Coordinating Trade Litigation

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International Centre for Trade
and Sustainable Development

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LIST OF ABBREVIATIONS AND ACRONYMS

ACWL	Advisory Centre on WTO Law
DSB	Dispute Settlement Body
DSU	Dispute Settlement Understanding
EU	European Union
GATS	General Agreement on Trade in Services
GATT	General Agreement on Tariffs and Trade
US	United States
WTO	World Trade Organization

FOREWORD

Lauded as a major achievement of the Uruguay Round, the World Trade Organization (WTO) dispute settlement system is today characterized by a rapidly growing body of jurisprudence that has become ever more legalized and increasingly complex. This, in turn, has put demands on the capacity of Member countries seeking to engage in the system to advance and defend their trade interests. Developing country participation has increased dramatically since the time of the General Agreement on Tariffs and Trade (GATT), but just five countries account for more than half of all developing country complaints, while 75 countries have never been involved in a dispute either as complainant or respondent.

When the International Centre for Trade and Sustainable Development ICTSD asked 52 WTO Member states, including 40 developing countries, what they believed was the major advantage of developed nations in the multilateral dispute settlement system, explaining this unequal engagement, 88 percent responded that it was institutional capacity. *

Against this background of persisting capacity constraints in developing countries, ICTSD's Legal Capacity Project team works towards strengthening developing countries' legal capacity to empower them to fully participate in the multilateral trading system.

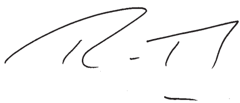
ICTSD believes that equal opportunity to participate in the rule making and rule shaping of the multilateral trading system is essential to ensure the system's fairness and conduciveness towards sustainable development. Only if countries can navigate this increasingly complex and legalized system will they be able to realize their development potential.

Following this conviction, ICTSD engages in a bottom-up assessment of conflict management and avoidance strategies deployed by developing countries of various sizes, geographical locations, and levels of development. Through a series of country studies, national and regional dialogues, and thematic assessments, we have developed a catalogue of real-life experiences and working best-practices for trade conflict management, which we use to offer cutting-edge training and technical assistance in the area of legal capacity.

The present study is the newest addition to this publication series. It is published together with five other studies, all focusing on specific steps in the litigation process, outlining experiences and best practices for managing these tasks at the national level. Multi-stakeholder coordination and communication are at the core of the assessment, which takes a real-life, non-academic approach to the issue.

Written by Ambassador Virachai Plasai, the paper provides a practical illustration of the importance of effective coordination on the domestic front by taking a closer look at the different stages of proceedings in a WTO dispute and the different roles played by the various stakeholders at each step. Recognizing that such coordination can represent a considerable challenge for many developing countries, the author illustrates how the building up of long-term human resource capabilities and awareness raising of WTO issues are central to the improved involvement and input of relevant actors.

We hope that you will find it interesting and insightful.



Ricardo Melendez-Ortiz
Chief Executive, ICTSD

EXECUTIVE SUMMARY

Coordination can be the key to a successful litigation outcome, particularly in the field of dispute settlement where the subject matter of the dispute often involves the competence of more than one government agency. During the WTO litigation process, starting with the consultation request and ending with the adoption of a ruling, various stakeholders need to be properly engaged to better ensure that dispute settlement is effective.

Member states have adopted several approaches to dealing with dispute settlement cases, often concentrating the task in one sole focal point tasked to handle all cases. This may be the Ministry of Commerce or the Ministry of Foreign Affairs or, as has been the experience in Argentina and Brazil , a specialized unit on WTO dispute settlement within the Ministry of Foreign Affairs. This paper explores alternatives, but concludes that a dedicated dispute settlement unit within the agency dealing with WTO/trade matters helps facilitate the development of expertise and institutional memory in dealing with WTO dispute cases while simultaneously eliminating possible rivalry among different agencies in dealing with trade litigation.

Each stage of the dispute settlement proceedings is examined by assessing the roles played by the various actors at each stage of proceedings, and identifying successful coordination strategies and approaches.

The study covers the following stages of dispute settlement: consultations, the request for the composition of a panel and the selection of panellists, the first written submissions to the panel, and first substantive meeting with the parties by the panel, the rebuttal submissions and second substantive meeting, and country responses to panel enquiries, then the initiation of appellate review, written submissions to the Appellate Body and finally the oral hearings at the appellate stage. In this regard, the study begins with a comprehensive yet accessible introduction to the general rules governing the various stages. It then proceeds to analyze the circumstances of each stage, assessing who is engaged at which stage and in which way and what approaches are most promising for successful coordination.

Finally, the study assesses various “dilemmas” countries might be confronted with. This includes, for instance, the following questions: how can countries maintain control of a case litigated by private counsel potentially even funded by private industry; who has the final authority to decide whether to bring a case or not – is it the purview of the foreign affairs ministry or its equivalent, or does it fall under the purview of different ministries? Moreover, which part of the government is responsible for a dispute involving agriculture, or one involving anti-dumping? Should one deploy one general “coordination division” or leave it to the different ministries and departments? Does the same department handle both cases, or do different departments handle different cases depending on the nature of the dispute?

The central question that this study seeks to answer is how do governments decide who is responsible for the case from stage to stage, and how does that entity effectively coordinate among all the actors involved throughout the whole dispute process in order to prosecute the case efficiently. Practical recommendations include the need to develop the experience and knowledge of in-house lawyers and the need to raise awareness of WTO issues among relevant stakeholders in order to enhance coordination. While recognizing that coordination will often represent a significant challenge for developing countries, the need to improve the involvement of stakeholders should not be underestimated.

1. INTRODUCTION

Coordination is a key element of success in many areas of work involving the World Trade Organization (WTO). Since WTO Agreements encompass a wide range of subject matters, no single government agency can cover every issue. This is particularly true in the area of dispute settlement where, more often than not, the subject matter of a dispute, no matter how small it seems, would involve competence of more than one government agency.

At home, coordination is not limited to only government entities. These entities in charge of trade litigation must identify, consult and interact with other stakeholders, particularly members of the private sector and civil society, in order to be inclusive and effective. WTO trade disputes often concern real, tangible interests, and not just symbolic values, conventional power politics, or traditional diplomacy. They often have serious implications for the economic performance of the country as a whole, as real profit or loss on the part of a domestic industry can have direct or indirect consequences on consumers, upstream or downstream businesses, and workforce. Although each trade dispute has its own specific attributes, there are common characteristics in all WTO litigation cases that should be highlighted, since an understanding will help ensure successful coordination at home.

First, although domestic industry is usually the driving force behind international trade disputes, the WTO dispute settlement system operates in an intergovernmental context. The rights and obligations at issue are those of governments, and only governments can be involved as parties in disputes. Private entities have no status within the system and can only act through the government agencies of their respective countries. It is therefore imperative that, through effective home coordination, the interests of the genuine stakeholders are adequately protected by the government representatives at litigation.

Second, the procedures under the Dispute Settlement Understanding (DSU) represent a mixture of diplomatic negotiations and litigation. The DSU allows negotiations between the parties at every step, from the request for consultation to the adoption of reports. As such, the parties can always engage in negotiations during litigation to seek substantive resolution of the dispute or to reach agreement on procedural points. As a general rule, a Dispute Settlement Body (DSB) panel is likely to look favourably on a common procedural approach suggested by the parties. However, this is true to a lesser extent during appellate proceedings as the Appellate Body has more control over procedural aspects than the panel.

In this regard, it may be useful to note certain differences between negotiation and litigation. On the one hand, through negotiation, countries try to establish rules or try to be forward-looking in their effort to find a common way out for the problem at hand. On the other hand, the parties involved in litigation try to solve problems that have arisen from certain existing common rules or from the implementation of such rules.[1] The main aim of litigation is not to create new rules or agreements to fit one's interest, but to protect one's interest within an existing framework.

Countries have more control over how they conduct negotiations than the litigation process. The DSU, for example, has deadlines and certain procedures set in place that the parties involved in a dispute are required to follow. In contrast, participants in a negotiation are very much in control of procedures, as they can set up their own methods and agree to their own timeline. Therefore, although the DSU allows negotiations during all steps of the dispute settlement process, the role of negotiations focuses on certain issues and aspects of the litigation process.

Whether involved in litigation or negotiation, a government agency in charge of trade disputes will likely find that there are two fronts to cope with — the internal front and the external front. Coordination on the internal front, it must be emphasized, is certainly as important and complicated as on the external front. A lack of coherent internal management within the country can easily translate into weakness on the external front, making it difficult to bring the litigation to a successful conclusion.

2. MECHANISMS REQUIRED FOR COORDINATION

2.1 Implications for Developing Countries

In order to effectively litigate a trade dispute at the WTO, it is practical to have a single mechanism at home that serves as the focal point for coordination among the various actors at the domestic level. These actors should include government agencies that are substantively involved in the subject matter or in charge of the measure at issue under the domestic law of the party concerned. Domestic entities involved may also include the private sector, civil society, a dispute's legal counsel, and a country's permanent mission in Geneva. Along with a central coordination point, it may also be desirable to have an inter-agency mechanism for decision-making in the litigation.

2.1.1 Focal point

In general, WTO members have used several approaches to set up a focal point to handle their dispute cases. The first involves the setting up of a special WTO dispute settlement unit as a legal arm within the same government agency that deals with general WTO issues. This could be the Ministry of Commerce or Ministry of Trade in some cases, or the Ministry of International Trade and Foreign Affairs in other cases. Members that have adopted this approach have all been actively engaged in the WTO dispute settlement system. Notable examples among the developed Members are the European Union (EU) and the United States (US). Several developing countries have also adopted this approach. For example, Argentina and Brazil have created a specialized unit on WTO dispute settlement within their Ministries of Foreign Affairs.[2] China has also set up a WTO Division within the Department of Treaty and Law, Ministry of Commerce, to handle WTO dispute settlement cases.[3]

An alternative approach to a dispute settlement focal point is to separate the legal unit responsible for dispute settlement from the agency responsible for general WTO issues. This may be the case in countries where a government department in charge of litigating state-state disputes in all fields — such as the Ministry of Foreign Affairs or Office of the Attorney-General — handles the dispute settlement aspect of WTO work, while the Ministry of Trade or Commerce is responsible for general WTO issues. Developing country Members of the WTO with this practice include Commonwealth countries, such as Kenya,[4] Malaysia, and Singapore.

A possible third approach would be a compromise between the two aforementioned approaches such that the government agency for general WTO issues and the legal unit in another government agency are jointly responsible for conducting WTO dispute litigation. Among developing countries that have opted for this approach are India, Thailand and Viet Nam. For Thailand, the Ministry of Commerce is the focal point on WTO negotiations while the Ministry of Foreign Affairs handles state-state disputes in all fields. For WTO dispute settlement cases, the Ministry of Commerce coordinates with the Ministry of Foreign Affairs, which supplies expertise on international law and sends officials to Geneva to serve as in-house lawyers at the Permanent Mission of Thailand to the WTO.[5]

The first approach is perhaps the best possible option. A dedicated dispute settlement unit within the agency dealing with WTO/trade matters facilitates the development of expertise and institutional memory in dealing with WTO dispute cases. At the same time, it eliminates any possible rivalry among different agencies in dealing with trade litigation. In-house lawyers from such a unit are likely to be familiar with trade issues and operate in the framework of real-world trade diplomacy. Therefore, they would have ample opportunities to monitor day-to-day developments in international trade as insiders and to participate in live trade negotiations either as legal counsel or as negotiators. They also have the opportunity in their careers to alternate between legal service

at the "outpost" in Geneva and the capital back home and, thus, can better master the different aspects of the legal work involved. This system of a dedicated dispute settlement unit provides valuable experience and insight that counsel from private practice or from a non-trade government agency can rarely match. As a result, special dispute settlement units can lead to a more efficient and realistic approach toward litigation.

However, one disadvantage of a dedicated trade dispute settlement unit could be that such a division might be cut off from the overall picture of national diplomacy and the general public international law environment. In strict legal terms, this means that in-house lawyers at a trade agency are rarely exposed to the mainstream development of international legal norms, such as those taking place in the International Law Commission; the Sixth Committee of the United Nations; and the international tribunal circuits, including the International Court of Justice, the International Tribunal for the Law of the Sea, the Permanent Court of Arbitration and other international arbitration tribunals. This more limited legal and diplomatic horizon could have a bearing on pleadings, since, in the WTO dispute settlement system, GATT/WTO law and public international law have more or less merged through the application of the customary rules of interpretation of public international law.[6]

The other two approaches lack the above advantages of a dedicated dispute settlement unit and can lead to rivalry among the agencies concerned and thus reduced efficiency in litigation. In these models, however, the litigation team can benefit from a broader perspective that normally results from greater exposure to public international law and a country's general diplomatic environment.

2.1.2 Inter-agency Coordination Mechanism

Efficient WTO litigation depends on a well-coordinated home front. Successful coordination, in turn, requires effective and speedy decision-making based on accurate and real-time information. As WTO disputes are generally multi-faceted and may involve the turfs of many agencies, the best model is perhaps to set up an inter-agency mechanism with decision-making authority. Variations of this idea include an inter-ministerial body that is competent to make recommendations to the government for a decision. The nature of dispute settlement decisions varies from dispute to dispute, and can range from making technical determinations to giving political or policy guidance relating to the dispute. The form and competence of this decision-making mechanism may also vary from country to country, depending on the prevailing domestic legal system and administrative structure. However, the role of this mechanism should be the same; it should make key decisions on relevant substantive and procedural matters in the best possible environment on the basis of comprehensive information inputs from all concerned and in a speedy fashion. Such a mechanism, when set up at the ministerial level, could also play a potential role in settling differences in opinion at the domestic level among government agencies.

A number of WTO Members already have some sort of inter-agency coordination mechanism in place. For instance, Costa Rica has the Trade Advisory Council, chaired by the Minister of Foreign Trade, while Thailand has the Committee on International Economic Policies, chaired by a Deputy Prime Minister, as an inter-agency coordination mechanism that makes decisions and gives policy guidance related to each country's respective WTO dispute settlement cases.[7] Brazil and Ecuador rely on the Inter-Ministerial Foreign Trade Chamber, or CAMEX, for determining policies and making decisions in matters related to trade in goods and services.[8] In the Philippines, an inter-agency mechanism has been set up for this purpose, with responsibility shared between the Office of Attorney-General and the Ministry of Trade.[9]

2.2 The Job

2.2.1 Focal point

It is indispensable for the focal point to coordinate litigation matters with the domestic government agency or agencies legally in charge of the measure at issue in trade litigation. These agencies have the important responsibility of assisting the focal point with pertinent information and data as well as relevant comments and policy direction throughout the dispute settlement process.

The focal point must also ensure coordination with stakeholders in the private sector and civil society. In many circumstances, these players can effectively complement and strengthen the role of government officials in the dispute settlement process. In particular, they can help identify potential cases that might be brought against another WTO member and give useful inputs – such as trade insiders' views, information on trade interests of the private sector, relevant business confidential information that in normal circumstances is not revealed or evaluations of the social and environmental impacts of the dispute – to support arguments in the written submissions and oral statements. Many of these informational inputs can be pertinent in forming "the bottom line" for a litigating Member in a given case. The private sector and civil society can also provide support to officials in the complex process of monitoring compliance with WTO rulings or recommendations. The DSU does not prevent each WTO Member from including representatives from the private sector in its delegation. As such, representatives from the affected domestic industry can participate actively to the work of the government agencies throughout the dispute settlement process even though they are usually not present at the oral hearings.

Private legal counsel is another important actor to be considered in the coordination process. The degree to which outside counsel is involved in a dispute may vary, depending on the level of permanent resources the Member has been able to invest in in-house lawyers. Even governments with the most qualified in-house legal experts may need to hire private counsel. This might be because in-house counsel is often overloaded with dispute cases, making out-sourcing necessary. In other scenarios, WTO Members may need to hire specialist experts in a particular area of law to assist their in-house lawyers in a specific dispute. Instead of hiring a private law firm, developing and least-developed countries that are Members of the Advisory Centre on WTO Law (ACWL) can also seek assistance from the Centre at a very advantageous rate at all stages of WTO proceedings.[10] Recourse to ACWL legal services thus comes in handy in cases where the budget for litigation is limited, owing to a lack of domestic resources or parliamentary cut.

It is often the in-house counsel that is mainly responsible for interacting with outside lawyers, who may be hired by the government and/or the private sector to assist with the case. For Members that have their own in-house legal experts on WTO dispute settlement, some level of coordination may still be required with private specialist lawyers hired by the private sector or by the government to assist with the case, especially to ensure that private lawyers observe the country's general legal policy. For Members without in-house legal expertise or Members that choose to outsource WTO litigation to independent lawyers under guidance and policy from government lawyers, close coordination with these lawyers is a must.

The role of the representatives in Geneva is also crucial for effective coordination at home. They are the "forward elements" or "outposts" of the legal arm of the capital, acting *inter alia* as an interface with the other parties, the Membership, and the WTO Secretariat. As such, they can fulfil valuable functions of gathering information, assessing the situation, and making recommendations. They also provide an element of human touch that can help convey to their respective capitals a better understanding of the situation at any given stage of litigation. This in turn will enable the focal point and the actors at home to make decisions that are more likely to best respond to the situation at hand. For this reason, Permanent Missions in Geneva increasingly have within their staffs at least one

diplomat or legal officer specifically in charge of dispute settlement. Depending on organization at the domestic level, the persons handling dispute settlement at various Permanent Missions may come from the Headquarters or different agencies, like Commerce or the Trade Ministry, Foreign Affairs, or Office of Attorney-General, among others.

2.2.2 Inter-agency coordination mechanism

As with other matters, different domestic agencies may maintain different positions with regard to litigating a dispute. This could be the case, for example, between the negotiators and the implementing agency, the latter of which would naturally consider its own measures legitimate and read its own legislation as being compatible with WTO obligations. The best mechanism is perhaps an inter-agency process, on an ad hoc or permanent basis, where viewpoints on decisions can be exchanged and differences reconciled.

In addition, some important policy decisions need to be made up front by a functional mechanism. The first important decision in litigation is whether or not to bring a case or whether to go through with a case or find alternative solutions in the instance of responding to a consultation request. Some issues involve political considerations and may require a wider range of government agencies to get involved. If no mechanism for inter-agency coordination is available, decision-making regarding litigation could be complicated, uncertain, and time-consuming.

If the inter-agency process could be at the ministerial level, it would have the potential role of settling differences in opinion among domestic-level government agencies. This is because there can be difficulties in coordinating a case where responsibilities in implementing WTO obligations overlap or lie within different government agencies that are not under the supervision of the same minister.[11] Thus, conflicting viewpoints and positions need to be resolved and decisions made collectively among the relevant ministers.

Also, coordination with the legislative branch is of crucial importance. Effecting this depends on each Member's constitutional system. However, in a democratic regime, the Parliament is usually vested with the power to regulate foreign trade and could have a say in, or at least could monitor, trade disputes. The more the Parliament is involved in decision-making in this area, the more coordination with it is necessary. The government agencies responsible for trade litigation are normally part of the executive branch. An optimal, real-time coordination mechanism must therefore be devised to ensure the best possible scenario for conducting an efficient litigation in the best interests of all concerned. It will not be helpful if each and every move of a Member in WTO litigation got bogged down by an absence of or delay in parliamentary approval.

3. COORDINATION AT VARIOUS STAGES OF THE PROCEEDINGS

In the WTO dispute settlement process, there are advantages and disadvantages to both being the complainant and respondent. The complainant has the obvious advantage in deciding to bring a case when it is ready while the respondent cannot choose when a case starts and may have limited time to get ready. On the other hand, the complainant has the burden of establishing its case before the panel, while the respondent only has to rebut the claims put forward by the complainant. In the sense that it may be more difficult to establish a case than to rebut it, the respondent might feel a bit less burdened than the complainant. Furthermore, the respondent is the party that will normally get "the last words" in both the oral and written parts of the proceedings, and this could give it some advantages in arguing a case.

Therefore, from the overall point of view of coordination, there may not be a radical difference between taking part in a dispute as the complainant or as the respondent. Rather, the bigger difference lies in the respective capacity of each Member to litigate a case. Developing countries and smaller economies, whether they are the complainant or respondent, are more likely to be at a disadvantage in litigation. In terms of coordinating the home front, their domestic structure and infrastructure, in particular, might not be as suited for the task as that of industrialized countries. Smooth coordination with government agencies, between government agencies, and with the private sector and civil society is no small feat.

This section will discuss each stage of the dispute settlement proceedings along with the roles played by various actors at each step. It starts with consultations, which is a pre-requisite to requesting a dispute settlement panel, and ends with compliance determination and the enforcement of panel and Appellate Body reports.

3.1 Consultations

3.1.1 The proceedings

Under Article 4 of the DSU, consultations are the first step of formal dispute settlement. The main aim of consultations is to "obtain satisfactory adjustment of the matter" without resort to litigation. However, if the consultations fail to settle a dispute within 60 days after the request, the complaining member may request the establishment of a panel.[12] The formal prerequisite of prior consultations is unique and constitutes a feature that distinguishes the WTO dispute settlement system from most domestic judicial systems and other international tribunals.

All requests for consultations must be submitted in writing and must give the reasons for the request, which includes identifying the problematic measures at issue and an indication of the legal basis for the complaint.[13] In practice, such requests for consultations are very brief and may not need to be more than one or two pages long.[14] It should be noted that the request for consultations may be taken into account in subsequent panel or Appellate Body deliberations, but it does not directly affect the scope of the dispute.

While the complaining party can address the request for consultations to the responding party, it is required to notify the DSB and relevant WTO councils and committees of its request for consultations.[15] The notification to the DSB can be sent to the Council Division of the WTO Secretariat, specifying the relevant councils and committees that also need to be notified.[16] The Secretariat will then take care of its distribution to all specified bodies.

The responding party needs to respond within 10 days after the date of receipt of the request and enter into consultations within a period of no more than 30 days, or a period otherwise mutually agreed. Otherwise, the complaining

party can proceed directly to request the establishment of a panel.[17]

Other Members may request to be included in the consultations if they have a "substantial trade interest" and if it is a case of consultations pursuant to Article XXII:1 of GATT or the General Agreement on Trade in Services (GATS), or the corresponding provisions in other covered agreements.[18] Article XXIII:1 of GATT or GATS can also serve as a basis for launching a dispute with a request for consultation, while there is no reference to the participation of third parties under this provision. Therefore, the complaining party can make a strategic choice whether to allow third-party participation by choosing between Articles XXII:1 and XXIII:1 of GATT or GATS, or the corresponding provisions in other covered agreements.

3.1.2 The Coordination

In preparing for a request for consultations, the complainant needs to be able to identify a measure at issue, a WTO legal provision involved, and specify how each measure at issue has violated the relevant legal provision. All the preparation for this should be done through internal consultations among relevant agencies, stakeholders, and legal counsel.

WTO consultations are normally conducted through question-and-answer sessions. Therefore, it is imperative for the complaining party and the respondent alike to ensure that all domestic actors concerned are involved in preparing the questions or the answers. More often than not, useful information can be obtained from the affected domestic industry, and the aim of consultations should be to allow useful information to be exchanged as much as possible between the parties to the dispute through the questions and answers. For the complainant, coordination with all domestic actors will help ensure a complete picture of the possible case against the respondent and allow the best chance of getting sufficient information for subsequent assessment before moving on to the next stage. For the respondent, coordination with all domestic actors will enable adequate preparation and anticipation of issues to be raised in the consultations. In all cases, it is important for the coordinating agency to identify any business confidential information and treat it with care to preserve the interests of those concerned, such as domestic industry.

While the Permanent Mission in Geneva may be the front line for consultations with another party in Geneva, representatives from relevant government agencies, and perhaps the private sector, should be part of the delegation in the consultations.

After consultations, there should be a summary of the results, assessment of the information received, and preparation for next steps. This may require factual as well as professional assessment as to the other side's position. One important role of the legal counsel at this stage is to advise the delegation on the advantages and disadvantages of moving on to the next stage of litigation under the DSU. The legal counsel may also provide an expert professional assessment as to when it is no longer fruitful to continue with the consultations.

Consultations are not necessarily limited to formal sessions. There can be informal discussions on the sidelines of other meetings or subsequent consultations at the respective capitals of the parties as well.

Although consultations can be meaningful and have led to successful settlement of the dispute in a number of notable cases,[19] several WTO Members do not seem to consider consultations a serious and useful step in practice, but rather as a formality to be fulfilled (as complainant) or merely as a delay tactic (as respondent). It should be stressed that even if consultations fail to resolve the dispute, they constitute in general a useful step for probing the other side's position with a view to determining the desirability and the scope of the dispute. Then again, some WTO Members seem to have a practice of not giving out detailed information until the panel stage. Therefore, in deciding strategy for a given consultation session, it may also be useful to know how the other party approaches this stage of the proceedings.

3.2 Panel Proceedings

3.2.1 The proceedings

The complaining party may request the establishment of a panel if consultations fail to settle a dispute within 60 days after the request for consultations.[20] A panel is established by "negative consensus" in the DSB, at the earliest, at the second DSB meeting that considers the request.[21] Any Member with a substantial interest may become a third party in the case.[22]

The panel proceeding is the stage at which the litigation process starts. It provides an opportunity for the complaining party to protect its WTO interests. At the same time, the responding party will have an opportunity to defend itself and its interpretation and implementation of WTO obligations. Third parties also will have an opportunity to be heard and to obtain information about the case.

The request for the establishment of a panel must be made in writing.[23] It must indicate whether consultations were held, identify the specific measures at issue, and provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly.[24]

It is important to note that the content of the request for the establishment of a panel usually determines the scope of the dispute. Only the measures identified in the request become the subject of the panel's review, and the panel will review a dispute only in light of the provisions cited in the complaining party's request.[25] All possible legal claims must be specified sufficiently in the request, as the request cannot later be amended.[26] If a certain claim is not included in the request, it cannot be subsequently added by the complaining party in its written submissions or oral statements to the panel.[27]

The composition of the panel and the determination of its terms of reference[28] take approximately three to four weeks. The Secretariat has the responsibility to propose nominations for the panel to the parties to the dispute.[29] Although the parties must not oppose nominations except for compelling reasons, WTO Members in practice oppose nominations frequently, and there is no review available, even if the reasons given are in fact compelling.[30] If there is no agreement between the parties regarding the composition of the panel, it will be up to the Director-General to appoint the panellists whom he considers most appropriate after consulting the parties.[31] It may be safe to say that in determining the composition of a panel, the Director-General has a strong interest in ensuring that well-qualified individuals serve on a panel, given that the credibility of the WTO dispute settlement system is at stake.

In theory, panels "assist the DSB in discharging its responsibilities" under the DSU, through assessment of facts and of conformity with the WTO Agreement, so that the DSB may make recommendations or rulings.[32] Panels may also suggest ways in which the "Member concerned" could implement the DSB recommendations.[33] In practice, however, the "negative consensus" rule means that it is actually the panel, with the technical support of the Secretariat, that decides each dispute.

The panel usually begins its work by holding an organization meeting with the parties in order to draw up a calendar for its work. The panel process is based on the working procedures of Appendix 3 to the DSU, which normally includes two substantive meetings with the parties to the dispute, including one meeting with the third parties (together with the parties). The panel also has the right to seek information and technical advice from any individual or body.[34] The panel must issue a report within nine months from the date of the establishment of the panel.[35]

On the substantive side, the process may start with an exchange of submissions between the parties on a preliminary issue raised by the responding party, such as on the sufficiency or clarity of the request for panel establishment.[36] If there is no preliminary issue, the substantive panel process may begin with the parties exchanging a first set of written submissions.[37]

The complaining party is normally the first to file its submission, after which the responding party sends its submission in reply. Third parties will receive the submissions of the parties to the dispute and will be the last to file their submissions.[38]

The parties' submissions clarify the facts of the case and put forward legal arguments that often rely on prior jurisprudence of panels and the Appellate Body.[39] They can be quite extensive documents. The complaining party's submission tries to establish the claim that there has been a violation and/or nullification or impairment of its rights and obligations under a WTO Agreement.[40] The responding party, on the other hand, attempts to refute the complaining party's factual and legal arguments.[41] Finally, third-party submissions comment on the parties' arguments. The parties to the dispute and third parties may be requested to submit executive summaries of their submissions, which could be used in drafting the descriptive part of the panel report.[42]

After the exchanges of the first submissions, the panel will convene the first substantive meeting (also known as oral hearing), which takes place at the WTO headquarters in Geneva.[43] Only the parties and third parties to the dispute, the panellists, the Secretariat staff supporting the panel, and the interpreters can attend this meeting.[44] However, at the request of the parties in the dispute, the panel may allow for part of its meeting with the parties to be open for public viewing, which normally takes place in a different room through a closed-circuit television broadcast or in the form of a public viewing of pre-recorded video, sometimes with business confidential information omitted.

As a general rule, the parties are free to appoint any individual as members of their respective delegations to a panel hearing. The delegation could, therefore, include in-house lawyers as well as private counsel. The appointment is normally done through a written note from the respective Missions to the Chair of the panel. As any person in the delegation can take the floor upon authorization of the Chair, in practice, a Member that wishes to leave all or parts of its oral pleadings to outside lawyers can do so without any problem.

The complaining party will be invited to present its oral statement first, followed by the responding party and third parties. Normally, this is done based on a prepared statement, a copy of which is distributed to the panel and other parties.[45] After the oral statements, the parties to the dispute as well as third parties will be invited to respond to questions from the panel and from other parties in order to clarify all the factual and legal issues.[46] The parties may respond orally to the extent that they are ready to do so. They will be given a deadline to submit written answers after the hearing, irrespective of whether the question was put forward by the panel or another party and whether the question was already discussed orally.[47]

Approximately four weeks after the first substantive meeting, the parties to the dispute will simultaneously exchange a second written submission in which they respond to each other's first written submissions and oral statements at the first substantive meeting.[48] At this stage, third parties will no longer be involved. The panel will hold a second substantive meeting with only the parties to the dispute. Each party will present its oral statements and respond to further questions from the panel and the other party, first orally and then in writing.[49] The panel may hold a third meeting when, for example, an expert hearing is needed.[50]

Panel deliberations are confidential and the report of panels is drafted without the presence of the parties in light of the information provided and the statements made.[51] The panel's report contains two main parts, the "descriptive part" and the "findings."[52] The panel will issue the descriptive part to the parties for written comments first.[53] The descriptive part usually consists of an introduction, the factual aspects, the claims of the parties, and a summary of the factual and legal arguments of the parties and third parties.[54] The parties will have two weeks for comments in order to ensure that their key arguments are reflected and to correct any errors.[55]

Thereafter, the panel will issue the "interim report," which contains both the descriptive part and the findings.[56] The findings would set out the panel's reasoning to support its final conclusions as to whether the complaining party's claim should be upheld or rejected. The reasoning would be a comprehensive discussion of the applicable law in light of the facts established by the panel on the basis of the evidence before it and in light of the arguments submitted by the parties.[57] The interim report would indicate the likely outcome of the panel report. The interim review would allow the parties to the dispute to request the panel to review precise aspects of the panel report.[58] Parties may also request a meeting of the panel to further argue specific points with respect to the interim report[59], but this rarely happens in practice. The interim review will be the last opportunity for the parties to rectify any factual mistake in the panel report as the Appellate Body does not review factual questions.[60]

Within two weeks after the conclusion of the interim review, the panel will submit its final report to the parties to the dispute. The report will be translated and then circulated to all WTO Members.[61]

3.2.2 The coordination

On the domestic front, the focal point needs to consult in detail with all the relevant agencies and stakeholders at each step of the panel process from the drafting of the panel request (for the complainant) or the respondent's first statement to the DSB and until the issuance of the final report of the panel. At all stages, close coordination with and sufficient support to the Geneva mission is crucial, as the DSU requires strict deadlines to be met throughout the proceedings.[62]

For the complainant, coordination at home should start as early as the drafting of the panel request, as this document defines the scope of the dispute. Claims that do not figure in the request may not be added at a later stage.[63] In *European Communities — Large Civil Aircraft*, for example, the US restarted the process all over again from a new consultations request in order to add more claims on additional subsidies announced by the European Communities but not mentioned in the previous panel request.[64] It is, therefore, necessary to draft the request for panel establishment with sufficient coverage and precision after consultations with relevant agencies, stakeholders, and legal counsel. It should be emphasized that the complainant is not required to provide detailed arguments at this stage, but only claims that are sufficient to allow the respondent to prepare its defence.[65] The panel request usually consists of identifying the measure(s) at issue and the WTO provisions allegedly violated by the measure(s) and specify the connection between these two elements (*how* the violations are made).

Also at the panel request drafting stage, it might be useful to coordinate the views of all concerned about alternative claims. A measure could violate WTO provisions in more than one aspect. It would therefore be wise to examine all possible angles in order to present a comprehensive panel request, which identifies all possible WTO provisions that are relevant and are potentially violated by the measure(s) at issue. Once the measures at issue are properly identified and duly included in the panel request, the panel will be obliged to deal with them.

For the respondent, coordination at home should start, at the latest, at the panel composition stage. Each stakeholder should be able to voice its concerns and state its preferences as to which individuals to appoint. The focal point must provide and highlight many factors to enable a useful discussion, including the qualifications of the individuals proposed by the Secretariat, the position of their respective countries vis-à-vis the issues at hand, and the overall balance of different possible combinations.

Once the panel is composed, one way of ensuring a successful litigation is to set up a regular domestic coordination meeting schedule that is synchronized with the timetable of the case. The timetable is usually issued within a short period by the panel after an organizational meeting with the parties. The organizational meeting itself, which is normally presided over

by one of the panellists, can be a tricky exercise for Members without sufficient experience, as it fixes all the deadlines in the subsequent proceedings. A coordination meeting at home prior to the organizational meeting is recommended as is the presence of a qualified lawyer, in-house or out-sourced, at the meeting. The purpose is to ensure that the timetable will respond best to the interest of the Member in terms of legal positions, availability of resources, and other relevant factors, including those that can administratively or otherwise affect the performance of the Member, such as long periods of national holidays or foreseeable obstacles.

Thereafter, at least one coordination meeting and/or decision-making session should be held in advance of each step of the proceedings. The aim of this step is to ensure that every word spoken or written by the delegation corresponds well with the interest of the Member. Again, the focal point must provide and highlight all policy and technical points, legal or otherwise, for the stakeholders to consider and provide comments. The stakeholders must also be encouraged to provide their inputs. Discussion should be conducted in an open-minded setting to allow all the possible arguments and scenarios to be reviewed. Legal and economic considerations are the most important, but other relevant factors, such as the political context and the systemic interest involved should also be taken into account. Options may then be prepared for decision-making — whether actual decisions are made within the coordinating mechanism or by some other body in the country — as to the position of the delegation at that particular stage of the proceedings.

Representatives from the private sector, on the other hand, normally do not attend the oral hearings but can accompany the delegation to Geneva to give inputs from outside the meeting room as well as and during internal meetings.

During the period of the substantive meeting, the home front is naturally moved to Geneva, since it is necessary to consider any problem that may arise and to respond to it in real time in the best possible manner. It is, therefore, advisable to have available representatives for all the stakeholders. Daily coordination is usually the best approach for ensuring a successful panel.

3.3 Adoption of Panel Report/Filing of an Appeal

3.3.1 The proceedings

The DSB must adopt the panel report at the earliest 20 days after the date of circulation of the report, but no later than 60 days after that date. The report is adopted by "negative consensus" unless an appeal is filed. In case of appeal, the panel's report is not adopted until after completion of the appeal.[66]

A notice of appeal must include a brief statement of the nature of the appeal, including the allegations of errors in the issues of law covered in the panel report and legal interpretations developed by the panel.[67] It is not designed to be a summary or outline of the arguments of the appellant, which are to be set forth in the appellant's submission.[68]

3.1.2 The coordination

Coordination should start as soon as the panel report is communicated to the parties. One of the most important decisions to make is whether to appeal. Here, there is no single rule. The stakeholders will normally have to consider whether the trade interest at stake would justify an appeal, as well as the likelihood of prevailing at the appellate stage. Since the Appellate Body cannot review issues of fact, in most cases an appeal is made on the grounds that the panel erred on points of law. The appeal case can therefore turn into a battle of arguments between the appellant, on the one hand, and the panel (in the report), with the support of the appellee, on the other. This is, in fact, no different from the appeals process in domestic court proceedings, which often require the parties involved to adjust their arguments from against the opposing side to against the rulings of the lower court.

An appeal can also be made for "political" reasons, for example, to provide justification on domestic grounds in case a measure may be planned to be taken in compliance with an adverse panel recommendation or ruling to the extent these findings are upheld by the Appellate Body. Indeed, if the Appellate Body reverses the panel recommendations or rulings, the case may be considered a "victory" for the appellant.

The desirability of an appeal can be a delicate question. Normally, it is relevant for both sides, as WTO disputes have become so complex and multi-faceted that it is rare to see one side "win" on all of the legal points at the panel stage. In many cases, both parties end up being appellant and appellee in an appeal case. It is, therefore, necessary to consult all stakeholders, in particular the affected domestic industry, and, for the respondent having "lost" the case, the government agency that has the responsibility for implementing the recommendation or ruling of the panel, which is generally the agency that was responsible for the measure(s) at issue in the case.

3.4 Appellate Body Proceedings

3.4.1 The proceedings

The Appellate Body designates, on a rotational basis, three of its members to serve on any one case, regardless of national origin.[69] It determines its own working procedures and only decides on issues of law.[70] The Appellate Body may uphold, modify, or reverse the legal findings and conclusions of the panel.[71]

Third parties during the panel proceedings automatically become third parties at the appeals stage (unless they withdraw themselves). A Member that has not been a third party at the panel stage would not be able to join in at the appellate stage.[72] Third parties are not required to file third participants' submissions in order to be entitled to attend the oral hearing before the Appellate Body as they have the option to participate as "passive observers".[73]

The Appellate Body has a shorter time frame to deliberate and must issue a report within 90 days from the date of appeal – or 60 days in the case of prohibited subsidy appeals.[74] On the same day that the notice of appeal is filed, the appellant must file its written submission setting out a precise statement of the grounds for the appeal, including alleged errors by the panel, a precise statement on the relevant treaty provisions, and what ruling the appellant requests from the Appellate Body with regard to the panel findings.[75] Within five days from the notice of appeal, the other party to the dispute may "cross appeal."[76] The appellee must file its submission within 18 days from the notice of appeal, setting out in detail its legal reasoning vis-à-vis the appellant's challenge, including arguing to what extent it agrees or disagrees with the panel's conclusions.[77]

The Appellate Body normally holds only one oral hearing, between 30 days and 45 days after the notice of appeal.[78] The oral hearing is similar to the substantive meetings at the panel stage. However, oral statements before the Appellate Body are usually kept short, and an oral hearing rarely lasts longer than one full day.[79] In addition, the participants may not pose questions directly to each other.[80] The Appellate Body's deliberations are confidential, and the drafting of the report takes place without the presence of the participants or third parties.[81] The Appellate Body may suggest ways in which the Member concerned could implement the DSB recommendations.[82]

The DSB must meet within 30 days from the date of circulation of the Appellate Body report, to adopt the Appellate Body and the panel reports at the same time.[83] The reports are adopted by "negative consensus."

3.4.2 The coordination

In the same fashion as during the panel proceedings, coordination must take place on the domestic front with all the relevant government agencies and stakeholders to ensure that at the appellate stage the country is represented with all its interests taken into account. This

is true regardless of whether the Member is an appellant, appellee, or both, in the case.

At least one coordination meeting and/or decision-making session should be held in advance of each of the steps of the Appellate proceedings, the most important ones being the written submission and the oral hearing. The coordination must be precise and to the point, since the appellate proceedings are usually short and concise. Although only the points of law are involved, more often than not it would be wise to discuss those legal issues in the context of the factual environment of the case. For this reason, it is advisable to hear the views of all stakeholders, even though they may not be directly involved or may not have competence in legal matters.

Like in the panel proceedings, during the oral hearing the home front is moved to Geneva for effective and real-time coordination. It is advisable to include all the relevant agencies in the delegation as oral questions are usually answered during the session, and it can prove to be valuable to have all the technical experts and the stakeholders available for input.

There are some important differences in the nature of the Appellate Body proceedings compared with the panel stage. Here, the appellant pleads most of the time against the panel – not the appellee – with a view to convincing the Appellate Body how the panel erred in its reasoning and findings given the relevant standard of review set by each covered agreement at issue. In some cases, such as in an anti-dumping case, the issue of standard of review can figure prominently in the appeal. These "new" arguments can be made in addition to the substantive points already stated at the panel stage. In contrast, the appellee would make arguments in support of the panel decision on the particular point of law concerned.

Another difference in the nature of the proceedings results precisely from the fact that the Appellate Body only decides on issues of law. Many of the substantive points to decide, therefore, concern general questions of public international law — for example, treaty interpretation, state responsibility, customary international law, *jus cogens*, and general principles of law, to name a few. The arguments are, therefore, of a totally different nature than pure WTO law pleadings. Thus, the experience and broader horizon of "generalist" in-house lawyers who are more exposed to general diplomatic and public international law environment[84] are of the utmost importance. The main purpose of coordination is to ensure that, before the Appellate Body, the Member's pleading conforms to its overall legal policy[85] in terms of public international law. For example, a Member that maintains a practice contrary to that of the majority of states in one particular matter would want to be careful about admitting in an Appellate Body proceeding that the majority practice has become customary law through *opinio juris*.

Along the same lines, a Member arguing a case before the Appellate Body would wish to ensure that its arguments on questions of general public international law conform to its position in other international fora and even with an anticipated legal position in possible future litigation cases — be it at the WTO or elsewhere. For example, a Member that is aware of a possible case against it, say at the International Court of Justice, that could potentially be adversely decided on the basis of estoppel, would not wish to admit before the Appellate Body that there is estoppel based on the same type of circumstances and facts.

3.5 Implementation of the Reports and Surveillance by the DSB

3.5.1 The proceedings

Prompt compliance with the DSB recommendations or rulings is the rule. But, if it is impracticable to comply immediately, there must be compliance within a "reasonable period of time" which is to be determined by the parties to the dispute, the DSB, or through binding arbitration,[86] consisting normally of one Appellate Body member.

Six months after the determination of the reasonable period of time, the implementing Member must regularly report to the DSB (in writing at least 10 days before each DSB meeting) until the issue is resolved.[87]

3.5.2 The coordination

Again, it is necessary to consult all the relevant government agencies and stakeholders, in particular the affected domestic industry and the implementing agency, as to the appropriate time frame required for implementing the reports of the panel and the Appellate Body.

As for the regular reports to the DSB on the status of implementation, although envisaged as a mechanism for surveillance, this obligation unfortunately seems to have become a mere formality in practice. It is, nevertheless, necessary for both sides to ensure periodic domestic coordination to consider all the factual inputs necessary to enable the respondent to present satisfactory reports to the DSB and the complainant to exercise effectively its right to surveillance.

3.6 Alternative Means of Dispute Settlement

3.6.1 The proceedings

The parties to a dispute may resort to good offices, conciliation, or mediation, with possible assistance from the Director-General.[88] They may also agree to resort to arbitration. In this case, Articles 21 and 22 of the DSU on surveillance and compensation and retaliation apply *mutatis mutandis* respectively.[89]

3.6.2 The coordination

Resort to alternative means of dispute settlement under DSU Article 5 is normally made through an agreement of the parties. Therefore, coordination at home is crucial for both sides in a dispute to determine whether it is desirable to do so. There are advantages and benefits to consider. Mediation, for example, is an alternative means that can provide a graceful exit for the parties to the dispute.[90] It is voluntary, and no side "wins" or "loses" as a result of mediation. It is also very likely that the result of a panel process will be the same as that of mediation as both processes are based on the same rules and the same kind of assistance from the Secretariat. From the domestic political point of view, mediation can therefore be useful under certain circumstances, as it allows a respondent government to justify taking a measure to settle a dispute in accordance with the mediator's opinion, without having to actually "lose" a legal case.

Once it is decided to resort to an alternative means of dispute settlement under DSU Article 5, coordination should be made on the home front in the same fashion as for panel proceedings.

3.7 "Compliance Determination" and "Enforcement" of the Reports

3.7.1 The Proceedings

Compliance determination is made through recourse to the procedures of the DSU, including whether it is possible to resort to the original panel.[91] In practice, Members always resort to the original panel with the possibility of an appeal. In general, this procedure takes place after the expiry of the reasonable period of time. A "21.5 panel" is quite similar to the "normal" panel process, except that there will normally be only one hearing. Coordination among the domestic actors is, therefore, indispensable, starting from the panel request to the adoption of the report, including during the appellate stage, if any.

Enforcement of reports is carried out according to Article 22 of the DSU. In case of non-compliance within the reasonable period of time, the parties to the dispute must negotiate with a view to agreeing on mutually acceptable compensation. If no agreement is reached within 20 days, the DSB shall grant authorization at the request of the complaining party to "retaliate" (suspension of concession) by "negative consensus" within 30 days of the expiry of the reasonable period of time. However, if the other side objects to the level (value) of the retaliation, the matter shall be referred to arbitration, which has to be completed within

60 days after the expiry of the reasonable period of time. The DSB must, upon request, authorize by "negative consensus" retaliation consistent with the decision of the arbitrator. It should nevertheless be mentioned that compensation and retaliation are temporary measures intended to induce compliance with the DSB recommendations and rulings.

Articles 21 and 22 of the DSU contain certain loopholes that have led to several problems in practice in the past. In particular, as the texts stand, they allow retaliation even before resort to a multilateral determination of compliance (the "sequencing" problem). They also allow unilateral revision of the list of products or services subject to the retaliation (the "carousel" practice) as long as the level of such retaliation as determined by the DSB is observed.

WTO Members have been engaging in negotiation to address, *inter alia*, the problems of "sequencing" and "carousel" in the context of DSU negotiations launched at Doha in late 2001, but it has yet to be concluded. Meanwhile, WTO Members seem to have developed a practice of settling on the order of sequence of Articles 21 and 22 through bilateral agreements between the parties to the dispute.

3.7.2 The coordination

With regard to compliance determination, the first and crucial question that requires coordination at home is whether and when to request a "21.5" panel. This is true for both sides as, remarkably, the DSU does not contain any provision that prevents the implementing Member ("the losing side") from doing so. The factors to be taken into consideration are the same as in the case of a normal panel, and therefore the same actors should be included, and the same reasoning used, in the process of coordination. Once it is decided to resort to Article 21.5, coordination should be conducted on the home front in the same fashion as for normal panel proceedings.

Coordination among all the domestic actors is again the key to a successful enforcement of (for the "winning" side) or compliance with (for the "losing side") the DSB recommendations or rulings. For the former, it is imperative to analyze the situation thoroughly to ensure that the right level of retaliation is sought and that an intended retaliation measure does not have an unintended adverse effect on its own economy in one way or another. A classic example of this would be raising the duty for a good originating in the respondent Member that turns out to be a vital raw material for an important domestic industry in one's own economy.

For the respondent, assuming that it cannot implement the recommendation or ruling of the DSB, the analysis should focus on finding the best arguments to justify a level of retaliation that is as low as possible. Once that level has been determined, the focus should shift to seeking appropriate measures to minimize the impact on its economy from the retaliation measures taken by the other side.

4. RECOMMENDATIONS

Coordination is likely to be a big challenge for developing countries in utilizing WTO dispute settlement. Some countries have highlighted the lack of national structures for internal coordination on international trade issues, resulting in limited opportunities to protect their trade interests, including through the WTO dispute settlement system.[92] The needs to improve involvement of stakeholders have also been underscored.[93]

Coordination is not only a question of organization, but also an issue related to human resource capacity. It is probably not difficult for a country to set up a coordination structure, but the success of this structure may depend on the human resource base in the country. To enable effective coordination, the relevant stakeholders need to have awareness and adequate understanding of the dispute settlement process as well as the rights and obligations under the WTO Agreement. In addition, the private sector should be aware of its rights regarding trade disputes and try to engage actively in the coordination process.[94]

There are different factors for consideration with regard to coordinating litigation in each country. It might not be practical to try to come up with recommendations that would be applicable in all cases — a "one-size-fits-all" solution. The following, however, are some general issues that may need to be considered in coordinating litigation under the WTO.

4.1 In-house Counsel vs. Outside Lawyers — Who Should Take Control?

Private legal counsel normally acts in the best interests of the client. However, "best interests" are not always the same when thinking of a government client versus a private sector one. Governments have constraints. An outside lawyer hired by the private sector representatives could raise issues that the government cannot and private counsel may not realize that. Governments may also have certain legal policies that are not known to private counsel, in particular that with possible long-term consequences on the government's position regarding important issues of public international law; for example, its interpretation of a specific question of customary international law. Domestic industries, on the other hand, may not be interested in legal policy. For this reason, it is perhaps best for the government to bear the entire costs of hiring private counsel, or at least share the costs with the domestic industry, so that the government can assert some control over private counsel on the questions of legal policy that come up in the case.

4.2 The Need to Build up Human Resources

Even if an outside counsel is hired, WTO Members still need to have some capacity to make effective use of independent legal experts.[95] Expertise within the government – legal and economic as well as in other technical fields – is still required in bringing a legal case to the WTO. With regard to in-house lawyers, there is a need to develop experience in the dispute settlement process and knowledge in international economic law. Litigation at the WTO requires a high degree of legal expertise. The process of human resource development may be slow. The best way is perhaps through direct engagement in cases, such as participation as a co-complainant, respondent, or third party, which would entail some investment of time and resources.[96] There is, therefore, a need for long-term planning for recruitment and training.

In this respect, the experience of other countries in capacity building can be valuable. This does not, however, suggest that every country should set up a special unit with specialist in-house lawyers in charge of WTO dispute settlement. The cost-effectiveness of such an approach should be considered in the context of each country's respective situation. The challenge is not confined to the availability of qualified personnel, but is also about how to maintain specialized human resources and provide them with an appropriate and rewarding career path

as well as an opportunity to keep up to date with WTO jurisprudence.[97]

As one of the most active users of the system, Brazil has set up a special unit on WTO dispute settlement and adopted the system of rotating personnel between thatunit and its Geneva Mission.[98] While some countries, such as Ecuador, have adopted the Brazilian approach, others, such as Costa Rica, have opted for outsourcing more to outside counsel and relying less on in-house lawyers over the years as WTO cases have become increasingly complex.[99]

A number of governments have benefited from the ACWL secondment programme, in which their legal officers work under supervision of ACWL lawyers in key areas of dispute settlement, including consultations between the parties to the dispute and drafting panel requests.[100] Others have benefited from internships for legal officers at the WTO Secretariat, in particular in the Legal or the Rules Divisions. In addition, by allowing their officials to serve as panelists in WTO cases, many governments have provided the opportunity for those officials to develop deep knowledge and expertise on WTO laws and the dispute settlement system.[101] These experienced personnel are valuable resource persons in further building capacity on WTO dispute settlement in their respective countries.

4.3 The Need to Raise Public Awareness of WTO issues

Awareness raising and capacity building would help enhance coordination. All relevant stakeholders need to have adequate understanding of WTO rules and the possibilities for redress under the WTO, to meaningfully participate in any coordination process. This is true not only within the government, but also within the private sector and civil society, so they are ready to enter into coordination mechanisms right away, or take the least time to prepare themselves when litigation becomes necessary.

China has introduced a mechanism on Foreign Trade Barrier Investigation to enhance communication with the public, particularly the private sector.[102] Through this mechanism, Chinese firms or industries may file a petition with government authorities to launch investigations into foreign trade barriers, similar to the US Section 301 process or the EU's Trade Barrier Regulation. Although such mechanisms have yet to be widely used in China and can probably be further developed, it is certainly a starting point in engaging the public in the WTO dispute settlement process.[103]

In addition, China and Brazil have systematically encouraged their law firms to take part in the WTO dispute settlement process. For many years, China has continuously supported its private lawyers to come to Geneva and learn about the WTO dispute settlement system through participation as third parties.[104] In each of its WTO cases, Brazil requires that at least one Brazilian law firm be included in the legal team.[105] Brazil also has an internship and training programme in which private lawyers, as well as government officials not regularly dealing with WTO issues, come to work for its Permanent Mission in Geneva.[106] This helps diffuse knowledge about the WTO system and facilitates future coordination among relevant actors.[107]

In conclusion, there is no perfect recipe on coordinating trade litigation. This article can only help identify the key steps to take in coordination and the possible mechanisms to set up for key decision-making in substantive and procedural matters as well as for determining policy directions and facilitating coordination among different actors. Challenges facing many countries may be similar, notably the human resource limitation, but each country needs to find solutions that best fit its own context and, perhaps above all, its legal, administrative, and political culture.

ENDNOTES

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

1 Editor’s note: For a more in-depth discussion about the differences between litigation and negotiation, *see* the discussion about dispute resolution versus conflict management in “How to Successfully Manage Conflicts and Prevent Dispute Adjudication in International Trade” by Robert Echandi in the ICTSD issue paper in this series.

2 *See* Shaffer, G. C., Ratton, M., Badin, S., and Rosenberg, B., “Winning at the WTO: the development of a trade policy community within Brazil,” in Shaffer, G. C. and Meléndez-Ortiz, R. (eds.), *Dispute Settlement at the WTO: the Developing Country Experience*, pp. 44-46; see also Pérez Gabilondo, J. P., “Argentina’s experience with WTO dispute settlement: development of national capacity and the use of in-house lawyers”, in Shaffer, G. C. and Meléndez-Ortiz, R. (eds.), *Dispute Settlement at the WTO: the Developing Country Experience,* pp. 120-21.

3 *See* Liyu, H. and Gao, H. “China’s experience in utilizing the WTO Dispute Settlement Mechanism,” in Shaffer, G. C. and Meléndez-Ortiz, R. (eds.), *Dispute Settlement at the WTO: the Developing Country Experience,* p. 163.

4 *See* Ochieng, D. O. and Majanja, D. S., “Sub-Saharan Africa and WTO dispute settlement: the case of Kenya,” in Shaffer, G. C. and Meléndez-Ortiz, R. (eds.), *Dispute Settlement at the WTO: the Developing Country Experience,* pp. 325-26.

5 *See* Danvivathana, P., “Thailand’s experience in the WTO dispute settlement system: challenging the EC sugar regime,” in Shaffer, G. C. and Meléndez-Ortiz, R. (eds.), *Dispute Settlement at the WTO: the Developing Country Experience,* pp. 212-14.

6 *See* WTO, Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU), Article 3.2; *see also* Plasai, V., “The WTO Dispute Settlement System and the Customary Rules of Treaty Interpretation: Nine Years After,” in *Journal of Law and Economics in International Trade,* Vol. 1, No. 1, Consortium of Independent Research and Training Institutes, January 2004, pp. 171-185.

7 Discussion during the South-South Dialogue on Managing Trade Litigation, 3-4 May 2012, Geneva; see http://www.wto.org/english/news_e/pres12_e/pr661_e.htm (Last visited: 17/04/13)

8 Ibid.

9 Ibid.

10 See Schunken, K. R., “The Advisory Centre on WTO Law: A Success Story, But for Whom?” in *The Law and Practice of International Courts and Tribunals (2008) 59-79,* pp.71-72 (quoting ACWL, *How to use the service of the ACWL: A Guide for developing countries and LDCs,* p.24) (ACWL fees are considered to be at lower rate than those charged by private law firms).

11 See Shaffer, G. C. and Meléndez-Ortiz, R., Dispute Settlement at the WTO: *the Developing Country Experience, supra,* p.163.

12 See DSU, Article 4.7.

13 See DSU, Article 4.4.

14 See WTO, "The process – Stages in a typical WTO dispute settlement case; 6.2 Consultations," in *Dispute Settlement System Training Module*, available at: http://www.wto.org/english/tratop_e/dispu_e/disp_settlement_cbt_e/c6s2p1_e.htm (last visited on 31 August 2011)

15 See DSU, Article 4.4.

16 See WTO Dispute Settlement Body, *Working Practices Concerning Dispute Settlement Procedures,* WT/DSB/6, 6 June 1996, p. 2; DSB, Minutes of the Meeting of 19 July 1995, WT/DSB/M/6, p. 12.

17 See DSU, Article 4.3.

18 See DSU, Article 4.11.

19 For example, *see* India – Anti Dumping Measures on Batteries from Bangladesh (DS306); *see also* Shaffer, G. C. and Melendez-Ortiz, R., Dispute Settlement at the WTO: the Developing Country's Experience, pp.236-45. In Columbia - Safeguard Measures of Imports of Plain Polyester Filaments from Thailand (DS181), a mutually agreed solution was eventually found after consultations when Columbia decided not to extend its safeguard measures as originally planned.

20 See DSU, Article 4.7. But, if the respondent does not respond within 10 days after the date of receipt of the request, or does not enter into consultations within a period of no more than 30 days, or a period otherwise mutually agreed, the Member requesting the consultations may proceed directly to request the establishment of a panel. See DSU, Article 4.3.

21 See DSU, Article 6.1; "negative consensus" means a panel will be established unless the DSB decides by consensus not to establish it.

22 See DSU, Article 10.2. There is a difference between "substantial interest" before the panel and "substantial trade interest," which is required for third parties in consultations. In case of consultations, it is possible for a third party to join only with the responding party's consent. In case of a panel process, a Member invoking a systematic interest is in practice admitted to a panel procedure as a third party without any scrutiny; *see also* WTO, Dispute Settlement System Training Module: Chapter 6, The process – Stages in a typical WTO dispute settlement case, 6.3 The panel stage, p. 1, available at http://www.wto.org/english/tratop_e/dispu_e/disp_settlement_cbt_e/c6s3p1_e.htm (last visited on 31 August 2011).

23 See DSU, Article 6.2

24 See ibid.

25 See WTO, Dispute Settlement System Training Module: Chapter 6, The process – Stages in a typical WTO dispute settlement case, 6.3 The panel stage, p. 1, available at *http://www.wto.org/english/tratop_e/dispu_e/disp_settlement_cbt_e/c6s3p1_e.htm* (last visited on 31 August 2011).

26 See Appellate Body Report, EC – Banana III, 143.

27 Ibid.

28 See DSU, Articles 7-8.

29 See DSU, Article 8.6.

30 See Article 8.6; WTO, Dispute Settlement System Training Module: Chapter 6, The process – Stages in a typical WTO dispute settlement case, 6.3 The panel stage, p. 2, available

at http://www.wto.org/english/tratop_e/dispu_e/disp_settlement_cbt_e/c6s3p2_e.htm (last visited on 31 August 2011).

31 See DSU, Article 8.7.

32 See DSU, Article 11.

33 See DSU, Article 19.

34 See DSU, Article 13.

35 See DSU, Article 12 and Appendix 3.

36 See WTO, *Dispute Settlement System Training Module*: Chapter 6, The process – Stages in a typical WTO dispute settlement case, 6.3 The panel stage, p. 3, available at http://www.wto.org/english/tratop_e/dispu_e/disp_settlement_cbt_e/c6s3p3_e.htm (last visited on 31 August 2011).

37 Ibid.

38 Ibid. See also DSU, Article 10.3.

39 *See* WTO, *Dispute Settlement System Training Module*: Chapter 6, The process – Stages in a typical WTO dispute settlement case, 6.3 The panel stage, p. 3, available at http://www.wto.org/english/tratop_e/dispu_e/disp_settlement_cbt_e/c6s3p3_e.htm (last visited on 31 August 2011).

40 See ibid.

41 See ibid.

42 See ibid.

43 See ibid.

44 See ibid.

45 See ibid.

46 See ibid.

47 See ibid.

48 See ibid.

49 See ibid.

50 See ibid.

51 See DSU, Article 14.

52 See WTO, *Dispute Settlement System Training Module*: Chapter 6, The process – Stages in a typical WTO dispute settlement case, 6.3 The panel stage, p. 3, available at http://www.wto.org/english/tratop_e/dispu_e/disp_settlement_cbt_e/c6s3p3_e.htm (last visited on 31 August 2011).

53 See DSU, Article 15.1.

54 See WTO, *Dispute Settlement System Training Module*: Chapter 6, The process – Stages in a typical WTO dispute settlement case, 6.3 The panel stage, p. 3, available at http://www.wto.org/english/tratop_e/dispu_e/disp_settlement_cbt_e/c6s3p3_e.htm (last visited on 31 August 2011).

55 Ibid.

56 See DSU, Article 15.2.

57 See DSU, Article 12.7; see also WTO, *Dispute Settlement System Training Module:* Chapter 6, The process – Stages in a typical WTO dispute settlement case, 6.3 The panel stage, p. 3, available at http://www.wto.org/english/tratop_e/dispu_e/disp_settlement_cbt_e/c6s3p3_e.htm (last visited on 31 August 2011).

58 See DSU, Article 15.2.

59 Ibid.

60 See WTO, *Dispute Settlement System Training Module*: Chapter 6, The process – Stages in a typical WTO dispute settlement case, 6.3 The panel stage, p. 4, available at http://www.wto.org/english/tratop_e/dispu_e/disp_settlement_cbt_e/c6s3p4_e.htm (last visited on 31 August 2011).

61 Ibid.

62 See WTO, Public Forum 2009 Global Problems, Global Solutions: Towards Better Global Governance, p. 178.

63 See *supra*, Footnote 15.

64 See European Communities – Large Civil Aircrafts (DS316, DS347).

65 See Appellate Body Report, Korea – Dairy, 124; Appellate Body Report, Thailand – H-Beams, 95.

66 See DSU, Article 16

67 See WTO, *Working Procedures for Appellate Review*, WT/AB/WP/6, Rule 20(2)(d).

68 See WTO, *Dispute Settlement System Training Module*: Chapter 6, The process – Stages in a typical WTO dispute settlement case, 6.5 Appellate review, p. 3, available at http://www.wto.org/english/tratop_e/dispu_e/disp_settlement_cbt_e/c6s5p3_e.htm (last visited on 31 August 2011).

69 See WTO, *Working Procedures for Appellate Review,* WT/AB/WP/6, Rule 6(2); *see also*, for example, United States – Import Prohibition of Shrimp and Certain Shrimp Products (DS58) and United States – Laws, Regulations and Methodology For Calculating Dumping Margins (“Zeroing”) (DS294), in which one of the Appellate Body Members in the division that sat on the case was of the nationality of one of the parties to the dispute.

70 See DSU, Article 17.9 and 17.6.

71 See DSU, Article 17.13.

72 See WTO, Working Procedures for Appellate Review, WT/AB/WP/6, Rule 1.

73 See WTO, *Dispute Settlement System Training Module:* Chapter 6, The process – Stages in a typical WTO dispute settlement case, 6.5 Appellate review, p. 2, available at http://www.wto.org/english/tratop_e/dispu_e/disp_settlement_cbt_e/c6s5p2_e.htm (last visited on 31 August 2011).

74 See DSU, Article 17.5; SCM Agreement, Article 4.9.

75 See WTO, Working Procedures for Appellate Review, WT/AB/WP/6, Rule 21(2).

76 See WTO, Working Procedures for Appellate Review, WT/AB/WP/6, Rule 23(1).

77 See WTO, Working Procedures for Appellate Review, WT/AB/WP/6, Rule 22.

78 See WTO, Working Procedures for Appellate Review, WT/AB/WP/6, Rule 27(1).

79 See WTO, *Dispute Settlement System Training Module:* Chapter 6, The process – Stages in a typical WTO dispute settlement case, 6.5 Appellate review, p. 3, available at http://www.wto.org/english/tratop_e/dispu_e/disp_settlement_cbt_e/c6s5p3_e.htm (last visited on 31 August 2011).

80 Ibid.

81 See DSU, Article 17.10.

82 See DSU, Article 19.

83 See DSU, Article 17.14.

84 See also supra 2.1.1.

85 See also supra 2.2.1.

86 See DSU, Article 21.3.

87 See DSU, Article 21.6.

88 See DSU, Article 5.

89 See DSU, Article 25.

90 See, e.g. Nilaratna Xuto, *Thailand: Conciliating a Dispute on Tuna Exports to the EC,* available at http://www.wto.org/english/res_e/booksp_e/casestudies_e/case40_e.htm (last visited on 4 September 2011); for official documents concerning the mediation between Philippines/Thailand and the European Communities, see WT/GC/66 (16 October 2002), WT/GC/66/Add.1 (23 December 2002) and WT/GC/71 (1 August 2003).

91 See DSU, Article 21.5.

92 See Gregory C. Shaffer and Ricardo Meléndez-Ortiz, *Dispute Settlement at the WTO: the Developing Country Experience*, pp. 163, 182, 333.

93 See ibid, pp. 164, 182, 268, 276, 321, 334.

94 See ibid, pp. 164, 182, 268, 276, 321, 328.

95 See ibid, p. 344.

96 See ibid, p. 131.

97 See also discussion during the South-South Dialogue on Managing Trade Litigation, 3-4 May 2012, Geneva.

98 Ibid.

99 Ibid.

100 Ibid.

101 Ibid.

102 Ibid.

103 Ibid. Since its introduction in 2004, the Foreign Trade Barrier Investigation has been invoked on two occasions: the Japan – Laver (seaweed) case and the U.S. – renewable energy subsidies case. For comments about China’s Foreign Trade Barrier Investigation, see Gregory C. Shaffer and Ricardo Meléndez-Ortiz, *Dispute Settlement at the WTO: the Developing Country Experience*, pp. 162-163.

104 Discussion during the South-South Dialogue on Managing Trade Litigation, 3-4 May 2012, Geneva.

105 Id.

106 Id.

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