tendency to frequently rotate diplomats to different locations. Such frequent

²⁶ This section is largely based on the background study by Virachai Plasai. See Virachai Plasai, *Coordinating Trade Litigation*, ICTSD Programme on International Trade Law Issue Paper No. 14, (ICTSD, Geneva, 2013).

rotation, however, can deplete the knowledge and expertise in the Geneva office, which can be particularly hurtful when a rotation overlaps with an important proceeding. This issue can be managed by specifically assigning diplomats with trade experience to the Geneva office and by handling their postings somewhat independently of other rotation systems, for instance, by allowing for extensions if the need arises.

5.2. Inter-Agency Coordination Mechanism

While one ministry may be in charge of international trade disputes, the industries affected in these disputes may fall under other ministries, such as agriculture or tourism. In many of the developing country Members, there is a staggering lack of coordination among the various government agencies or departments involved in trade, even where a focal point, as described above, exists. This means that there is a lack of a single mechanism for the collation of information or assignment of responsibilities for the various aspects of a dispute. As one may anticipate, such lack of coordination impedes a Member's preparation for WTO disputes.

Brazil's solution to this problem was the 2009 creation of the Chamber of Foreign Commerce. This body is composed of officials from six or seven ministries that are involved in international trade. The Chamber of Foreign Commerce is the authority responsible for deciding whether Brazil proceeds with a trade dispute. Thus, private sector players may address their problems to any one of these ministries, but they will have to be debated by the Chamber before any decision is made.

China, the EU, Singapore, and the US are examples of WTO Members that have a single agency of government (or key contact point) to which private individuals and industries may address their trade-related problems.

China's internal structure is worth analyzing in further detail. China generally has eight lawyers dedicated to WTO dispute settlement. These lawyers are in the Ministry of Commerce and not in the Ministry of Foreign Affairs. Since 2003, China has had one division dedicated to dispute settlement. Recently, China has had two and a half persons working on each current dispute. Also, when China is a complainant or respondent, they

engage the in-house counsel, private law firms from China, and foreign counsel. China's system results in a three-tier system for each dispute, but they all work together.

Quite to the contrary, in the much smaller Costa Rica, trade policymaking, trade administration, the administration of treaties, and trade disputes are the responsibility of the Minister of Foreign Trade. This Ministry was established in 1996 and has provided permanent guidance with regard to dispute settlement. It has a unit dedicated to the application of Costa Rican treaties that has played a large role in the application of their litigation as well as ensuring compliance with treaties by their trade partners. This unit has a permanent coordination structure with other ministries, for instance, the Agricultural Ministry, Economic Ministry, and Finance Ministry. Costa Rica also has dispute settlement and legal units, which have served as the main focal points within the Ministry of Foreign Trade.

5.3. Coordinating the Different Stages and Aspects of a Dispute

Coordination of the government's litigation strategy should be completed before the first stage of the dispute has commenced as it will enable the country to follow a consistent strategy throughout a case and to react to newly arising issues in a quick but also coherent manner. In either case, irrespective of who is involved in the team and who provides what type of information, the leader of the team needs to understand both the technical aspects and the diplomatic issues at play in the dispute in order to truly lead an entire dispute.

WTO Members have also come to the realization that the optimal WTO dispute settlement teams are multidisciplinary. With the increasing complexity of disputes, legal knowledge alone does not suffice. WTO Members, including Brazil and Mexico, now include engineers and economists in their dispute settlement teams with these team compositions yielding positive results in recent disputes, such as the *US - Upland Cotton* dispute. This multidisciplinary approach, however, also depends on the level of the WTO dispute participation of a WTO Member and the political disposition of the government at a given time. Egypt, a less-active WTO Member, introduced economic assessments into its WTO

dispute assessment process, but funding was not made available to enhance this exercise, and the economists involved in the project were eventually transferred to other ministry departments.

The unity of different government agency interests into a single policy and strategy at the WTO is of paramount concern. Developing countries must ensure that they have the proper tools in place to manage the numerous interests that are generally involved in a single trade dispute. Despite this need for a strategy and a designated authority to be determined at the outset, agencies must continue to be coordinated and updated throughout the entire process. Achieving such consistency will allow a government to focus on winning the dispute at hand, instead of being concerned with domestic disagreements or politics.

6. Managing Litigation - the External Front

The external front of trade litigation involves four other actors that also have the potential to play a role in a dispute. Foreign governments can often play roles in disputes as co-complainants or third parties. Local industries in the exporting country or business partners in the importing country will nearly always play a role in disputes, as they are the actors directly affected by the outcome of the cases. In many cases, if not all, private counsel has also played a very important role in preparing and actually litigating the dispute at the WTO. Finally, international civil society (e.g. NGOs) and academics also have the ability to play a role in disputes. Their roles can include submitting amicus briefs, providing information and data to the parties to the dispute, and playing a role in the way the media perceives and hears about the dispute.

This section will focus on the aspects of each different actor that developing countries need to consider. Each actor has the potential to play a very positive role in a WTO dispute, but there are also concerns that must be addressed proactively to ensure that this happens.

6.1. Foreign Governments

As third parties, foreign governments can be a blessing or a curse, since they may support the claims of the complainant by submitting new arguments, or they may add an additional workload to the complainant by aligning themselves with the respondent. In view of the different positions they may have, it is advisable to know where third parties stand before approaching them with a particular request. The co-complainants, on the other hand, should be looked at as partners in designing the litigation strategy, drafting the submissions, and sharing data.

Brazil found that it can be beneficial to build a coalition of countries who are all affected by a particular measure. For example, in the *US - Offset Act (Byrd Amendment)* case, Brazil was able to join with eight other WTO Members as the complainant and was also relieved of much of the work as the European Communities took the initiative to lead the suit.²⁷ Ecuador also had a favourable experience in *EC - Bananas*. The US, a co-complainant, and Ecuador developed a close relationship throughout the proceedings. The US presence also served to enhance Ecuador's bargaining power.

6.2 Local Industries in the Exporting Country and Business Partners in the Importing Country

As discussed above, WTO disputes are often triggered by, and relate to, private sector interests. Governments of WTO Members must necessarily engage with the private sector to ensure coherence in their management of WTO disputes.

Industry can provide detailed information about a measure, because private companies are the actors who suffer the consequences; therefore, the complainant should work very closely with the industry affected and, to the extent possible, try to reach a consensus with the main stakeholders before launching the dispute. In addition, the increasing complexity of WTO disputes makes it

²⁷ *US - Continued Dumping and Subsidy Offset Act of 2000*, WT/DS217/234 (2000).

necessary for governments to have a unit that can 'translate' for the industry and other governmental agencies the legal issues under discussion in the dispute as well as the consequences they may have.

Also, in cases where the industry has prepared the basis of a dispute, including the initial economic and legal assessment, the government should carefully assess the merits of the case itself as well as the impacts for other, non-industry interests. To that end, a good approach would be to play the role of the respondent to be sure of the legal foundations of the arguments presented by the industry.

As described above, it is recommended that there be a single agency of government or a key contact point for private industries to direct their problems. This ensures that there is a harmonious approach to dealing with trade enquiries or complaints. The private sector players in the US are empowered, through Section 301, to compel the government to initiate a trade dispute or to retaliate. However, Section 301 actions have been invoked only once over the last ten years. Indeed, some WTO experts consider this action to be redundant given that private industries in the US have access to the US Trade Representative (USTR) where they may address their complaints. Thus there would be no need to compel government action.

Other than coordinating complaints and trade enquiries, the government should also interact with the private sector in the gathering and dissemination of information. Some WTO Members, like Mexico, did not initially have a public policy regarding how to deal with industry members. Members were therefore surprised to learn, after years of WTO disputes on zeroing, that Mexico's stainless steel industry was being affected by the US zeroing practice. This led to a deliberate action by the government to increase interaction with the private sector to be up to date on information affecting their industries.

Taiwan's experience in *EC - IT Products (US, Japan, Chinese Taipei)* provides useful insight into gathering information from local industry.²⁸ Because the IT industry provided for a significant part of the country's economy and trade, the industry already had an open line of communication

with the government. Coordination of information was implemented in three phases: dialogue, input, and education. During the dialogue stage, the government and information technology (IT) industry (as well as all other actors) were able to have a two-way conversation. Also, the government provided the industry with information from the initial assessment of the case. Taiwan refrained from revealing the government's political considerations, instead focusing on legal perspectives and the potential beneficial outcome. At the input stage, the Taiwanese IT industry considered its ability to cope with changes in the way it might be treated by the other party. For example, when the EC issued a new directive that it would nullify the zero percent tariff prescribed in the Information Technology Agreement (ITA), the industry had to determine a way to cope with such a change. The main focus of the input stage, however, is for the government to hear feedback from the industry. Finally, in the education stage, both the Taiwanese government and the IT industry coordinated their information and reached an effective, coordinated, and mutually agreed upon position from which to begin the WTO dispute.

Furthermore, the dissemination of information by the government to the public may be a tool to manage public expectations, thereby avoiding the escalation of trade problems to formal dispute levels. Indeed, Singapore employed public dissemination of information in this manner to avoid the escalation of a dispute relating to the trading of Malaysian shares in Singapore during the Asian financial crisis.

Thailand, on the other hand, experienced a much more difficult relationship with industry in *EC - Chicken Cuts (Brazil, Thailand)*.²⁹ Much of the affected industry had supported Thailand's position until there was an avian flu outbreak. In response to the outbreak, many of the companies in the industry that were supporting Thailand shifted their positions, which severely harmed the government's legal arguments and its overall position in the dispute. It is only one example that underlines that developing countries must be wary of the ever-changing interests of industry and be ready to litigate disputes without its support.

²⁸ *EC - Tariff Treatment of Certain Information Technology Products*, WT/DS375/DS376/DS377 (2008).

²⁹ *EC - Customs Classification of Frozen Boneless Chicken Cuts*, WT/DS269/DS286 (2002).

Another issue is the funding of disputes by local industries, which is a disputed and controversial subject. For some developing countries, the general rule is that the industry is responsible for the costs of the dispute; only in situations where the industry cannot fund the dispute should the government cover costs. However, other developing countries have expressed concern and are wary of the government's ability to maintain independence when the dispute is not solely funded by the government.

Nevertheless, the private sector has served as a source of funds for WTO disputes. Several developing country Members, including Antigua, Barbuda, Brazil, the Philippines, and Thailand have relied on their private industries to fund their WTO disputes. This is particularly useful when there is no budget allotment for WTO dispute settlement, as is often the case for many developing country Members.

However, as mentioned above, WTO Members must be cautious in accepting private sector funding and must retain control of the conduct of the dispute despite the private sector funding. Brazil managed to do so, but Antigua and Barbuda was not as successful, as the *Gambling* dispute shows. This caution has led some Members, like China, not to accept private sector funding. Instead, China has set aside funds in its budget specifically for WTO dispute settlement.

Regardless of the area of public-private interaction, a Member's successful WTO dispute preparation must involve their government (in its capital and as represented in Geneva) working with the private sector.

6.3. Handling Private Counsel

For those developing countries that lack the necessary legal capacity to participate in the WTO dispute settlement on their own, private counsel is an indispensable actor in a dispute. These countries are often confronted with the question of what legal firm they should hire. To make this decision, some considerations should be taken into account, such as whether the firm has offices in Geneva, the type of experience it has on WTO disputes, and whether it is in a position to lobby in the country that applied the measure under challenge.

The experience of Ecuador, which was involved in the *US - Shrimp* dispute in 2005 but had no previous WTO knowledge, is telling in this regard. Ecuador decided to hire US lawyers for a number of reasons: they had good understanding of the US shrimp industry; they had access to the USTR; and they knew how to lobby in the US Congress.

However, after having hired US lawyers, Ecuador realized that there were many more things that needed to be considered. For example, even with the aid of private counsel, Ecuador's mission in Geneva needed to be just as prepared as its private counsel. Also, there were simple issues, such as the time difference between Ecuador and the US and the US and Geneva which made it difficult to discuss the filing of the submission, as well as the counsel not knowing exactly how to present the submission, i.e. number of copies and to whom to submit them. If a developing country has procedural questions like these that cannot be answered confidently by private counsel, it should not hesitate to ask the WTO Secretariat directly.

Furthermore, it was important for Ecuador to note the interests of private counsel. In their view, it is nearly always in private counsel's interest to litigate a case, which might lead them to provide advice favouring that outcome. In this regard, Ecuador found that it was very important to keep full control over the litigation, even though private counsel was doing much of the legal work.

6.4. International Civil Society and Academics

International civil society and academics can provide useful information as was the case in *EU - Export Subsidies on Sugar* and the *US - Upland Cotton* disputes, where the complainants used technical information prepared by NGOs to support their claims. Furthermore, lobbying campaigns can be used as an effective tool to gather support among these types of actors.

The coordination with the media deserves particular attention due to the influence it has on the general public. For this reason, the parties to a dispute should be very careful in how they manage and coordinate the flow of information with the media, bearing in mind the differences between local and international media; in that regard, in dealing with the international media the partnerships that can be built with other

countries with similar interests and positions can be very valuable. Finally, signing confidentiality agreements on the type of information that can be given to the media can be useful.

6.5. Conclusion

There are numerous actors who might play a role in a WTO dispute. Just as was the case regarding inter-agency coordination, the goal is to manage all the actors who play a role so that a coherent policy and strategy exists. It is important to use other actors in a beneficial manner, but many developing countries have referenced the need to ensure that control over the case remained in the hands of the government, and not with the affected industry or private counsel. Developing countries will also gain from knowing the relevant actors for the other party to the dispute, because such information might aid in understanding the other party's policy and strategy.

7. Implementation and Countermeasures

The reasons behind the limited use developing countries make of the system of retaliation and implementation of WTO rulings and recommendations have often been discussed.³⁰

The general view is that the system is ineffective for small economies, because it fails in the objective of inducing compliance of Members with a larger share of world trade. The WTO rules on retaliation impose, *inter alia*, a quantitative limit on the amount of retaliation that may be applied. Pursuant to these rules, the level of retaliation has to be equivalent to the level of economic damage caused by the original inconsistent measure. Therefore, it is often argued that retaliation is ineffective in situations where a great imbalance in terms of trade volume exists between the complaining party seeking retaliation and the non-compliant WTO Member. Indeed, an equivalent level of economic sanctions does not have the same impact on countries with unbalanced economic powers.

In addition, since the suspension of concessions or other obligations normally takes the form of increased tariffs on imported goods, countermeasures actually result in increased prices that domestic consumers must pay for those goods. Insofar as developing countries often are in a situation of export dependency *vis-à-vis* the country against which they wish to retaliate, countermeasures often amount to self-imposed wounds.

Regardless of the system's effectiveness, whether a country loses or wins a WTO dispute, one will likely need to take steps domestically after a ruling has been adopted. This concerns situations where the losing party is required to make legislative or administrative changes to bring its system into compliance and situations where the winning party pursues countermeasures to induce compliance by the other party. On the one hand, developing countries implementing a negative ruling may face particular institutional and coordination challenges. On the other hand, as countries entitled with a Dispute Settlement Body (DSB) authorization to suspend concessions or other obligations against a major trading partner, they need to choose the amount and sector in which they are not economically dependent in order to minimize the detrimental impact that may otherwise flow from trade retaliation. In either case, governments will need to coordinate among various actors at the domestic level. Brazil and Mexico have provided examples of the issues involved in creating retaliatory measures, and Colombia has grappled with complying with a WTO ruling.

7.1. Retaliation

In Brazil's experience, the first step in the process of retaliation is that, prior to requesting a DSB authorization to suspend concessions and other obligations, a phase of information-gathering needs to be completed. The objectives of gathering information are: (1) understanding the impact and effect of retaliation on the economy as a whole with the help of the industry that assists

³⁰ This section is largely based on the background study by Carolina Saldanha-Ures and Diego Ures. See Carolina Saldanha-Ures and Diego Ures, *Compliance and Countermeasures: Experiences to Follow and Avoid in International Trade Law*, ICTSD Background Paper No. 5 (ICTSD, Geneva, 2012).

the government in the choice of countermeasures; and (2) assessing the effects the imposition of countermeasures has on the implementing Member as a means to determine the incentives for imposing countermeasures. The objective is to undertake a cost-benefit analysis with the view of comparing the impact of the illegal measure on the sector targeted with on the economy as a whole and the costs of undertaking action and imposing retaliation. For Brazil, the key to a successful process was the involvement of all actors in the society from the earliest stage of the process, with the private sector acting as an important source of knowledge for the government.

Brazil's experience in the *US - Cotton* case illustrates the above-mentioned general guidelines. In this case, the Brazilian government created a group to examine trade flows between the US and Brazil. As a result of this analysis of trade flows, all products where no alternative supplier existed in Brazil were excluded from the list of products on which retaliation could be imposed. The remaining 222 products on the list were selected on the basis of 17 years of statistical trade data. In addition, a process of consultation was conducted to collect input from the industry and consumers via one-page questionnaires followed by a series of hearings. The objective was to calculate the effects for each potential increase in tariffs on the basis of the different price elasticities. Brazil was able to practice a high level of transparency and achieved the involvement of different actors in Brazilian society through this process of public consultations, which explains the successful outcome of the procedure.

Beyond gathering information, Brazil found that it is necessary for countries to (1) choose the best available forum; (2) ensure that local legislation allows for retaliation; and (3) identify product groups to be targeted in retaliation proceedings.

7.1.1. Fora for retaliation

The choice of forum also needs to be factored into the decision-making process. Brazil found that the WTO is the best option available for retaliation insofar as the dispute settlement mechanism is the most mature of all international dispute resolution systems, both in age and expertise. It is also the

most efficient in securing and institutionalizing a mutually agreed solution (MAS). The 'diplomatic touch' was one of the major avenues to counterbalance the political dependency of the Member imposing retaliation *vis-à-vis* the non-complying Member for Brazil.

Selecting a forum in retaliatory proceedings is an issue that has also been faced by Mexico. Mexico has had recourse to the WTO system in one occasion in the *US - Offset Act (Byrd Amendment)* case and twice under NAFTA. While the WTO system has detailed rules and requirements and foresees a detailed procedure of arbitration, the NAFTA system only requires that the retaliation is equivalent to the level of harm caused by the inconsistent measure. Under the DSU, the authorization and imposition are monitored through the DSB, while in NAFTA the imposition of countermeasures is merely subjected to the other party's scrutiny. In the event of a disagreement on the imposition of countermeasures, the party subject to retaliation is entitled to bring a case under NAFTA; however, there is no third-party determination of the level or type of retaliation.

7.1.2 Local legislation

For a retaliatory measure to be implemented effectively, it must, of course, be enacted through a proper legislative measure in domestic proceedings. Developing countries must, therefore, adopt the measure in a manner that is consistent with their domestic legal systems.

Mexico has dealt with constitutional issues in both WTO and NAFTA disputes by using presidential decrees. When importers have challenged the constitutionality of those decrees, domestic Mexican courts have upheld the president's authority to make such decrees based on the right to respond to emergency situations. All countries need to undergo similar research to ensure that retaliatory measures are not undermined by a domestic issue. It is important to choose the adequate legislative instrument, with the adequate hierarchical level in the national body of laws, to suspend concessions or other obligations. The choice of the instrument must also be consistent with the nature of the suspension itself, which is conceived as a temporary solution.

7.1.3. Identifying targeted product groups

Identifying the industry or product group that a retaliating country should target might be the most difficult step in this process. Article 22.3 of the DSU states the general principle that retaliation should be on products in the same sector, but allows a country to retaliate in another sector if retaliation within the same sector would be ineffective.

At the stage of drafting the new measures once the DSB authorization of countermeasures was requested, Brazil focused on adapting the new legislation to the new context. The challenge was in interpreting long-undertaken commitments in light of the new context. In the legislative process, support needed to be drawn from the sector concerned by the challenged measure. The government also needed to gain support from private industry in order to pool intelligence and financial resources for successful litigation. This ensured that Brazil had sufficient financial resources and political capital before undertaking legislative changes.

Cross-retaliation - retaliating against another sector - can be especially difficult when applied to intellectual property rights (IPR). Antigua and Barbuda experienced difficulties in *US - Gambling*, where the industry pushed for USD 3 billion of retaliation, which severely limited the industries in which Antigua and Barbuda could retaliate, because they imported food and most manufacturing products from the US. For this reason, Antigua and Barbuda requested cross retaliation on IPRs. While the amount of retaliation only ended up being USD 21 million (annually), actually enforcing these measures proved to be very difficult in practice. For instance, the feasibility of setting up a factory to print books or manufacture software and then cease this activity when the exact amount of retaliation was reached was not considered feasible.

In addition, the global integration in goods and services was an additional obstacle in the selection of IPR protected software or other goods and services. Further, local producers of intellectual property were very concerned about what implementation of countermeasures would mean in terms of protection for their IPRs. Also, Antigua and Barbuda had not been implementing

the WTO Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS), which further complicated the imposition of countermeasures.

In that particular instance, the US eventually revoked the relevant commitment in its services schedule and entered into compensatory arrangements with all trading partners entitled to claim interest except Antigua and Barbuda, who refused to settle. In the context of the modification of commitments, Antiguan industries did not see the benefits of non-monetary compensation. In this context, the government criticized that industries have had unrealistic expectations regarding retaliation, insofar as they expected enhanced market access to be granted as a result of the imposition of countermeasures.

Another form of cross-retaliation is carousel retaliation, in which a Member periodically rotates the products or services on which the retaliation measures are applied. Mexico has viewed carousel retaliation as a successful tool for implementing countermeasures and giving relief to the country as a whole. Insofar as importers facing retaliation change over time, the economic harm in form of increased tariffs is redistributed among importers. That is why the opposition changes; while the government may face pressure and opposition from some sectors, there are also new sectors that will support the imposition of the countermeasure on a certain product. Overall, Mexico found that suspending concessions or other obligations was an effective means to achieving a permanent solution to a particular dispute.

7.2. Implementation of a WTO Ruling

Just as a country seeking retaliation, a country implementing a ruling must coordinate with a number of different institutions. To begin, the different governmental bodies involved in legislative or administrative proceedings, such as ministries, parliaments, or customs authorities, must all be informed and working together. Furthermore, sub-federal and local governments must be coordinated if they are required to take action. Beyond internal government, domestic industries and regional partners in free-trade agreements (FTAs) that are affected must be coordinated with so that implementation of the ruling is done in a way that takes into account all interests.

Colombia's experience in *Colombia - Ports of Entry (Panama)* provides an example of a government grappling with these different issues.³¹ In this case, two measures were found to be WTO inconsistent: (1) indicative prices applicable to specific goods and (2) restrictions on ports of entry for certain goods. Colombia was granted a reasonable period of time (RPT) of eight months to implement the ruling. Because these measures had been put in place to address the sensitive issue of smuggling in Colombia, implementation in this case did not mean that Colombia would simply withdraw measures, but rather engage in a thorough revision of the legislation.

Colombia faced three main issues with implementation. First, while in Geneva the visible head was the mission, in the capital, there were shared competences between the Ministry of Commerce and the tax authorities. This first challenge, therefore, required explaining international trade obligations to tax authorities. Some of the tax authorities attended the panel meeting in Geneva, which was useful when it came to the implementation stage. However, Colombia believed that further integration needed to be achieved between the actors sharing competencies.

The second type of challenge consisted in dealing with divergent views on how to implement the ruling. In this particular case, this problem was minimized, because the Colombian Congress did not have to act in order to change the regulation. However, the drafting process has generally been further complicated the more actors that are involved in the process.

Finally, the third challenge was that implementation of a DSB ruling or recommendation required permanent internal surveillance. Several months after the implementing measures were in full conformity, the Colombian customs authorities made amendments that resulted in reviving the original inconsistent measures. These had to be repelled in order to avoid further challenges in the WTO.

8. Actively Building Legal Capacity

To varying degrees, developing countries have continued to lack strong legal capacity, which is reflected in the numerous disputes that could be brought but remain unchallenged.³² Developing countries have faced numerous obstacles in building such capacity. It has been difficult for governments to recruit young international trade lawyers, because the field of international trade is so small, especially in developing countries just learning how to use the WTO system. Then, once governments have hired lawyers, there are issues with the ebb and flow of the demand for their work, since disputes are difficult to predict. Furthermore, governments have experienced high turnover of officials who have trade law experience, because they have been rotated through different ministries. In this context, there are numerous logistical issues, specific to international trade law, that developing countries must overcome.

Since the WTO entered into force, every Member has been, effectively, in a permanent training course on WTO law. It is a constantly evolving area of law with an increasing amount of jurisprudence to be derived from panel and Appellate Body reports. The development of expertise in and enthusiasm for international trade law contributes to the diffusion of WTO experience, which can strengthen a WTO Member's overall capacity to make use of the DSU. Taking advantage of existing capacity-building opportunities, such as joining a dispute as a third party or using the academic and training programmes in Geneva and elsewhere are obvious starting points. This section discusses the effect of a country's size on legal capacity, the different actors involved, and strategies that developing countries can and have used to actively build their legal capacity within the WTO.

8.1. Effect of a Country's Size

With respect to building legal and economic capacity, there is no one size fits all approach for WTO Members. Members with large economies,

31 *Colombia - Indicative Prices and Restrictions on Ports of Entry*, WT/DS366 (2007).

32 This section largely builds upon prior work by ICTSD. See ICTSD, *Dispute Settlement at the WTO: The Developing Country Experience*, International Centre for Trade and Sustainable Development Information Note, (ICTSD, Geneva, 2012).

be they classified as developing or developed (China, the EU, and the US) can safely anticipate that they will be involved in several disputes at the WTO every year. Conversely, the smaller economies within the WTO may have participated in very few WTO disputes. For example, Antigua and Barbuda and St. Lucia have both only participated in one dispute at the WTO since 1995. The resources dedicated to WTO dispute settlement will and should differ for these two types of Members. Determining how to allocate these resources is what is referred to as the 'make or buy decision'.

For WTO Members that are very actively involved in dispute settlement, it is cost-effective to have a permanent staff dedicated to WTO dispute settlement. The same cannot be said for the less active participants. For these Members, their options lie in seeking help when the need arises, from private law firms or from the AWCL.

However, even among the larger economies there is a notable difference in the number of staff assigned to disputes. For Brazil and China, for example, each averages at least two members of staff working full-time on a dispute, while for the EU and the US, due to the sheer volume of disputes, it is usually only one member of staff who works full-time on a given dispute. The result of strained resources has been that all WTO Members, to varying extents, engage private law firms to assist in their WTO disputes. In these cases, however, it must also be kept in mind that even working with external counsel, whether through private law firms or the ACWL, requires some expertise at the domestic level. Not all decisions can be left to the counsel, in particular, where they concern other foreign affairs interests that might be advanced in other non-trade adjudicative mechanisms or negotiation fora. Also, expertise is required for the very first step of reaching out to private counsel - for knowing that it is necessary to reach out - as well as for the eventual steps of implementation and retaliation, should the need arise.

For that reason, despite these differences in size, all WTO Members have recognized the need to build capacity in the area of WTO dispute settlement. Various tools have been suggested in this regard, as highlighted below.

8.2. Actors

Identifying the different actors who must be trained is an important step in building legal capacity, because the type of training differs greatly for each actor. Students, industries, NGOs, and government officials are all actors with specific training needs.

Students, for example, feed into industry and the government. Thus, it is important that they develop an interest in trade law and have economic incentives to study trade litigation. This includes a viable career path for the special skills they will develop. The presence of strong academics in trade law helps support a strong group of working professionals in the area. Furthermore, there must be incentives to go into international trade law as well as stay there. Sometimes students see a lack of career opportunities in this area, and making a government career in international trade attractive can be very helpful. Comprehensive approaches are good, but activism in developing legal capacity should be a lifelong learning exercise for individuals and a continual goal for institutions.

Industries and NGOs are another category of 'trainees', as both are stakeholders in trade litigation proceedings. Legal capacity for these groups needs to be 'bell-ringing awareness' as governments rely on these groups for early feedback on trade disputes. Industries and NGOs should have a baseline awareness and knowledge of WTO issues with specific training in some industrial sectors.

Finally, government officials and judges require a deeper knowledge of trade law, since these actors are often directly involved in trade litigation. In general, every official needs an understanding of what his or her government has committed to in the WTO or FTAs. However, the depth of training for government officials is need-dependent and can range from having good awareness to possessing specialized litigation skills.

8.3. Strategies

There are numerous strategies available for developing countries to train each of the actors mentioned above.

WTO Members that have a permanent mission to the WTO in Geneva have the opportunity to expose their staff members to the intricacies of dispute settlement. Many developing country members, like Singapore, participate as third parties in disputes to expose their mission staff to the dispute settlement process. This is an inexpensive but effective method of acquainting government officials with the dispute settlement process. In addition, some WTO Members, like Brazil and Mexico, have introduced internship programmes in their respective missions. These internship programmes allow young lawyers from the two countries to spend time at their respective Geneva missions and attend dispute settlement proceedings. For Brazil, the interns are sponsored by the Brazilian private law firms that are attached, while the Mexican mission has found more success in providing the internships to graduate students who later join the government.

This leads to the issue of retaining the lawyers who have been trained in WTO dispute settlement. For several WTO Members, international trade departments are linked to the foreign affairs ministry. These ministries are staffed on the basis of rotation, which means that a staff member trained in dispute settlement may, after the dispute settlement rotation, end up in a completely different department, leading to a waste of that potential resource. Brazil, China, and Mexico, among others, have responded to this potential of losing expertise by creating special legal or dispute settlement units within their various ministries. These units are permanently staffed with dispute settlement professionals who are excluded from the normal rotation practice. Thus, in addition to training, Members must also be careful to retain their trained staff where they would be most useful.

Still, with regard to legal units, Mexico has officials who are dedicated to managing not only the offensive interests of Mexico, but also its defensive interests. Thus, Mexico's officials examine some of the bills that are to be passed by their legislative body and advise the body as to the WTO compatibility of the proposed law. This means that there is potential to arrest the problem before it escalates to a dispute.

An additional avenue for building legal capacity is through 'skills transfer'. All WTO Members hire private law firms to help them with the conduct of their disputes. For the developing country Members, these private law firms tend to be from other countries. While some Members, such as Antigua and Barbuda, failed to capitalize on the presence of private law firm experts, other Members have created opportunities for skills transfer from international law firms to their local lawyers. In Brazil and China, for example, the hiring of law firms to assist in WTO disputes is a competitive process based on international bidding. However, every international law firm selected is required to collaborate with a local law firm to allow these local firms to gain the requisite skills and knowledge in WTO law, thereby increasing their capacity in the area.

Overcoming staff shortcomings caused by financial constraints is another problem that needs to be overcome. In this regard, Guatemala has been very successful at actively building its legal capacity for trade litigation despite a very limited number of staff being assigned to Geneva. Indeed, the mission in Geneva now provides legal service to the capital with respect to WTO issues rather than receiving guidance from the capital. However, the mission has been downsized from five to two people since the start of 2012, so its goal now is to encourage as many people as possible from other government agencies to participate in WTO courses and be involved in actual experience in order to spread expertise. Indeed, every time the mission is asked to provide a legal opinion, it tries to incorporate lawyers from the capital to get them involved in WTO law and help spread ministerial awareness and understanding of the country's WTO obligations. Guatemala is also attempting to establish an internship programme at the mission.

Countries such as Pakistan, on the other hand, have successfully made use of the AWCL to build its legal capacity through the junior secondment programme of the centre. The training of individuals at the ACWL can help member states by providing practitioners in the Geneva mission with a different take on trade disputes. Rather than tailoring one's strategy to the desired outcome for

one's country in a dispute, countries may choose to develop solutions with the understanding that both players have interests at stake and that eventually they will need to work together to solve a problem - even when a dispute is won, cooperation will be required at the implementation stage. This is a perspective that delegates can learn from working with the centre as ACWL always considers the case from the perspective of more than one country.

The most important element to overcome any of these capacity constraints, however, is awareness of WTO issues in the capital, the political willingness to make this a political priority, and a joint strategy for building capacity that involves all actors at the national, and potentially even regional, level. Mapping existing expertise, needs, and shortcomings is an important first step from where both awareness and eventually strategies can be built.

The ICTSD Programme on International Trade Law seeks to facilitate access to dispute settlement systems to enable developing countries to make use of the options that are available to defend their trade rights and advance trade objectives.

One of its priority areas focuses on strengthening legal capacity in developing countries. Over the years, the Legal Capacity Project has established a unique role in the trade law community. It generates research and analysis on the challenges posed by a rules-based system and builds the necessary international, regional and domestic networks for stakeholder cooperation and interaction.

For further information please visit: www.ictsd.ch/dsu

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