

Forum Selection in Trade Litigation

By **Arthur E. Appleton,**
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LIST OF ABBREVIATIONS AND ACRONYMS

ACP	African, Caribbean and Pacific countries
ACWL	Advisory Centre on WTO Law
BIT	Bilateral Investment Treaty
CISG	UN Convention on Contracts for the International Sale of Goods
DDA	Doha Development Agenda
DSB	Dispute Settlement Body
DSM	Dispute Settlement Mechanism
DSU	Dispute Settlement Understanding
EC	European Community
ECJ	European Court of Justice
ECT	Energy Charter Treaty
EPA	Economic Partnership Agreements
EEZ	Exclusive Economic Zone
EU	European Union
FAO	Food and Agriculture Organization of the United Nations
FCPA	US Foreign Corrupt Practice Act
FTA	Free-Trade Agreement
GATS	Trade in Services
GATT	General Agreement on Tariffs and Trade
GPA	Agreement on Government Procurement
GSP	Generalized System of Preference
ICANN	Internet Corporation for Assigned Names and Number
ICAO	Council of the International Civil Aviation Organization
ICCAT	International Commission for the Conservation of Atlantic Tunas
ICJ	International Court of Justice
ICSID	International Centre for Settlement of Investment Disputes
ICTSD	International Centre for Trade and Sustainable Development
ILO	International Labour Organization
IP	Intellectual Property
ITLOS	International Tribunal for the Law of the Sea
ITC	International Trade Commission
IUU	Illegal, Unreported, and Unregulated
NAFO	Northwest Atlantic Fisheries Organization
NAFTA	North American Free Trade Agreement
NASCO	North Atlantic Salmon Conservation Organization
NGO	Nongovernmental Organization
PTA	Preferential Trade Agreement
RFMO/As	Regional Fisheries Management Organizations and Arrangements
RTA	Regional Trade Agreement
SCM	Subsidies and Countervailing Measures
SEAFO	South East Atlantic Fisheries Organisation
TBR	EU Trade Barriers Regulation
TBT	Technical Barriers to Trade
TRIMs	Trade-Related Investment Measures
TRIPs	Trade-Related Aspects of Intellectual Property
UDRP	Uniform Domain Name Dispute-Resolution Policy
UN	United Nations
UNCITRAL	UN Commission on International Trade Law

UNCLOS	United Nations Convention on the Law of the Sea
UNFSA	United Nations Fish Stocks Agreement
US	United States
USTR	United States Trade Representative
WIPO	World Intellectual Property Organization
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 Arthur E. Appleton, this study examines the alternative fora available for resolving international trade conflicts. It examines different opportunities provided by international, regional, bilateral, and domestic fora by assessing the tribunal's jurisdiction and main characteristics and providing a number of recommendations for public and private actors.

We hope that you will find it interesting and insightful.

Ricardo Melendez-Ortiz
Chief Executive, ICTSD

EXECUTIVE SUMMARY

Despite the negative effects of trade barriers, which are often felt most acutely by private industry, the right to file a WTO case rests only with WTO member states themselves. An economic, legal, and political assessment of trade barriers should, however, provide private actors with a number of alternative options for resolving economic conflicts/disputes and safeguarding their interests.

The WTO Agreement offers considerable flexibility with respect to the means available to resolve a dispute, but the process can be lengthy, particularly when "enforcement" in the form of retaliation or cross-retaliation is necessary. Furthermore, there is no guarantee that a losing member is going to implement an adverse decision to the satisfaction of the prevailing party. At the same time, proceedings lack transparency, and WTO rules are seldom enforceable in national courts. Nevertheless, to the extent that it is applicable in a particular situation, the WTO dispute settlement system is overall a success, particularly when compared with many other forms of international dispute settlement.

However, in many instances where the public interest does not replicate the interest of the affected sectors, it may not be the best solution to bring a case under the WTO system. Alternative fora for trade-related dispute settlement exist under several international agreements as well as at the regional and national levels and as a result of private contractual arrangements. While opportunities for forum selection may exist in selected domains, there are few magic bullets to be found at the international and regional levels.

Following a closer analysis of the dispute settlement facilities available at the World Intellectual Property Organization (WIPO), the International Labour Organization (ILO), trade in fish mechanisms, the Energy Charter Treaty (ECT), and international civil aviation, the paper highlights that such systems are often plagued by a lack of effectiveness and that there are no international organizations that offer a complete substitute to the WTO for the resolution of trade disputes.

The proliferation of preferential trade agreements (PTAs) with the inclusion of compulsory dispute settlement procedures, such as those under the North American Free Trade Agreement (NAFTA) and EU-CARIFORUM, as well as under customs unions, such as MERCOSUR and the European Union (EU), has led to the creation of alternative fora for their members to resolve trade disputes. This paper emphasizes, however, that such fora are of course limited to PTA members and that the significant similarities between dispute settlement under PTAs and the WTO Agreement means that many of the same weaknesses can be found. Similarly, overlap in the fields covered by PTAs and the WTO Agreement continues to complicate matters and present a challenge to adjudicators, with parties often seeking to rely on both mechanisms as a way of resolving particular conflicts.

With a particular focus on EU and United States (US) rules, mechanisms available for the private sector to access their domestic courts to address certain trade problems are also examined, most notably, with respect to dumping and illegal subsidies. While recognizing that such domestic rules do not make the WTO Agreement directly effective, there are, nevertheless, means for stakeholders to access domestic courts to seek remedies. Again, however, these are limited to countries where such laws are in place, and the author identifies that it is, in fact, developing countries that are often the target of US and EU trade remedies actions at the domestic level.

Alongside these fora, arbitration under the WTO Dispute Settlement Understanding (DSU) and international arbitration outside the WTO can also represent a valuable alternative. A like-for-like comparison with dispute resolution procedures shows commercial arbitration to be suitable for a broad range of disputes, with the possibility of parties, including either states or private parties or both. The author takes a closer look at the typical provisions found under both the UN Commission on International Trade Law (UNCITRAL) and the ICSID rules relating to investor-state arbitration, recognizing at the same time that commercial arbitration is commonly used in investment disputes, which largely remain outside the WTO regime.

In conclusion, while forum selection alternatives do exist, they are often in areas at "the edge" of the WTO Agreement, such as investment, labour, or environmental law. These alternative fora do not offer many opportunities for developing countries seeking other ways to resolve disputes outside the WTO system.

The study concludes that questions of forum selection should not be divorced from the wider political reality accompanying most trade disputes. Most members have at one time or another taken actions that can be challenged under one or more of the covered agreements. By initiating a trade dispute in one forum or another – particularly highly politicized fora – they may be opening a Pandora's Box. They may be subject to tit-for-tat retaliation, as well as political and economic pressure from other members. Some developing countries are particularly vulnerable in this regard. They may be dependent on market access, PTAs, foreign aid, security guarantees, remittances from guest workers, et cetera. Such dependencies may limit their political room for manoeuvre.

Likewise, businesses in developing countries may suffer as a result of ill-chosen actions. Industries are becoming ever more dependent on supply chains, and ill-chosen disputes may disrupt these valuable private sector trade relationships and have a knock-on effect on employment, exports, balance of payments, et cetera. This in turn may have unintended domestic as well as foreign political and economic implications.

This is not to say that developing country WTO members should not consider bringing disputes in the WTO or in other fora, but instead only to suggest that developing countries carefully consider their actions and that they anticipate the economic and political effects of launching a particular dispute, as well as the expected legal outcome well before commencing litigation.

1. INTRODUCTION

Dispute settlement in the WTO faces some well-known limitations. Developing country members have standing to participate in WTO dispute settlement, just as any other WTO member, but they face financial, human resource, and political constraints that limit their ability to make use of the system to assert or defend WTO rights. For example, due to these constraints, it is unlikely that a member of the African, Caribbean and Pacific countries (ACP) group is going to bring a dispute settlement proceeding against the EU.[1]

On the other side, private stakeholders, in particular business people may be profoundly affected by the outcome of WTO dispute settlement proceedings, but they lack legal standing to participate formally in WTO disputes. They also lack the ability to participate in many other forms of international and regional dispute settlement. Instead, private stakeholders must work through sympathetic governments that are WTO members to address their international economic needs, or turn to alternative fora, such as national courts or arbitral tribunals, to resolve their disputes.

Lacunae in the WTO dispute settlement system necessitate a search for standing in alternative fora. For both developing countries and private stakeholders, when alternative fora are available, the choice of a forum may play a role in the outcome of a trade dispute, irrespective of whether the dispute involves goods, services, or intellectual property. This is because different fora apply different rules of law that may influence the strategy and outcome of a dispute. The relevance of forum choice appears to be increasing with the availability of different fora and the overlap among various trade-related agreements. Nevertheless, it is difficult to know how government officials make forum selection decisions without being in the room with the decision-makers. Without such a 'fly-on-the-wall perspective,' one must look for alternative means of examining the viability of various fora. One such means is to examine disputes that have been heard in more than one forum, looking particularly at considerations related to standing, enforceability, expertise, transparency, and speed.

This paper, which follows terms of reference established by ICTSD, examines alternatives to WTO dispute settlement, bearing in mind the shortcomings of the WTO system and the needs of developing countries and stakeholders in developing countries. Due to the broad scope of the terms of reference, this paper should be regarded as a work in progress — a first step in what is likely to be a long journey. Much of the paper is written from a state actor perspective, and not necessarily from the perspective of business actors. Examples are offered throughout. Particular attention is given to a number of WTO cases where related matters have also been heard in other fora.

The conclusion of this paper, which is not based on (but would benefit from) empirical research is that for many trade disputes, there is no real substitute for the WTO dispute settlement system. No magic bullet exists for developing countries to address the underlying inadequacies of international economic law in general and the WTO system in particular. The availability of viable and efficient fora is relatively limited and there would appear to be few novel or unconventional strategies that developing countries or private stakeholders can successfully follow to pursue needs not addressed or addressable at the WTO. Where alternatives to WTO dispute settlement do exist, viable alternative fora tend to lie at the periphery of the WTO system in areas that are traditionally a part of international economic law, but not fully integrated, or not well integrated, into the WTO legal system. The 'Singapore issues,'[2] in particular investment, fit well into this category as well as other issues that are not well regulated in the WTO Agreement, including some issues involving civil aviation; the environment (in particular fisheries); energy resources; labour rights;

and certain intellectual property matters outside the WTO Agreement on Trade-Related Aspects of Intellectual Property (TRIPs). Absent WTO jurisdiction in the form of a violation complaint,[3] such issues may give rise to a non-violation complaint.[4] But a non-violation complaint is unlikely to remedy the underlying economic problem, owing to the limited remedies available under Article 26(1) of the DSU, thus further fuelling the search for alternative fora.

The search for alternative fora implicitly involves a choice in the type of dispute settlement: litigation before international tribunals, litigation before regional bodies, traditional litigation in national courts and tribunals, or arbitration. This paper looks at all four alternatives. While, as already noted, this work does not succeed in finding a magic bullet in the various fora that can substitute for the WTO dispute settlement system, it does identify occasional alternatives to WTO dispute settlement that may give a frustrated developing country trade warrior a few more arrows to place in his or her quiver in limited situations.

1.1 Scope and Shortcomings in the WTO System

WTO dispute settlement is member to member (usually state to state), limited by the scope of the 'covered agreements,' rule based, binding among parties, and subject to clear time limits. As it is member to member, businesses and other stakeholders often find themselves 'outside looking in.' They are effectively deprived of standing in dispute settlement proceedings and must 'act' or 'operate' through members if they are to achieve their strategic objectives.

The WTO is, as its name implies, a trade agreement. It applies to goods and services in international trade and measures that affect goods and services in international trade. The DSU applies to the Agreement Establishing the World Trade Organization and the multilateral trade agreements on (i) trade in goods; (ii) trade in services (GATS); (iii) TRIPs; (iv) the DSU itself; and (v) to the members of the plurilateral Agreement on Government Procurement (GPA).[5] The general applicability of the WTO Agreement to goods, services, and intellectual property means that there is substantial business and other stakeholder interest in its activities, but its incomplete coverage of government procurement, investment, and intellectual property and its general inapplicability to almost all questions concerning non-existent coverage of competition law, environmental law, and labour law means that businesses and other stakeholders must find other means of addressing certain types of what many may view as 'trade-related' disputes.[6]

The starting point of this paper is the realization that the right to initiate a WTO dispute rests with member governments. Only WTO members have a right to participate as parties and third parties in WTO dispute settlement.[7] Industries and other stakeholders must act indirectly – their only real option is to convince a WTO member to initiate a WTO dispute or to represent their interests in various WTO meetings. Few industries and stakeholders have this power. Furthermore, developing country governments are often reticent to initiate trade litigation as a government's short and long-term interests may differ from those of stakeholders.[8]

The second basic point is that the WTO Agreement provides considerable flexibility with respect to the means available to resolve a dispute. The DSU offers an opportunity for good offices, mediation, and conciliation as well as an independent arbitral system. However, members generally prefer to resolve trade disputes bilaterally through informal consultations or through application of the formal Dispute Settlement Mechanism (DSM). The WTO DSM has four possible phases: (i) mandatory consultations; (ii) panel proceedings – a tribunal almost always composed of three persons who serve as finders of fact and law; (iii) Appellate Body Proceedings – a standing tribunal (the

Appellate Body) from which three "judges" are selected to hear appeals on questions of law and legal interpretation arising from panel decisions; and (iv) an enforcement phase pursuant to which the prevailing party may withdraw trade concessions (retaliation or cross-retaliation) until the losing party brings its trade measures into conformity with the covered agreements.

WTO dispute settlement is subject to strict time limits. The time period from a Member's Request for Consultation to the adoption of an Appellate Body report generally takes less than two years. The efficacy of WTO dispute settlement is enhanced by the fact that the losing member usually implements the adopted reports. These facts alone elevate WTO dispute settlement above many other forms of international dispute settlement. Nevertheless, the process can be lengthy, particularly when "enforcement" in the form of retaliation or cross-retaliation is necessary. Furthermore, there is no guarantee that a losing member is going to implement an adverse decision to the satisfaction of the prevailing party. In other words, the WTO's enforcement mechanism, set forth in the DSU, is somewhat weak — the power to retaliate or cross retaliate against the losing party (through higher tariffs and the suspension of other concessions) is generally only effective in the hands of the most powerful members with sufficient trade to apply pressure on a losing party. In instances when the prevailing party has the capacity to enact enforcement measures in the form of higher tariffs, the result is almost always that consumers in the sanctioning country pay the price in the form of more expensive goods. Even in instances when the respondent knows its measure is illegal and that it will lose a dispute, there is frequently little financial incentive to withdraw a protectionist measure. The absence of monetary damages and the length of the dispute settlement and enforcement process mean that industry in the losing member may benefit from several years of protection without having to pay financial compensation.

Another concern with WTO dispute settlement is the potential lack of transparency. While judgments (known as reports) are published, which elevates the WTO regime above many forms of arbitration in terms of transparency, many members (in particular developing country parties) seldom agree to open hearings to the public or make their legal submissions publicly available.

A further shortcoming is that WTO rules are seldom enforceable in national courts. In most jurisdictions, the WTO Agreement lacks direct effect — private parties cannot apply WTO rules in national courts. The result is that on the domestic level, governments do not need to practice what they preach with respect to trade policy. Even in instances when the WTO Dispute Settlement Body authorizes countermeasures (retaliation or cross retaliation), a member is not obliged to implement these measures, and stakeholders are unable to compel a member to implement such measures through legal action at the national or international level.

Nevertheless, to the extent that it is applicable in a particular situation, the WTO dispute settlement system is overall a success, particularly when compared with many other forms of international dispute settlement. Its success depends on WTO members acting as "good citizens" by withdrawing offending measures during the consultation stage or implementing adverse decisions. If a member chooses to ignore an adverse ruling, a trade barrier will remain in place.

In summary, WTO dispute settlement has the following characteristics:

	WTO
Parties	Parties must be WTO member governments. Third parties must also be WTO member governments. Business interests can sometimes make their views heard through amicus submissions or by asking governments to represent their points of view as parties and third parties.
Types of Disputes	Disputes arising under the covered agreements (the agreements that form the WTO Agreement) are the only disputes that may be heard in the WTO.
Commencement of Dispute	A Request for Consultations begins the dispute settlement process. Formal consultations are required before a Request for the Establishment of a Panel may be filed.
Rules /Procedures	Rules are specified in the DSU. Formal Working Procedures also exist.
Composition of the Tribunal	The parties can agree on the composition of a panel (tribunal of first instance). They usually do not and the institution makes the appointment. Unless the parties agree, nationals from parties and third parties cannot be panellists. A standing body called the Appellate Body, which is composed of seven members, hears appeals. Three members are assigned to each case; however, the Appellate Body works by collegiality and all members meet to discuss on-going cases.
Discovery	No formal provisions govern discovery. Panels draw adverse inferences if a party does not produce requested information.
Confidentiality/ Transparency	Decisions are published. Business confidential information is protected. Hearings can be opened by agreement of the parties.
Appeal ability	The WTO Agreement provides for an appeal as a matter of right.

1.2 Developing Countries and Alternative Fora

Alternative fora for trade-related dispute settlement exist under several international agreements as well as at the regional and national levels and as a result of private contractual arrangements. This is demonstrated by the number of disputes related to WTO cases that have been filed or are pending in alternative fora. Some of these fora regulate trade relationships — frequently (as noted in the introduction) those trade relationships lying at the 'edge' of the WTO system. For example, effective dispute settlement systems of potential interest to stakeholders exist in many important jurisdictions for two of the Singapore issues, investment and competition law. Likewise, viable systems for dispute settlement exist at the national and international levels for many intellectual property-related matters, some of which involve issues that cannot be addressed easily in the WTO, such as domain-name disputes. With the exception of commercial and investor-state arbitrations, and actions in national courts, many fora do not provide access to private stakeholders, opening their doors only to governments that have ratified specific international instruments empowering the government to take a matter to dispute settlement.

Questions arise as to the suitability of alternative fora for developing countries and stakeholders in developing countries. Unlike WTO dispute settlement, where developing countries may have the opportunity to use the moderately priced and highly effective legal services offered by the Geneva-based Advisory Centre on WTO Law (ACWL), no similar centre exists to advise on regional trade agreements, or to advise on investment, competition, and other trade-related disputes. Likewise, no international organization offers legal advice to developing countries and their stakeholders involved in contract disputes subject to arbitration.

Leaving aside international arbitration (discussed in section 5), many alternative fora lack effective enforcement machinery, relying instead on various forms of "name and shame" to exert political pressure on losing parties. The result

is that consultations remain important for negotiating the resolution of most trade-related international disputes.

1.3 Methodology

This paper examines strategies for developing country government officials, businesses, and other stakeholders to improve prospects for successful trade litigation. The focus of this paper is on the important subject of forum selection — commencing a dispute in the forum most likely to produce the desired result – either finding in a complainant's favour or generating sufficient attention to bring about the withdrawal of a measure ('name and shame'). The primary question posed throughout this paper is whether there are fora other than the WTO that can be used to litigate trade disputes. More specifically, this paper looks at dispute settlement alternatives for governments and stakeholders in four fora: (i) specialized international fora; (ii) regional trade agreements; (iii) domestic courts; and (iv) international arbitration. The discussion involves fora across the world, each with their own advantages and disadvantages in terms of the actors (those permitted to participate), cost, confidentiality, quality, thoroughness, reliability, speed and integrity. From a methodological viewpoint, each dispute settlement mechanism is examined from the perspective of the following criteria: (i) background, parties, and subject matter of the dispute; (ii) interim measures and relief that a tribunal can award; (iii) enforcement; confidentiality (transparency); and effectiveness (including rapidity of proceedings); and (iv) unique features (if any).

1.4 Conclusions and Recommendations

Based on the methodology outlined above, pointers and conclusions are drawn in every major section on the efficacy of particular dispute settlement fora. When useful, tables are used to compare particular mechanisms and recommendations are made on forum selection.

The main conclusion is that while opportunities for forum selection may exist in selected domains, there are few magic bullets to be found at the international and regional levels. Governments (and private parties to the extent they have standing) must generally rely on 'name and shame' even in instances when they prevail in an international dispute before international organizations. At the national level, the situation is somewhat different. For private parties and governments participating in disputes cognizable before national courts or enforceable before national courts pursuant to the 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the New York Convention), the situation is brighter – enforcement potential exists. Alternative fora demonstrate promise in two particular instances. Arbitration is promising in instances when there is an agreement to arbitrate applicable between the parties and when enforcement is possible under the New York Convention. Also, actions in national courts may be promising in instances where leverage can be exercised against an offending party (such as in an action for annulment in the EU system).

From the preceding introduction, some recommendations can already be offered:

- For governments and stakeholders, forum selection in international dispute settlement requires a determination as to who has standing under the rules of a particular system – whether a government, a stakeholder, or both – then working with and through the entity with standing.

- Before pressuring a government to proceed to dispute settlement in an international forum, businesses, nongovernmental organizations (NGOs) and other stakeholders should try to persuade the government to address a problem bilaterally in informal consultations between trade officials (in instances when they cannot act directly themselves). This method can be fast and cost-effective and may avoid protracted litigation.

- While enforceable solutions may not always result from actions before international fora because most fora lack effective enforcement machinery, success before certain bodies may have a 'name and shame' effect that will eventually produce results.

2. SPECIALIZED INTERNATIONAL FORA: OPPORTUNITIES UNDER SPECIALIZED INTERNATIONAL AGREEMENTS

This section examines dispute settlement in several international fora and compares dispute settlement in those fora with WTO dispute settlement. Due to size constraints, and the sheer number of international agreements, this paper does not explore every international forum, and is generally limited to sectors proposed by ICTSD. Employing the methodology outlined in the introduction, this paper focuses on selected fora with dispute settlement systems that may be of interest to developing countries with trade issues. Emphasis is also placed on institutions that reach out to stakeholders other than members of the WTO.

- Dispute settlement in several of the organizations described below is not limited to member states. Individuals, companies, other legal entities and labour and employer organizations also have standing under certain international agreements.

2.1 Intellectual Property: WIPO

The TRIPs Agreement does not apply to all trade-related intellectual property matters. In particular, private contracts with intellectual property provisions as well as domain-name disputes involving private parties are outside the WTO Agreement. In certain cases, however, such disputes may be cognizable under procedures established by the WIPO. The WIPO offers several forms of dispute settlement affecting commerce in goods, services, and TRIPs that provide for relief that is broader than that found under the WTO Agreement. WIPO fora may be open to individuals as well as companies and other legal entities. WIPO dispute settlement provides a relatively inexpensive means[9] for private stakeholders to pursue trade-related disputes with an intellectual property focus.[10]

2.1.1 The WIPO Mediation and Arbitration Center

Trade in goods and services often involves complex intellectual property issues. When the rights of private parties are at stake in intellectual property disputes between private parties, WTO members often have little incentive to interfere on behalf of one party or another. Furthermore, the inability of the Dispute Settlement Body (DSB) to issue injunctive relief or to award financial damages means that the DSM is usually not suitable as a means to resolve many types of intellectual property disputes. Other organizations have moved in to fill this gap.

As of 19 March 2012, the WIPO Mediation and Arbitration Center has administered more than 270 intellectual property-related mediation and arbitration cases since its creation in 1994, with amounts in dispute ranging from USD 20,000 to several hundred million dollars.[11] The Center offers several services: arbitration, expedited arbitration, mediation (non-binding), good offices, domain-name dispute resolution, and expert determinations (binding unless the parties agree otherwise).[12] The majority of the Center's cases have occurred in recent years, demonstrating that parties are now developing increased confidence in the competence of the Center. Most cases arise out of contract clauses, but some cases have arisen by subsequent agreement between disputing parties.[13] WIPO notes that parties have included: "collecting societies, individuals such as artists and inventors, large- and small- and medium-sized companies, producers, and universities."[14]

WIPO further notes that it has administered arbitration and mediation cases involving:

> […] artistic production finance agreements, art marketing agreements, consultancy

> and engineering disputes, copyright issues, distribution agreements for pharmaceutical products, Information Technology agreements including software licenses, joint venture agreements, patent infringements, patent licenses, research and development agreements, technology transfer agreements, telecommunications related agreements, trademark issues (including trademark coexistence agreements), TV distribution rights, as well as cases arising out of agreements in settlement of prior court litigation.[15]

Under WIPO rules, parties maintain the right to choose the applicable substantive law and the place of arbitration. If the parties have not so chosen and do not agree, the Tribunal may "apply the law or rules of law that it determines to be appropriate" with respect to the substantive law, and the WIPO Center will make the decision as to the place of arbitration.[16]

Remedies sought by parties in WIPO arbitrations include:

> [...] damages, infringement declarations and specific performance, such as a declaration of non-performance of contractual obligations, or of infringement of rights, further safeguards for the preservation of confidentiality of evidence, the provision of a security, the production of data, the delivery of goods or the conclusion of new contracts.[17]
>
> Although there is not an extremely large amount of experience with respect to WIPO mediations and arbitrations services, the settlement rate is impressive: 68 percent for mediation and 42 percent for arbitration.[18]

Article 46 of the WIPO Arbitration Rules permits a wide variety of interim measures, including injunctions and measures for the conservation of goods that form part of the subject matter in dispute, the provision of security for the claim, counterclaim, and costs and interim awards with respect to interim measures. Furthermore, Article 46(d) permits a party to petition a court to request interim measures without waiving any rights under the arbitration agreement.[19]

WIPO arbitration proceedings, whether normal or expedited, are relatively fast and the Rules permit confidentiality of both the proceedings and the awards.[20] Jurisdiction is usually compulsory once a party has invoked an agreement to arbitrate. Awards are enforceable under the 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the New York Convention),[21] when applicable. The New York Convention has two main objectives: to give effect to private agreements to arbitrate and to formalize a mechanism for the recognition and enforcement of arbitral awards made in other contracting states.[22] The New York Convention applies to arbitration agreements when the 'place' or 'seat' of arbitration is in one of the approximately 146 countries that have ratified the convention.[23]

WIPO arbitration proceedings have several unique features that distinguish them from WTO dispute settlement: private individuals and legal entities can be parties; parties to a contract can invoke WIPO jurisdiction where applicable; interim measures are possible; procedures are usually faster than WTO proceedings, and the awards are enforceable under the New York Convention provided that the place of arbitration is in a signatory country.

> Parties seeking to rely on the New York Convention should make sure that the place of arbitration is in a signatory country and that none of the reservations invoked by signatories or exceptions set forth in the convention preclude enforcement and that enforcement is sought in a signatory country other than the country of the place of arbitration.[24]

2.1.2 Domain-name arbitrations

Although trademarks and service marks fall within Part 2 of the TRIPs Agreement, trademark and service mark holders often turn to WIPO for dispute resolution services when an Internet domain name incorporating their mark, or a name that is confusingly similar to their mark, is registered by a third party (often a "cyber squatter"). Only members (governments) have standing in the WTO. In contrast, individuals and legal entities may have standing before WIPO to contest the use of certain domain names that are the same or confusingly similar to their trade and service marks. WIPO has administered more than 20,000 cases under the Uniform Domain Name Dispute-Resolution Policy[25] (UDRP or simply 'the Policy') involving more than 35,000 generic top-level domain names, which makes WIPO the leading provider of domain-name dispute resolution services under the Policy.[26]

The Policy, promulgated by the Internet Corporation for Assigned Names and Number (ICANN), binds domain-name registrars and their customers (domain-name registrants or holders). Pursuant to the Policy,[27] WIPO has administered an enormous number of generic top-level domain-name disputes involving the highly important .com, .net and .org suffixes. WIPO also administers disputes involving top-level domains ending in .aero, .asia, .biz, .cat, .edu, .info, .mobi, .name, .pro, .tel, .travel and .xxx[28] and has authority to resolve disputes involving 65 country code top-level domain names.[29]

WIPO domain-name arbitrations are inexpensive[30] and mandatory. ICANN, a not-for-profit organization, requires that registered holders of a generic top-level domain name sign a contract with their registrar, obligating them to participate in mandatory arbitrations or risk losing the right to the domain name they have registered. The Policy prohibits the registered holder of the domain name from transferring the name during a domain-name proceeding, for 15 days after the proceeding, or during a court proceeding (unless the transferee agrees to be bound by the judicial or arbitral decision).[31]

Unlike WTO dispute settlement, which often lasts between two and three years, the WIPO domain name procedure is extremely fast (normally 60 days from the filing of a complaint) and almost always completely online.[32] Hearings are seldom held,[33] and panellists (judges) may come from throughout the world.[34] Pursuant to Paragraph 4(k) of the Policy, court proceedings are, however, not precluded. Since, as a contractual condition, domain-name holders must participate in domain-name arbitrations or risk losing the right to the registered domain name, the procedure has an inbuilt mechanism to compel participation. Furthermore, the procedure has a built-in enforcement mechanism. ICANN accredits registrars and establishes the conditions of their operation. One condition is that the Policy be made applicable between the registrar and the domain-name holder. This gives ICANN the power to order registrars to transfer or cancel domain names after administrative or judicial proceedings.[35] WIPO proceedings are relatively transparent, as WIPO makes its awards (but not legal submissions) publicly available and searchable on the WIPO website.[36]

ICANN's power to accredit registrars and establish the conditions of their operation, and ICANN's power over the transfer or cancellation of domain names provides important leverage and allows for a very effective procedure. By its very nature, domain arbitrations lead to rapid and readily enforceable results. This is relatively unique in the international sphere and far exceeds the level of relief members can expect in WTO proceedings. The extent to which a similar mechanism can be made to work in other organizations remains questionable, as ICANN, by design, offers a privilege that individuals want, and ICANN has the power to withdraw that privilege. Only if the WTO Agreement was directly effective, and the DSB had the

power to award financial compensation to private parties could somewhat similar results be achieved in the WTO. This is very unlikely to happen in the foreseeable future.[37]

Finally, although most generic top-level domains as well as important trademarks and service marks are registered in more advanced countries, domain-name dispute settlement is attractive and affordable for developing countries. Developing countries could benefit if other dispute settlement forums replicated WIPO's model, in particular its low cost, speed, general elimination of expensive hearings, and relative transparency (particularly with respect to the publication of cogent decisions). However, due to the greater complexity of the issues involved, other areas of the law do not usually lend themselves to simple dispute resolution systems such as the WIPO model, which itself is not beyond criticism.[38]

2.1.3 Conclusions

WIPO arbitrations and the WIPO domain-name arbitration mechanism offer a viable but limited means for the resolution of certain intellectual property disputes with trade implications. Nevertheless, neither proceeding is a substitute for WTO dispute settlement, since the scope of both proceedings is limited to certain defined intellectual property disputes. WIPO arbitration proceedings allow private individuals and legal entities to be parties, permit the award of interim measures, and allow for enforceability under the New York Convention where applicable. Furthermore, jurisdiction is not mandatory in WIPO mediations and arbitrations – the parties (whether governments, businesses, or individuals) must consent through contract clauses or by subsequent agreement to mediation or arbitration.

WIPO domain-name arbitrations are transparent, rapid, and grant private parties standing. Furthermore, they are readily enforceable, since ICANN controls the use of most of the important domain names at issue. Few organizations are capable of exercising such economic leverage. While domain-name arbitrations are generally mandatory between disputing parties, their scope is limited to domain-name disputes. The UDRP is an effective dispute settlement model, but a model not easily transposed to other areas of the law because of the leverage that ICANN is able to wield.

In conclusion, private parties may wish to consider WIPO mediation or arbitration or domain-name dispute settlement when relevant to their business interests, but neither alternative will replace WTO dispute settlement. Although WIPO has broad enforcement tools at its disposition, WIPO's authority is limited to specific intellectual property issues.

2.2 Labour: The International Labour Organization (ILO)

The WTO Agreement does not contain specific provisions related to labour law. Efforts by certain GATT and WTO members to incorporate labour rules into the GATT and WTO have faltered since the negotiation of the Havana Charter,[39] including during the Singapore Ministerial Meeting.[40] Two WTO disputes[41] demonstrate that environmental criteria associated with the manufacture of a product, but undetectable in the final product (and by analogy human rights and labour practices), may be used by an importing country in certain circumstances to restrict market access. However, no WTO dispute settlement proceeding has ruled specifically on the relationship between WTO rules and international labour rules, or on whether a WTO member may deny market access to another member's exports based on a violation of international labour rules.[42] Such a dispute would be politically charged and highly controversial within the WTO.

The relationship between trade rules and labour practices is important from a trade perspective, even if it lies at the periphery of WTO concerns. As the Foxconn/Apple

controversy illustrates,[43] efficient producers seek low labour costs, but low labour costs may come at a price in terms of working conditions. Trade tensions may arise when producers with low labour costs and weaker labour standards seek to export goods and services to WTO members with higher labour costs and stronger labour practices. Labour practices may affect competition and a member's comparative advantage and have never been addressed in the WTO, even through non-violation complaints.[44] Free-Trade Agreements (particularly those signed by Canada, the EU, and the US, as well as generalized system of preference (GSP) programmes (such as the EU and US schemes) frequently contain labour provisions requiring participants to comport with certain labour standards.[45] But, these provisions are not always effective in assuring labour rights.

What can be done when a WTO member poses a competitive challenge in part because it fails to enforce workers' safety laws or does not respect core labour standards? WTO members are far from reaching a consensus that this is a WTO problem. For now, they have emphasized the competence of the ILO with respect to labour issues.[46] To what extent can WTO members turn to the ILO to enforce violations of ILO labour conventions when they perceive that a trading partner has an unfair competitive advantage?

The ILO provides an unusual forum for addressing labour issues because its General Conference (the International Labour Conference), which meets at least once a year, is composed of delegates from states (members) as well as delegates representing workers' and employers (representative organizations).[47] The ILO's tripartite nature distinguishes it from the WTO and other international organizations. While the ILO's tripartite nature does increase the participatory element in the adoption of international conventions, it may reduce the prospects for fast and efficient dispute settlement.

There are several distinct procedures whereby representative organizations and members are permitted to air grievances against ILO members. They are summarized below.

Annual Reports: Countries that have ratified an ILO convention are obliged to report on the application of the convention. Governments must submit copies of these reports to worker and employer organizations, each of which are permitted to comment on the reports. A Committee of Experts, whose members are appointed by the Governing Body, examines these routine reports and evaluates members' implementation of ratified conventions. The Committee of Experts is entitled to make observations and direct requests to members.[48] The Committee of Experts publishes an annual report.[49] A standing tripartite committee, called the Conference Committee on the Application of Standards, reviews the report and selects observations for discussion. The governments in question are invited to provide additional information, and the Committee makes recommendations to address specific problems.[50] The Committee selects approximately 20 cases a year for examination.

Committee on Freedom of Association: The ILO examines complaints about violations of the right to freedom of association – regardless of whether a member has ratified the relevant ILO conventions. The Committee on Freedom of Association (CFA) is tripartite and has the power to establish the facts of a case, issue reports through the Governing Body, and make recommendations to address violations. Established in 1951, the Committee on Freedom of Association has examined more than 2,300 cases.[51]

Representations: Article 24 of the Constitution provides industrial associations of employers or workersan opportunity to file 'a representation' that a member state (any member) is not observing an ILO Convention that it has ratified. The Governing Body may establish a tripartite committee to examine the representation. Article 25 gives the Governing Body the right to publish the representation and the statement, if any, made in reply.[52] This procedure is thus a form of 'name and shame.'

Complaints/Commissions of Inquiry: Article 26 of the ILO Constitution provides two mechanisms for initiating complaints. First, pursuant to Article 26.1 "Any of the Members shall have the right to file a complaint with the International Labour Office if it is not satisfied that any other Member is securing the effective observance of any Convention which both have ratified in accordance with the foregoing articles." The Governing Body may refer complaints from members about non-observance of ILO conventions to a Commission of Inquiry. Commissions of Inquiry are established on an ad hoc basis to address particular cases. Second, pursuant to Article 26.4, the Governing Body may initiate a complaint "either of its own motion or on receipt of a complaint from a delegate to the Conference." Pursuant to Article 33 of the Constitution "the Governing Body may recommend to the Conference such action as it may deem wise and expedient to secure compliance therewith." In theory, such a complaint could end up before the International Court of Justice (ICJ).[53] This was a possibility in the forced labour complaint filed against Myanmar and described below.[54]

There are no enforceable interim measures pursuant to any of the above mechanisms. However, government involvement at every stage has a 'name and shame' effect that increases throughout the duration of the process. ILO mechanisms may be slower or faster than WTO dispute settlement. For example, the ILO's Governing Body invoked Article 33 for the first time in the year 2000, four years after an Article 26 complaint had been filed in the same matter against Myanmar for violations of the Forced Labour Convention 1930 (No. 29). The resulting Commission of Inquiry found "widespread and systematic use" of forced labour in the country.[55] The ILO indicates that as of 2011, the Governing Body "remained concerned that serious problems in the use of forced labour persisted."[56] On the other hand, in November 2008, the Governing Body established a Commission of Inquiry that examined complaints filed by delegates to the Conference concerning Zimbabwe's observance of conventions 87 and 98 on freedom of association. It made its recommendations in December 2009.[57]

ILO "supervisory mechanisms" to the extent applicable allow ILO members and certain worker and employer associations to challenge labour practices that violate ILO conventions or that do not conform to principles made a part of the ILO Constitution. By challenging such practices, member states, employers, and worker associations may, to some extent, level the international playing field by increasing costs assumed by competitors that agree to improve labour practices. For example, Article 6 of the ILO Dock Work Convention (C137 of 1973) requires that "Each Member shall ensure that appropriate safety, health, welfare and vocational training provisions apply to dockworkers."[58] If dockworkers enjoy improved safety, health, welfare, and training opportunities (assuming no increase in productivity and competitiveness), port costs may increase, and the price of exports from the country involved (as well as imports) are also likely to increase.

2.2.1 Conclusions

Do ILO procedures offer a viable forum for addressing trade-related labour disputes? Without a thorough statistical review of all recent trade-related labour disputes heard by various ILO supervisory mechanisms (a task well beyond the scope of this paper), it is difficult to answer this question with certainty. Based on the information presented in this paper, the answer would appear to be that "it depends."

- First, the jurisdiction of the ILO supervisory mechanisms is generally limited to matters falling within the ILO constitution and conventions. Unless a trade dispute involves labour law issues, it is likely to fall outside ILO jurisdiction. This alone naturally limits the ability to bring most trade-related disputes before the ILO.

- Second, recourse to ILO supervisory mechanisms outlined above requires both knowledge of the ILO Constitution and relevant conventions, as well as the ability to persuade member states or appropriate employer and worker associations (when they have standing) to take action. Both legal expertise and political acumen are required.

- Third, while the WTO's enforcement mechanism is generally stronger than the ILO supervisory mechanism (offering WTO members the possibility of suspending trade concessions), the ILO supervisory mechanism does permit ILO member states the ability to apply pressure through 'name and shame' as well as a means to attract media attention to particularly egregious labour practices.

- In conclusion, it would appear that the ILO may provide a specialized forum for a limited number of trade disputes with underlying labour law considerations. Depending on the selected ILO supervisory mechanism (for example, example challenges to limitations imposed on freedom of association constraints), ILO mechanisms may operate expeditiously and efficiently.

2.3 Fisheries

International trade in fisheries products falls within the WTO Agreement. However, trade in fisheries products remains a contentious issue among WTO members, in large part because this trade is distorted by member subsidies. The subsidization of fishing vessels increases the potential for overfishing, as subsidies increase overcapacity and provide financial incentives for otherwise unprofitable vessels to continue fishing. WTO members agreed to address the relationship between members' subsidization of fishing vessels and overfishing in the Doha Development Agenda (DDA),[59] but these talks have yielded few results and any hopes of real progress in the DDA have dimmed despite general acceptance that, from an economic perspective, subsidies are one of the leading causes of overfishing.

The failure of the WTO members to address the fisheries subsidy problem within the DDA should give rise to a debate on alternative means of addressing the issue of overfishing. While reducing or eliminating member subsidies would address one of the sources of the problem, the problem can also be addressed by members further 'downstream' – by focusing on the overfishing itself that undermines the sustainable use of fishery resources. Admittedly, from a trade policy perspective this is a second-best solution, since it does not address the underlying subsidy issue, but it does provide a possible means forward, since fisheries disputes often involve violations of the national laws and regulations of a coastal state in areas under national jurisdiction (fishing without authorization, fishing in violation of authorized conditions), or violations of conservation and management measures established by competent regional fisheries management organizations or arrangements applicable to fishing on the high seas.[60]

Nations seeking to conserve and manage fish stocks in a sustainable manner may find possible ways forward through the following international and regional agreements that contain provisions addressing conservation and sustainable use of fishery resources. None of the approaches outlined below provides the "magic bullet" required to solve the problem of economic subsidies to fishing vessels or trade in unsustainably harvested fish. All of the international regimes described below have, however, adopted fisheries management strategies with legally binding rules for actions to be taken when stock sizes decline below reference points in an effort to avoid overexploitation of particular fish stocks. Each international arrangement also provides mechanisms for the peaceful settlement of disputes. A limited number of international and regional arrangements are discussed below.

2.3.1 International agreements related to fisheries

2.3.1.1 United Nations Convention on the Law of the Sea (1982)

Legal Regime

The United Nations Convention on the Law of the Sea (UNCLOS)[61] establishes a legal framework setting forth rights and obligations of states with respect to the various uses of oceans and seas, including navigation, protection of the marine environment, marine scientific research, maritime boundary delimitation, fisheries conservation and management, and seabed exploitation in areas beyond national jurisdiction. UNCLOS also provides compulsory and non-compulsory dispute settlement mechanisms for the peaceful resolution of disputes related to the interpretation and application of UNCLOS. This section examines UNCLOS provisions governing the conservation and management of fishery resources and mechanisms provided in the convention for the settlement of fisheries disputes with trade implications, including disputes concerning unsustainable fishing practices.

Article 56(1) of UNCLOS grants coastal states sovereign rights for the purpose of conserving and exploiting, *inter alia*, the living resources of its exclusive economic zone (EEZ).[62] Coastal states are entitled to ensure compliance with their laws and regulations governing conservation and management of living resources within their EEZs.[63] Pursuant to Article 61(2) of UNCLOS, a coastal state has an obligation to "ensure through proper conservation and management measures that the maintenance of the living resources in the exclusive economic zone is not endangered by over-exploitation."

UNCLOS further provides that all states have the right to engage in fishing on the high seas,[64] and grants flag state "exclusive jurisdiction" over vessels on the high seas.[65] States are required to ensure that fishing vessels flying their flag comply with conservation and management measures established by the competent fisheries management organization or arrangement for the high seas.[66]

Dispute settlement

Part XV of UNCLOS establishes the rules governing the settlement of disputes among state parties to the convention. It is divided into three sections. Section 1 sets forth general provision and elaborates rules for non-binding decisions. Section 2 deals with compulsory procedures and binding decisions. Section 3 deals with exceptions to the applicability of Section 2.

Article 297(3)(a), which is found in Section 3, exempts coastal states from compulsory procedures entailing binding decisions for disputes involving their sovereign right over living resources within their EEZ. This exception extends to the discretionary power of a coastal state to determine "allowable catch, its harvesting capacity, the allocation of surpluses to other States and the terms and conditions established in its conservation and management laws and regulations." This exemption is tempered by two provisions: Article 292 on prompt release of vessels and crews, and Article 297(3)(b), which requires states to submit fisheries disputes under Article 61(2), 62(2), 69, and 70 to compulsory conciliation procedures.[67] Balancing Articles 292, 297(3), Article 61(2),[68] and 62(2)[69] is a challenge for many coastal states and requires a considerable degree of good governance.

Fisheries disputes on the high seas concerning unsustainable fisheries practices, in violation of Articles 117-119 of UNCLOS are subject to mandatory dispute settlement procedures under Articles Section 2 of Part XV of UNCLOS. Article 287 allows state parties to choose between the following fora, each with the capacity to issue a binding decision: (a) the International Tribunal for the Law of the Sea (ITLOS); (b) the ICJ; (c) anad hoc arbitral tribunal (constituted in accordance with Annex VII of UNCLOS); or (d) a "special arbitral tribunal" (established under Annex VIII of UNCLOS for specific types of disputes — including fisheries

disputes). Pursuant to Article 287, Annex VII ad hoc arbitration is generally the default means of dispute when state parties do not agree on the choice of a specific forum to resolve their dispute.[70]

The ability to implement provisional measures is important in natural resource disputes. Article 290(1) of UNCLOS vests "a court or tribunal which considers that *prima facie* it has jurisdiction" with authority to enact provisional measures "to preserve the respective rights of the parties to the dispute or to prevent serious harm to the marine environment" and vests ITLOS with authority and jurisdiction to determine interim or provisional measures.[71] In addition, "[p]ending the constitution of an arbitral tribunal to which a dispute is being submitted under this section," Article 290(5) of UNCLOS provides that "any court or tribunal agreed upon by the parties or, failing such agreement within two weeks from the date of the request for provisional measures, the ITLOS may prescribe, modify or revoke provisional measures if it considers that *prima facie* the tribunal which is to be constituted would have jurisdiction and that the urgency of the situation so requires."

Pursuant to the ITLOS statute,[72] state parties that consider they have "an interest of a legal nature which may be affected by the decision in any dispute" may pursuant to Article 31 of the statute submit a request to intervene to the Tribunal. If the request to intervene is granted, the state party is bound by the Tribunal's decision.[73] Pursuant to Article 32(1) and (3) of the statute, state parties may intervene as a matter of right when the interpretation or application of the convention is at issue.[74]

What would happen when a subsidized fishing vessel overexploits resources within a coastal state's EEZ? In the WTO, a member might be able to countervail the subsidy if it violates WTO rules. This is a long process — it will not solve an immediate problem, and the outcome is by no means certain.[75] Remedies under UNCLOS can be more effective than WTO remedies. Pursuant to Article 73 of UNCLOS, a coastal state has the right to arrest a vessel and crew that violates its domestic fishing laws and regulations within its EEZ and hold them until a bond or other security is posted. This is a rapid and effective measure. While this does not address the underlying subsidy, it does serve as a powerful deterrent to overfishing within a coastal state's EEZ.

Several fisheries disputes have arisen since the entry into force of UNCLOS. For example, Australia and New Zealand submitted their dispute with Japan on conservation of southern blue fintuna to arbitration, and on 30 July 1999 petitioned the ITLOS for provisional measures (an interim injunction).[76] On 27 August 1999, the Tribunal responded to the request for provisional measures ordering, in part, that the fish catches of the parties not exceed the last agreed levels and that the parties refrain from conducting experimental fishing programmes.[77]

In another fishery case, the Tribunal formed a special chamber of five judges to hear a dispute between Chile and the EC on alleged EC overfishing of swordfish in Chile's EEZ and on the legality under UNCLOS of certain unilateral conservation measures implemented by Chile to protect swordfish stocks on the high seas.[78] The institution of proceedings was delayed by agreement of the parties for almost nine years.

The EU/Chilean swordfish dispute is significant from the perspective of forum selection. This case has its origins in the 1990s. Chile accused the EU of overfishing in its EEZ in violation of its sovereign rights under UNCLOS, and the EU accused Chile of failing to grant its vessels access to Chilean ports to land swordfish, in violation of Articles V and XI of GATT 1994.[79] The EU requested WTO consultations.[80] Like the UNCLOS dispute, the WTO proceeding lingered for many years. The EU never requested a panel. On 28 May 2010, the EU and Chile informed the DSB of the discontinuance of the ITLOS case, stating that they had "unconditionally agreed that neither party shall further exercise any procedural right accruing to it under the DSU."[81]

In a third fishery dispute, Russia arrested a Japanese fishing vessel based on an alleged infringement of Russian fisheries laws regulating use of its EEZ.[82] The Tribunal found the Japanese petition to the Tribunal to be without object as the Russian courts had already fully adjudicated the merits of the matter.[83]

Based on a review of the above cases, some initial conclusions can be drawn.[84] First, there is the potential for forum shopping. The dispute between Chile and the EU over swordfish found its way to both WTO dispute settlement and an ITLOS tribunal.

Second, ITLOS has the potential to act fast, particularly in matters related to the award of provisional measures. In certain instances, it has the potential to act faster than a WTO panel. There is also some degree of transparency that may exceed what one finds at the WTO. Highly detailed press releases (almost of a legal nature) are available on the Tribunal's website, as are Court orders as well as some submissions.[85] The ability of the Tribunal to award provisional measures also distinguishes ITLOS from a WTO panel where no such awards are possible.

The ICJ, also a standing tribunal, works more slowly than both ITLOS and a WTO panel. For example, the ICJ took more than three years in the *Fisheries Jurisdiction Case (Spain v. Canada)* to determine that it lacked jurisdiction.[86] Leaving aside maritime delimitations cases, which obviously have an effect on the delimitation of fishing rights, the ICJ has only heard a handful of fisheries jurisdiction cases (dealing most famously with Iceland and Norway's extension of jurisdiction over coastal fisheries).[87] The ICJ has not had an opportunity to apply UNCLOS to rule on the merits of a dispute.

A review of ICJ cases suggests that the ICJ is not a practical forum for trade disputes. Although the ICJ has considered interstate disputes with environmental implications that may affect trade,[88] ICJ cases frequently concern questions related to actual conflicts between states, diplomatic questions or boundary delimitations disputes. Furthermore, unlike WTO dispute settlement, invoking ICJ jurisdiction results in greater politicization of a dispute, something not always desirable in trade cases. Lastly, and particularly important for developing countries, ICJ cases often involve large teams of lawyers, which may result in considerable expense. Nevertheless, for disputes involving broader principles of public international law, including those that may have certain implications for the trading system, the ICJ may be a desirable forum.[89]

In contrast to ITLOS and ICJ proceedings, ad hoc arbitrations related to the law of the sea[90] and arbitrations conducted by special arbitral tribunals are confidential unless the parties agree otherwise. Arbitration offers an advantage to state parties to the extent that they often have a say in selecting a tribunal with specialized technical skills. This is particularly true in Annex VIII UNCLOS "Special Arbitrations" where, pursuant to Article 2(2) of this Annex, a list of fisheries experts is drawn up and maintained by the Food and Agriculture Organization of the United Nations (FAO).

However, from a cost and timeliness perspective, arbitration is not always less expensive or faster than certain other forms of dispute settlement since the arbitrators' fees and administrative fees must be paid, and arbitrators with sufficient skill are in great demand. This point is discussed further in Section V.

2.3.1.2 The UN Fish Stocks Agreement (UNFSA)

Legal regime

The United Nations Agreement for the Implementation of the United Nations Convention on the Law of the Sea of 10 December 1982 relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks (UN Fish Stocks Agreement) is applicable to straddling fish stocks and highly migratory fish species, such as tuna, sharks, swordfish, and marlin.[91] The Agreement seeks to ensure the long-term conservation and sustainable use of

straddling fish stocks and highly migratory fish stocks through effective implementation of UNCLOS.[92] It mandates the application of the precautionary approach for conservation, management, and exploitation of straddling fish stocks and highly migratory fish stocks and requires that compatible conservation and management measures be taken in areas under national jurisdiction and on the high seas in respect of the two types of stocks. The Agreement strengthens the role of competent regional fisheries management organizations or arrangements in the conservation and management of straddling fish stocks and highly migratory fish stocks and emphasizes the duty of the flag state and the port state to ensure enforcement of and compliance with high seas fisheries regulations. Importantly, Article 21 of the Agreement establishes an exception to the flag state's exclusive jurisdiction on the high seas through the introduction of sub-regional and regional cooperation on enforcement that allows a state party that is also a member of a regional fisheries management organization to board and inspect fishing vessels flying the flag of another state party, even if the latter is not a member of the fisheries organization, in order to ensure compliance with fisheries regulations adopted by that organization.[93]

Dispute settlement

The United Nations Fish Stocks Agreement (UNFSA) requires state parties to cooperate in order to prevent disputes. It establishes an ad hoc expert panel without the power to make binding decisions to address disputes of a technical nature arising between state parties.[94] In addition, Article 30(1) of UNFSA provides that the mechanisms for the settlement of disputes set out in Part XV of the UNCLOS apply, *mutatis mutandis*, to any dispute between state parties to the Agreement concerning the interpretation or application of the Agreement, whether or not they are also parties to UNCLOS. Therefore, the Agreement's dispute settlement mechanism suffers from the same limitations as those provided in UNCLOS, in particular the lack of a compulsory procedure that would produce binding decisions with respect to a coastal state's sovereign rights regarding marine living resources within its EEZ.

2.3.1.3 FAO agreements

For the sake of completeness, a brief mention should be made of two FAO agreements, each of which suffers from weak dispute settlement provisions (which means that they do not offer viable alternatives to WTO dispute settlement). The Agreement to Promote Compliance with International Conservation and Management Measures by Fishing Vessels on the High Seas (FAO Compliance Agreement)[95] is aimed at increasing the responsibility of the flag state with respect to the activities of vessels flying its flag on the high seas in order to ensure that such vessels do not engage in activity that undermines the effectiveness of international conservation and management measures.[96] The FAO Agreement on Port State Measures to Prevent, Deter and Eliminate Illegal, Unreported And Unregulated Fishing[97] has as an objective "to prevent, deter and eliminate IUU [illegal, unreported and unregulated fishing] fishing through the implementation of effective port State measures, and thereby to ensure the long-term conservation and sustainable use of living marine resources and marine ecosystems."[98] Both agreements require consultations, but do not mandate more formal dispute settlement procedures.

2.3.2 Selected regional agreements related to fisheries: ICCAT, NASCO and SEAFO

UNCLOS obliges states to "cooperate to establish subregional or regional fisheries management organizations."[99] While such arrangements exist, it is often difficult to assure compliance with their conservation and management measures. In part, this is due to the legal regime governing the high seas and the exclusive jurisdiction of the flag state over vessels flying its flag on the high seas. These rules prevent another member of a given agreement from taking enforcement action on the high seas against fishing vessels that do not fly its flag.

The International Commission for the Conservation of Atlantic Tunas (ICCAT) is an "intergovernmental fishery organization responsible for the conservation of tunas and tuna-like species in the Atlantic Ocean and its adjacent seas."[100] There are currently 49 contracting parties (including the EU), including quite a few developing countries.[101] In addition to compiling statistics on tuna and tuna-like species in the Atlantic, it is involved in research, stock assessment, and science-based management.[102] Pursuant to Article VIII:1(a) of its Basic Texts, ICCAT has the authority to make recommendations to its members "designed to maintain the populations of tuna and tuna-like fishes that may be taken in the convention area at levels which will permit the maximum sustainable catch."[103] However, members maintain the power to block recommendations under Article VIII:3 of the Basic Texts with respect to themselves.

Although ICCAT is criticized by conservationists who have nicknamed the organization "the International Conspiracy to Catch All Tunas,"[104] it has one notable feature: ICCAT contracting parties have imposed sanctions, in particular quota cuts, on non-members (such as Chinese Taipei). For example, in 2005 ICCAT imposed USD 100 million in sanctions on Chinese Taipei in the form of a quota reduction for 2006 in response to overfishing of big eye tuna. In addition, ICCAT required Chinese Taipei to reduce the size of the fishing fleet it could send to the big eye tuna fishing grounds in 2006.[105] From the WTO perspective, this latter outcome is consistent with measures under discussion in the DDA.

Enforcement of ICCAT recommendations and sanctions is likely to raise WTO issues. The EU has imposed trade restrictions on fish imports from some developing countries in conformity with ICCAT recommendations.[106] How should WTO members reconcile ICCAT recommendations with WTO rules? Under the WTO Agreement import bans generally violate Article XI of GATT 1994 (prohibition of quantitative restrictions) and would have to be justified pursuant to Article XX(b) or (g) (the "environmental exceptions") of GATT 1994 as well as Article XX's chapeau (which prohibits arbitrary and unjustifiable discrimination and disguised restrictions on international trade). A review of NGO criticism of ICCAT suggests that ICCAT contracting parties do not always act in accordance with the stringent recommendations of ICCAT scientists – suggesting that trade sanctions should be stiffer and perhaps more discriminatory.[107] Would a WTO member be able to use ICCAT evidence or actual practice to justify either weaker or more stringent measures under GATT Article XX's chapeau or would such measures constitute arbitrary or unjustifiable discrimination? In certain instances, the scientific evidence from ICCAT suggests that more stringent measures might be justifiable. ICCAT practice may at times suggest the opposite. The question is complicated by the fact that ICCAT contracting parties may be influenced by political or foreign policy considerations or short-term consumer benefits.

In contrast to the WTO, the fact that ICCAT contracting parties maintain the power to block recommendations limits the utility of ICCAT as a means to address overfishing and related subsidy issues and is likely to result in non-members (as opposed to ICCAT contracting parties) being targeted for sanctions. When faced with a similar problem in the Uruguay Round, GATT contracting parties negotiated a reverse consensus approach to dispute settlement that prevents one WTO member from blocking establishment of a DSU proceeding or adoption of a panel or Appellate Body report.

A host of other regional fisheries dispute settlement mechanisms exist, many of which are reserved to state actors and are relatively weak, including the Northwest Atlantic Fisheries Organization (NAFO) Convention on Future Multilateral Cooperation in the Northwest Atlantic Fisheries.[108] However, the NAFO Convention lacks a compulsory dispute settlement mechanism. Likewise, the North Atlantic Salmon Conservation Organization (NASCO) Convention for the Conservation of

Salmon in the North Atlantic Ocean contains no provisions on dispute settlement, providing only that its Council has the power to make recommendations.[109] A different approach is taken in the Convention on the Conservation and Management of Fishery Resources in the South-East Atlantic Ocean where South East Atlantic Fisheries Organisation (SEAFO) member states may submit matters for binding decision under the 1982 (UNCLOS) convention or the 1995 UN Fish Stock Agreement.[110]

2.3.3 Conclusions

Except in limited cases, the dispute settlement mechanisms applicable to fisheries and discussed above are no substitute for WTO dispute settlement. They suffer from a number of shortcomings. First, like dispute settlement mechanisms in all specialized agreements, these mechanisms reach only the subject matter of the agreement – in this case fisheries. While these mechanisms may be used to challenge overfishing, they do not provide a direct means to discipline the subsidies that some members are according their fishing vessels and which are one cause of overfishing. Second, with respect to fisheries management, which of course has 'downstream' trade implications, there is doubt, at least among the environmental community, that the existing fisheries agreements (especially those related to tuna) will achieve their conservation objectives. If this is so, consumer demand for certain fish species, and the trade associated with meeting this demand, may lead to the collapse of fish species such as tuna. Third, from a developing country perspective, the practical utility and effectiveness of the dispute settlement regimes in most of the above agreements is debateable. Cost, human resource constraints, political considerations, and governance issues are likely to arise.

The one exception to the above conclusion may be UNCLOS, which has a relatively developed dispute settlement system. UNCLOS leaves the management of the EEZ in the hands of coastal states. Since developing countries constitute the majority of coastal states, and since coastal states can apply national law to regulate their portion of the EEZ, they have great potential to discipline the use of the EEZ for conservation, economic, or trade purposes. Of course, this requires good governance in the form of an effective legislative and judicial system. It also requires leaders to resist incentives and pressure to open their EEZs to foreign fishing vessels that fish beyond levels that are sustainable.

2.4 The Energy Charter Treaty

While oil and natural gas are widely traded and, among WTO members, and this trade is governed by WTO rules, transit and investment issues sometimes arise for which WTO rules are either lacking or unclear. This is because transit issues are not well regulated under the WTO Agreement, and investment issues are largely outside the WTO's purview. Complicating matters, not all energy rich countries are WTO members.

The ECT[111] was originally viewed as a means of integrating the energy sector of the former Soviet Union into the world market. Its role has now expanded and contracting parties see it as a means "to build a legal foundation for energy security, based on the principles of open, competitive markets and sustainable development" by developing multilateral rules for cooperation between energy importers and exporters.[112] A multilateral rule-based system requires some form of dispute settlement. Articles 26 and 27 of the ECT set forth two forms of binding dispute settlement.

Article 26 of the ECT provides for investor-state arbitration. Pursuant to Article 26, disputes between an investor and a contracting party may be heard by host state courts or administrative tribunals in accordance with a previously agreed dispute settlement procedure or by an arbitral tribunal. Contracting parties give unconditional consent to international arbitration except as provided in Article 26(3)(a) and Annexes IA and ID. Article 26(4) provides that arbitrations can be pursued under the auspices of (1) ICSID, (2) a sole arbitrator or an ad hoc arbitration tribunal

established under the rules of UNCITRAL or (3) the Arbitration Institute of the Stockholm Chamber of Commerce. Provisional measures are regulated through the choice of forum – the host state court, the applicable arbitral rules and the rules of the place of arbitration. The arbitral awards are binding and final, and contracting parties are obligated to enforce such awards in their territories.

Perhaps as a result of the binding nature of these awards, investor-state arbitration under the ECT has proven relatively popular. The Energy Charter Secretariat reports more than 30 investor-state arbitrations but notes that there is no obligation to notify the Secretariat of such arbitrations, implying that the number may be higher.[113] This suggests a fair degree of confidentiality with respect to Article 26 proceedings. A review of the list of known investor-state arbitrations involving the ECT reveals such well-known private complainants as various AES subsidiaries, Ascom, EDF, Remington, Yukos and Alstom.[114] With a few exceptions (most notably Turkey and Germany) almost all respondents listed on the Energy Charter website have been former Soviet Bloc countries. Most of the complainants have their origins in Western Europe.

Article 27 of the ECT provides for state-to-state arbitration for disputes involving the interpretation and application of the treaty. The Secretariat reports that it knows of only one Article 27 dispute and that it was settled diplomatically.[115] Article 28 exempts two types of disputes from Article 27 actions: (i) disputes with respect to the application or interpretation of Article 5 on Trade-related Investment Measures and (ii) disputes with respect to the application of Article 29 on Interim Provisions on Trade-related Matters (generally involving non-parties to the GATT and related instruments)[116] unless the parties agree otherwise.[117]

In addition to the dispute settlement provisions of Articles 26-27, Article 7(7) establishes a potentially lengthy conciliation mechanism for transit issues, Article 6(5) of the treaty creates a non-binding mechanism whereby contracting parties may request other contracting parties to initiate enforcement actions with respect to anti-competitive conduct (competition issues), and Article 19(2) of the treaty establishes a non-binding review mechanism for environmental issues.

Although ICSID arbitration is treated later in this paper, it may be useful to consider one example demonstrating how the ECT can be invoked by a private party as the basis for an ICSID dispute. *Vattenfallv. Federal Republic of Germany*[118] dealt with a dispute between the Vattenfall Group of companies and government authorities in Hamburg with respect to the issuance of emissions permits for a new coal-fired power plant.[119] The complainants alleged that the acts and omissions of the Federal State of Hamburg were directly attributable to Germany under Part III of the ECT and that Germany breached its obligations under Articles 10(1) (fair and equitable treatment) and Article 13 (expropriation).[120] ICSID jurisdiction was based on the fact that both Sweden (where Vattenfall maintains its registered office) and Germany are signatories to the ECT and that the parties consented to ICSID jurisdiction by virtue of their agreement to arbitrate contained in Article 26 of the ECT.[121] The Request for Arbitration was filed with ICSID on 30 March 2009. On 11 March 2011, the ICSID arbitrators released their award indicating that the parties to the dispute had signed a settlement agreement on 25 August 2010.[122]

2.4.1 Conclusions

From a technical point of view, Article 26 of the ECT contains an agreement to arbitrate that, among other alternatives, permits certain private parties to have recourse to ICSID arbitration. Arbitrations arising under the ECT (for which there is public knowledge) have almost always been brought by businesses in developed countries or advanced developing countries against former Soviet Bloc countries. These matters are investor-state disputes involving investors with a strong link to a contracting party and states that

are contracting parties to the ECT. Based on its present membership, its exceptions relative to trade disputes, and the fact that most disputes for which there is knowledge have been brought against former Soviet Bloc countries, the ECT would not appear to offer access to an alternative dispute settlement mechanism that would be attractive to most developing countries seeking to resolve a trade dispute. As investor-state disputes are outside the WTO and most developing countries have not signed or acceded to the ECT, bilateral investment agreements (discussed in Section V) may offer investors in developing countries a more viable means of initiating action against states in various fora, at least with respect to trade-related investment disputes.

The ECT[123] nevertheless offers a partial solution to sensitive trade issues that are not well regulated by the WTO Agreement. While the ECT shows promise for the resolution of certain investment disputes (not covered by the WTO), like the WTO, it is an unsatisfactory forum with respect to competition and environmental disputes as these issues are all subject to weak or non-binding forms of dispute settlement. Likewise, the lengthy conciliation mechanism in Article 7(7) of the ECT is not suitable for resolving urgent transit disputes, such as an interruption of natural gas or heating oil supplies during winter months.[124]

The varying levels of commitments undertaken by participants in the Energy Charter process lead to a lack of uniformity in the obligations assumed.[125] Furthermore, the failure of participants to finalize the Energy Charter Protocol on Transit has compounded uncertainty with respect to important oil and natural gas transit issues. Finally, some Commonwealth of Independent States (CIS) countries have not joined the WTO but have ratified the ECT.[126] Therefore, these states are not subject to WTO disciplines, and pursuant to Article 28 of the ECT, not subject to certain Energy Charter disciplines potentially applicable to trade disputes.

2.5 Air Cargo and Passenger Transport

Unlike aircraft subsidies, an issue that fits squarely within the SCM Agreement, air cargo and passenger transport are issues that lie at the edge of the WTO system. The EU attempts to reduce carbon emissions from air transport through carbon taxes and emissions trading schemes have proven controversial among countries that trade with the EU. The EU's emission trading scheme has also drawn criticism from airlines in China, India, Russia, and the US. If carbon from cargo and passenger aircraft is taxed, this will increase the cost of both goods travelling by cargo plane and passengers travelling in passenger aircraft. It may also provide protection to goods produced within the EU and sold within the EU that do not travel by air.

The EU has begun to apply its emissions trading scheme to cargo and passenger flights to and from the EU.[127] The European Court of Justice recently upheld the legality of the scheme.[128] However, the scheme would appear to raise questions under WTO law – more specifically under GATT 1994, the GATS, and the GATS Annex on Air Transport Services.[129] A WTO challenge will take a couple of years to resolve, as the WTO legality of the EU scheme is almost certain to pass through all phases of the DSU. It may also give rise to other related disputes, such as a dispute concerning carbon emissions from marine transport. In the meantime, airlines have begun the search for alternative fora to challenge the EU scheme. Thus, the EU scheme is likely to provide a real test concerning the advantages and disadvantages of various fora.

2.5.1 The Chicago Convention

One possible means to challenge the EU scheme is by filing proceedings pursuant to the Convention on International Civil Aviation (the Chicago Convention),[130] an agreement ratified by most UN members but not by the EU (a point made in the ECJ judgment).[131] Article 15 of the Chicago Convention prohibits "fees, dues or

other charges" […] by any contracting State in respect solely of the right of transit over or entry into or exit from its territory of any aircraft of a contracting State…." Article 24(a) prohibits "customs duties, inspection fees or similar national or local duties and charges" on fuel. The failure of the EU to ratify the Chicago Convention is likely to pose a serious obstacle to any proceeding against it under the convention.

In the unlikely event that a case against the EU (as opposed to its member states) could proceed under the Chicago Convention, Articles 84-88 set forth rules governing dispute settlement, arbitration, appeals, and penalties for non-conforming airlines and states. Pursuant to Article 84, the Council of the International Civil Aviation Organization (ICAO)[132] makes an initial ruling with the possibility of an appeal to an ad hoc arbitral tribunal or the ICJ. There are no specific provisions on interim measures set forth in the dispute settlement provisions of the convention, and there are no provisions related to confidentiality.

While Article 87 permits member states to suspend the operation of *airlines* in their airspace if an airline does not conform to a final decision, Article 88 only permits suspension of a state's voting power in the Assembly if a state is found to be in default with respect to its obligations under the convention. Thus, the Chicago Convention does not offer much leverage against states that do not abide by their obligations under the convention. Perhaps for this reason, states seem to prefer to resolve aviation disputes diplomatically rather than through arbitration.[133] Regardless, the EU has not ratified the Chicago Convention, and it would seem unlikely that an arbitration could proceed against the EU under such circumstances. Since the EU has ratified the WTO Agreement, the WTO would appear to be the more probable forum for such disputes.

2.5.2 The Open Skies Agreement

Some of the recent debate concerning the EU emissions trading scheme has taken place within the context of the EU / US Open Skies Agreement.[134] This debate is reflected in both the judgment of the European Court of Justice (ECJ) and the Opinion of the Advocate General in *The Air Transport Association of America and Others*. Each found that the EU emissions trading scheme is compatible with Article 15 of the Open Skies Agreement, as well as Articles 2, 3, and 11 of the same Agreement.[135] The point is not so much the finding that the EU scheme is compatible with the Open Skies Agreement, but that Open Skies Agreements may in themselves constitute a forum to which aggrieved parties may turn in disputes involving civil aviation. The overlap between the Chicago Convention and various Open Skies Agreements may also provide prospective litigants with more than one forum from which to choose.

2.5.3 Conclusions

It is probable that the WTO will prove to be the most appropriate forum for testing the legality of the EU emissions trading scheme and other environmental schemes, such as cargo taxes, designed to reduce trade-related carbon outputs. Schemes that tax or otherwise limit carbon emissions from aircraft, but leave road, rail, and ship transport outside their scope of application are likely to discriminate against certain WTO members and favour EC producers. They may be vulnerable to challenge under WTO rules – in particular Article 2.1 of the Technical Barriers to Trade (TBT) Agreement and Article III:4 of GATT 1994.[136] While the Chicago Convention is a potential forum for certain disputes among signatories, its weak dispute settlement mechanism means that its effectiveness rests on the good faith of signatories. Open Skies Agreements may also offer a forum for redress of certain aviation-

related disputes, but it is more probable than not, that such agreements will not prove to be an effective means for challenging carbon taxes and emissions trading schemes – schemes that have obvious implications for the multilateral trading system.

2.6 Conclusions on Forum Selection between the WTO and other International Organizations

When presented with the terms of reference for this study and in subsequent discussions with ICTSD, there was general optimism that reasonable alternatives to WTO dispute settlement would emerge for certain trade-related disputes involving the sectors examined in this section, and that some of these alternatives might be particularly attractive for developing countries. As the study progressed, optimism turned to pessimism. There are no international organizations that offer a complete substitute for the WTO for the resolution of trade disputes. Furthermore, the limited alternatives that do exist at the international level in the areas examined in this study do not appear to offer particularly inviting opportunities for developing countries seeking alternative fora to the WTO for trade-related disputes.

In retrospect, this should come as no surprise. The founders of the WTO created this organization to fill a gap — they sought a stronger and more effective rule-based system applicable to trade relations. They also constructed a more robust dispute settlement system to enforce the emerging body of trade rules. So it is not a revelation that trade disputes are more likely to be heard in the specialized forum designed to hear trade disputes – i.e. before WTO panels and the Appellate Body. Likewise, it should come as no surprise that labour disputes are likely to be heard in the ILO, and that other specialized policy disputes are likely to be heard in other specialized fora. From both a legal and policy perspective, this is to be expected. Specialized disputes are better heard in specialized fora before bodies that have specialized technical expertise. The sensitivity of these disputes also means that in many instances they are better suited to more specialized fora.

What will come as a surprise to some outside the WTO field is that, due to the effectiveness of the WTO dispute settlement system, the labour, human rights, fisheries, and environmental communities are is showing some interest in bringing their disputes, which lie at the edge of the trading system, to the WTO. Due to the broad economic scope of the WTO Agreement and the fact that many policy areas (labour, human rights, fisheries, intellectual property, transport, investment, etc.) have trade implications, the WTO itself is occasionally used as an alternative fora for disputes that might be more appropriately heard in more specialized fora.

So why does the WTO remain the forum of choice for most trade-related disputes and why has the portion of the study failed to produce the 'hoped for' results? In large part, this is due to the broad scope of the WTO Agreement and the effectiveness of the WTO dispute settlement system. It is relatively fast, relatively efficient, relatively transparent, and it has a relatively viable enforcement mechanism (albeit one that is better suited to large and more economically powerful trading countries).

What then are the alternatives for countries that do not want to take a dispute to the WTO and for developing countries that may lack the resources, whether human or financial, to get involved in WTO dispute settlement? 'Name and shame' is turning out to be a powerful tool, particularly when combined with a media campaign and support from civil society. 'Name and shame,' either by bringing an issue before another more specialised organisation, or by attracting media attention (or a combination of the two) is effective in instances when governments or companies care about their public image. It is ineffective when a government or company does not care about its image or the political or economic price is too high for it to pay.

Of course, 'name and shame' is only likely to be effective in disputes that generate some degree of public sympathy. Few people will be pay attention if 'name and shame' is used to address a countervailing measure or an anti-dumping duty. However, people will pay attention when 'name and shame' is used to address inhumane working conditions, environmental degradation, human rights abuses and breaches of core labour standards. In such instances, obtaining the support from specialised international organisations (the ILO, Human Rights Commission, etc.) can aid in a campaign. These organisations may lack strong enforcement capabilities, but their decisions with respect to issues within their area of predilection commands respect and attracts media attention provided that the stakes are sufficiently high.

What does this mean for the future? International organisations will be more effective if their dispute settlement machinery is fast, effective, and issues enforceable decisions. The WTO is one example, but it is not the strongest example. The domain-name dispute settlement mechanism is a better model in this regard. By controlling the use of a domain name, ICANN holds all the cards and is the master of enforcement.

3. FORUM SELECTION IN TRADE FORA OTHER THAN THE WTO – TRENDS IN REGIONAL TRADE AGREEMENTS

Pursuant to Article XXIV of the GATT, Regional trade agreements (RTAs)[137] consist of both free-trade agreements (FTAs) and customs unions. RTAs may offer their members a viable forum for resolving trade differences with other members. Much depends on the existence of effective dispute settlement machinery and good will among the members.

This section examines forum selection under RTAs and looks specifically at (i) current dispute settlement trends under RTAs; (ii) differences between FTA dispute settlement and WTO dispute settlement, and when it is preferable to use one system or the other; and (iii) novel approaches (to the extent that they exist). Due to the vast number of FTAs and the existence of considerable literature on FTAs,[138] only a small number of indicative FTAs are addressed. This section looks at forum selection under two FTAs (NAFTA and EU-CARIFORUM) and one customs union (MERCOSUR). Forum selection under a second customs union, the EU, is treated in Chapter IV (Domestic Court Systems) since the EU possesses a very high degree of integration and is admitted to the WTO as a member in its own right.

3.1 Overview of Trends in RTA Litigation

RTAs almost always contain dispute settlement provisions. These dispute settlement mechanisms do not grant jurisdiction to non-member states, since non-members assume no obligations and receive no benefits under the RTAs in question. RTA dispute settlement provisions take several forms, ranging from simple consultation mechanisms to more highly developed enforcement mechanisms. Many RTAs follow an approach similar to the WTO and offer suspension of concessions (made under the FTA or customs union) as the only form of relief. In such cases, the choice of forum (RTA versus WTO) may not be particularly important, except with regard to questions surrounding tariff treatment and market access for services given that RTAs and the WTO Agreement contain many of the same general disciplines and obligations but tend to differ most with respect to tariff treatment and market access for services.[139] Furthermore, it is unlikely that there will be much difference in outcome between WTO and RTA relief but for the fact that in some cases RTA members have more of an incentive not to annoy trading partners (given the value of the trade involved), with the result that they may be more willing to bring illegal trade measures into conformity with their RTA obligations. There are, of course, exceptions. Highly developed FTAs, such as NAFTA, offer members more serious juridical avenues. Furthermore, the direct economic value of trade under agreements, such as NAFTA, significantly increases the incentive for compliance among members.

As noted above, RTA dispute settlement provisions have much in common with the WTO dispute settlement mechanism. They are usually (i) state-to-state; (ii) require consultations before members litigate; (iii) offer optional access to good offices, mediation, and conciliation;(iv) provide access to formal arbitration if consultations are unsuccessful; and (v) use the suspension of concession as an enforcement mechanism. Some RTAs also have appellate mechanisms. Increasingly, RTAs cover trade in goods and services, and FTAs with developed countries increasingly have TRIPs-plus provisions (meaning intellectual property protection that exceeds the minimum protection required under the WTO TRIPs Agreement), as well as investment provisions. As with the WTO Agreement, access to interim measures does not usually exist under RTA dispute settlement rules.

3.2 Forum Selection Considerations

3.2.1. Exclusive nature of the forum

One of the most difficult questions affecting forum selection is the relationship between the WTO Agreement and an RTA in the event of overlapping jurisdiction. For example, what rules should be applied by a tribunal when the RTA grants its dispute settlement forum exclusive jurisdiction for trade disputes between members? In other words, should a dispute concerning a national treatment clause common to both an RTA and the WTO be heard by the RTA tribunal, a WTO panel, or both? Ostensibly, these questions are addressed by forum selection clauses in RTAs. However, there are several types of forum selection clauses that appear in RTAs, and it remains unclear whether they may bind or influence tribunals in other fora. The principle forum selection variants include the following:

(i) Some RTAs refrain from taking a position on exclusive jurisdiction and require the parties to consult;

(ii) Others make the RTA the exclusive forum for the resolution of a trade dispute involving RTA members regardless of whether the dispute could also be heard in the WTO;

(iii) Some RTAs contain a fork in the road clause that allows an RTA member to elect whether to have a dispute heard before an RTA tribunal or the WTO but make the first forum seized the exclusive forum;

(iv) Other RTAs provide for the exercise of concurrent jurisdiction – i.e., they allow the dispute to be heard in either or both the RTA tribunal and before a WTO panel;[140] and

(v) Some RTAs provide for staggered jurisdiction — a dispute involving the same trade measure may be heard before the RTA tribunal or the WTO tribunal, but not at the same time.[141]

Questions relevant to forum selection and applicable law were addressed by the WTO Appellate Body decision in *Mexico - Soft Drinks*.[142] *Mexico - Soft Drinks* involved a dispute that could have been heard under Chapter 20 of NAFTA[143] or the WTO Agreement. Subject to certain exceptions, Article 2005(1) of NAFTA gives the complaining party the choice of resolving a dispute in NAFTA or the WTO. Also, subject to certain exceptions, Article 2005(6) provides that once the choice is made and proceedings are initiated, the forum chosen becomes the exclusive forum (the exclusion clause).

Mexico did not argue that NAFTA should have been the exclusive forum for resolution of its dispute with the US. Mexico argued, instead, that NAFTA was the more appropriate forum.[144] Mexico recognized that the WTO panel had jurisdiction to hear the dispute, but argued that the panel erred by not declining to exercise its jurisdiction.[145] The issue before the Appellate Body was not whether the panel was legally precluded by NAFTA from ruling on the US claim but, instead, whether the panel could and should have declined to exercise jurisdiction.[146]

The Appellate Body ruled that Articles 3, 7, 11, 19, and 23 of the DSU require WTO panels to act and that a "decision by a panel to decline to exercise validly established jurisdiction would seem to 'diminish' the rights of a complaining Member to 'seek the redress of a violation of [WTO] obligations'…."[147] This decision restricts the right of a WTO panel to determine freely whether or not it can exercise jurisdiction. Nevertheless, the Appellate Body went on to say, based on the "precise scope of Mexico's appeal," that it expressed "no view as to whether there may be other circumstances in which legal impediments could exist that would preclude a panel from ruling on the merits of the claims that are before it."[148] Even more importantly, the Appellate Body specifically mentioned Mexico's admission that the "exclusion clause" of Article 2005(6) had not been exercised, and the Appellate Body expressly refrained from expressing its

view on whether exercise of the exclusion clause would constitute "a legal impediment to the exercise of a panel's jurisdiction…."[149]

The Appellate Body's decision in *Mexico — Soft Drinks* establishes that a WTO panel cannot decline to exercise *validly established jurisdiction* even when an FTA tribunal may be a suitable forum. However, the decision does not rule out the possibility that a WTO panel may decline to *rule on the merits* of a case in instances when a claimant has opted to have its case heard by an FTA tribunal and an 'exclusion clause,' such as that present in Article 2005(6) of NAFTA has been exercised to bar recourse to the WTO.

Forum selection may also involve questions regarding the applicable law. For example, can the Appellate Body apply the law of an RTA or vice versa? In *Mexico — Soft Drinks*, the Appellate Body made it clear that its authority was limited to interpreting the WTO Agreement (the covered agreements) and that it lacked authority under the DSU to adjudicate non-WTO disputes, such as whether the US acted consistently or inconsistently with its NAFTA obligations.[150] The reverse question, whether an RTA tribunal can apply WTO rules when adjudicating the trade relations of its members, depends on the rules of the RTA. Generally RTA tribunals only apply their own RTA rules. This does not rule out the possibility that an RTA tribunal may take informal guidance from WTO case law, particularly when the RTA incorporates specific WTO Agreements or uses language drawn from the WTO Agreement.

3.2.2 Distinctions regarding the type of dispute settlement actions

The following section examines forum selection consideration under two FTAs (NAFTA and the CARIFORUM EPA) and one customs union (MERCOSUR). Particular attention is given to disputes with related fact situations that have been heard in RTA dispute settlement bodies and the WTO, making them an interesting subject for a discussion on forum selection.

3.3 NAFTA

The NAFTA is only applicable between Canada, Mexico, and the US and cannot be invoked by non-members before NAFTA tribunals. This is a general characteristic of FTAs – they bind their members and may be invoked only by their members. From the perspective of forum selection, this is an obvious but important limitation.

NAFTA distinguishes between several different types of disputes and establishes a mechanism for each. This is a trend that is likely to grow, since the mechanics of disputes involving investment, trade remedies and more general trade matters are likely to differ – in terms of proof, expertise required to prove a case, and enforcement. The NAFTA dispute settlement mechanisms are set forth in Chapters 11, 19, and 20.

Chapter 11 establishes a mechanism for the resolution of investor-state disputes. From the perspective of forum selection, Chapter 11 is important, as it gives *private* investors from one member access to dispute settlement against another NAFTA member state in instances when the investor alleges that a member has breached its Chapter 11 obligations,[151] national treatment,[152] most favoured nation treatment,[153] such as fair and equitable treatment,[154] no expropriation without compensation,[155] etcetera.

In addition to allowing redress before the national courts of NAFTA member states, Chapter 11 provides investors with a choice of fora: (i) ICSID arbitration; (ii) ICSID's Additional Facility Rules; and (iii) UNCITRAL rules.[156] Interim measures are possible,[157] and final awards are enforceable in the domestic courts of the members and abroad under the ICSID Convention, the New York Convention, and the Inter American Convention.[158]

Chapter 19 authorizes independent bi-national panels to review final determinations in anti-dumping and countervailing duty cases involving members – in other words, it provides

an "alternative avenue of appeal" (as opposed to recourse to the domestic courts of Canada, Mexico, and the US) for industry with respect to such determinations.[159] Chapter 19 allows both private parties and governments to challenge a countervailing duty decision taken under domestic law.[160] Thus, from a forum selection perspective, aggrieved parties from NAFTA members have two routes in anti-dumping and countervailing duty cases – Chapter 19 (for the private parties) and the WTO for the governments (either simultaneously or consecutively).[161]

Chapter 20 is the general dispute settlement provision regarding NAFTA's interpretation or application.[162] The NAFTA process begins with consultations[163] and is followed by a meeting at the ministerial level,[164] then a five-member arbitral panel proceeding.[165] Chapter 20 allows for third-party participation, experts, and scientific review boards.[166] Disputes relating to Chapter 7 (Agriculture and Sanitary and Phytosanitary Measures); Chapter 10 (Government Procurement); Chapter 11 (Non-compliance of a Party with a Final Award); and Chapter 14 may also be referred to Chapter 20 dispute settlement.[167] Chapter 20 prohibits members from allowing for a private right of action for matters falling within Chapter 20.[168]

From the perspective of forum selection, NAFTA and WTO decisions demonstrate the possibility of choosing between either fora for dispute settlement, and the complications that can arise from such a choice. In the long-running *Softwood Lumber* dispute between the US and Canada, both NAFTA and WTO tribunals served as fora for various portions of the dispute, producing some inconsistent decisions.[169]

In the *US-Tuna II* case,[170] the US urged Mexico to bring the dispute to NAFTA, but Mexico opted for WTO dispute settlement.[171] The US then requested establishment of a NAFTA panel[172] to examine Mexico's decision to ignore the forum selection requirement in Article 2005(4) of NAFTA.[173] Mexico has apparently refused to appoint NAFTA panellists in this matter. If this is indeed the case, this could be viewed as tit-for-tat retaliation[174] over the alleged refusal of the US to appoint panellists to hear 'the NAFTA version' of the WTO *Mexico – Soft Drinks* case (discussed above).[175] The ability to delay or avoid NAFTA Chapter 20 dispute settlement by delaying or avoiding the appointment of panellists may be a factor favouring utilization of the WTO as a forum for the resolution of trade disputes based on fact situations under the purview of both agreements.

All three cases suggest that there is a tendency for the tribunal seized with a case to maintain jurisdiction. One finds this same attitude in commercial arbitration. From this, one can observe two important considerations regarding forum selection: (i) *Kompetenz-Kompetenz* – the notion that an international dispute settlement tribunal is generally free to determine its own jurisdiction and legal capacity within the framework of the legal system that it applies and (ii) the tendency of a tribunal to seek to maintain jurisdiction if such an effort is legally justifiable.

3.4 CARIFORUM

Although untested by formal dispute settlement proceedings and therefore less relevant with respect to questions concerning forum selection, the Economic Partnership Agreement between the CARIFORUM States and the EU provides important insight into EU expectations for dispute settlement, including forum selection, that may arise in its ambitious programme to negotiate Economic Partnership Agreements (EPAs) with the developing countries in the ACP.[176] Like NAFTA, the CARIFORUM EPA contains separate provisions governing trade remedies and investment. Article 23 permits signatories to launch WTO-consistent anti-dumping and countervailing duty actions against members, and Article 23(7) exempts these actions from the dispute settlement provisions of the EPA (but they remain subject to the WTO DSU with respect to WTO compliance). Article 24(2) permits the CARIFORUM states to enact safeguard measures, but it contains language whereby the EU will exempt the CARIFORUM imports (at least temporarily) from safeguard measures

taken pursuant to the WTO Agreement. Safeguard measures are also exempted from the dispute settlement provisions of the EPA (but also remain subject to WTO rules).[177] Investment (direct foreign investment through commercial presence) is regulated in Articles 60-79, which also cover trade in services more generally, as well as e-commerce. However, unlike NAFTA, the CARIFORUM EPA does not create investment-specific dispute settlement provisions.

Dispute settlement in general is covered in Articles 202 – 223, which establish an arbitration process that, despite the fact that there is no appeal, has points in common with the WTO dispute settlement system. The dispute settlement mechanism is member-to-member, meaning that private parties have no right of action. The process requires consultations prior to a dispute and makes mediation available (but not requisite) after consultations. If consultations are unsuccessful, a member may choose to submit a dispute to arbitration before a three-member panel. Pursuant to Article 213, enforcement is through the suspension of concessions, but concessions cannot be suspended for violations of Title IV, Chapter 4 (Environment) and Chapter 5 (Social Aspects).

From the viewpoint of forum selection, there are several noteworthy points.

- Article 222 of the CARIFORUM EPA establishes the rights of EPA members with respect to actions under the WTO Agreement, there by influencing forum selection. CARIFORUM arbitration bodies are prohibited from adjudicating WTO rights and obligations. (Likewise, WTO panels and the Appellate Body have no authority to adjudicate rights and obligations under the CARIFORUM – EU). Recourse to the CARIFORUM dispute settlement mechanism is not exclusive. Parties may still take disputes involving the same trade measure to the WTO and vice versa, but they must wait (at least in theory) for the other dispute to conclude.[178]
- Nothing in either the WTO Agreement or the CARIFORUM EPA appears to preclude parties from implementing the suspension of concessions authorized by their respective dispute settlement bodies.
- Article 217 allows interested stakeholders to submit *amicus* briefs. Thus, stakeholders have a formal means of making their views known in a dispute settlement proceeding even if only CARIFORUM EPA members are permitted to be parties in dispute settlement proceedings.

3.5 MERCOSUR

MERCOSUR is a customs union composed of southern states from Latin America.[179] Like many other RTAs, MERCOSUR contains a forum selection clause, sets forth a panel and appellate procedure for the resolution of trade disputes, and allows for the suspension of concessions in case an adverse decision is not implemented. The Protocol of Olivos for the Settlement of Disputes in MERCOSUR provides for the award of interim measures (suspension of concessions).[180] It also provides that individuals who are affected by legal or administrative measures established by country members that are restrictive, discriminatory, or result in unfair competition and violate the Treaty of Asuncion or the Protocol of OuroPreto may submit a complaint to their governments.[181]

MERCOSUR is particularly relevant to the issue of forum selection, since two MERCOSUR cases have given rise to WTO disputes.[182] In the first case, *Argentina – Poultry*,[183] a WTO panel examined the relevance of an earlier challenge to the same trade measure before a MERCOSUR ad hoc arbitral tribunal. Argentina made two preliminary requests: (i) that the WTO panel "refrain from ruling" on the Brazilian claim, and (ii) that, if the panel did proceed to make a ruling, it should be bound by the ruling of the MERCOSUR tribunal,[184] which had rejected Brazil's challenge to Argentina's anti-dumping measures.[185]

Argentina supported its first argument based on the principles of 'good faith' and 'estoppel.' The panel rejected the Argentine argument that Brazil failed to act in good faith, ruling that such a finding required "something 'more than mere violation'" of a WTO Agreement.[186] The panel also rejected the Argentine argument that Brazil was estopped, finding that the three conditions required to establish estoppel were not met: (i) the existence of a statement whereby Brazil agreed clearly and unambiguously that, having brought a case to MERCOSUR, "it would not subsequently resort to WTO dispute settlement proceedings"; which is (ii) voluntary, unconditional, and authorized and which is (iii) relied upon in good faith.[187] The panel found "no evidence on the record that Brazil made an express statement that it would not bring WTO dispute settlement proceedings in respect of measures previously challenged through MERCOSUR." Also, the panel did not find 'exceptional circumstances' that would allow it to imply such a statement.[188] The panel also was unable to find 'detrimental reliance' on the part of Argentina.[189] Lastly, the panel rejected Argentina's suggestion that a WTO panel was bound by MERCOSUR's ruling in the case, noting that nothing in Article 3.2 of the DSU suggests that a panel is required to rule in a certain way, and further noting that WTO panels are not even bound by prior adopted panel reports.[190]

In the second case, *Brazil -Retreaded Tyres*,[191] the Appellate Body ruled on whether Brazil's import ban on retreaded tyres, which exempted tyre imports from MERCOSUR based on a decision by a MERCOSUR arbitral tribunal, was justified under Article XX of the GATT. In reaching its decision, the Appellate Body examined whether Brazil's explanation for the discrimination between MERCOSUR and non-MERCOSUR countries (compliance with the MERCOSUR tribunal's ruling) was acceptable in light of the objective of Brazil's trade measure.[192]

The Appellate Body held that Brazil's explanation for its trade measure was unacceptable, since the MERCOSUR exemption, introduced as a result of the MERCOSUR tribunal's ruling, bore no relationship to the legitimate objective of the import ban (protection of human, animal, or plant life or health) and even went against this objective.[193] The Appellate Body ruled that the ban resulted in arbitrary and unjustifiable discrimination in violation of Article XX's chapeau.[194]

The Appellate Body also examined whether imports of certain used tyres, allowed by virtue of various Brazilian court injunctions, were justified under Article XX(b) and the chapeau. Applying the same reasoning as above (inconsistency of the importation with the legitimate objective), the Appellate Body ruled that such importation constituted arbitrary and unjustifiable discrimination. In effect, the Appellate Body's decision requires a link between the legitimate objective pursued by a member (protection of human, animal, and plant life or health) and the cause or grounds for the discrimination (in this case compliance with injunctions by Brazilian tribunals).[195]

Both of the above WTO decisions provide important lessons with respect to forum selection and illustrate likely trends. The panel's decision in *Argentina – Poultry* suggests that:

- WTO panels apply WTO law and are unlikely to accord any deference to the rulings of RTA tribunals in related disputes,
- WTO panels may find it difficult to refrain from ruling in a dispute between WTO members that was previously heard before an RTA tribunal based on the legal principles of 'good faith' and 'estoppel,' and
- To the extent that the principles of 'good faith' and 'estoppel' may be applicable in a WTO dispute, a panel will apply them strictly.

It should, however, be noted that at the time of the *Argentina – Poultry* dispute, the Protocol of Olivos had not yet entered into force, and Brazil was not legally bound by Article 1 of the protocol, which provides that "once a

party decides to bring a case under either the MERCOSUR or WTO dispute settlement forums, that party may not bring a subsequent case regarding the same subjectmatter in the other forum."[196] Of course, the Appellate Body ruling in *Mexico — Soft Drinks* suggests that a WTO panel would not be bound by this exclusivity rule and might still consider a case brought by a MERCOSUR member contrary to Article 1 of the Protocol of Olivos.

Retreaded Tyres also offers some guidance on forum selection and current trends:

- *Retreaded Tyres* stands for the proposition that if a member is going to argue the GATT legality of a measure before the WTO and refer to a ruling from an RTA or national tribunal, the member will need to establish that the legal justification made for the trade measure before the RTA tribunal or the national tribunal is in accordance with one of the legitimate objectives set forth in Article XX of GATT 1994. If not, doubt will be cast on the legitimacy of the objective asserted before the WTO. If a different objective is argued before an RTA tribunal, a WTO member may not find it worthwhile to bring the dispute before another forum (the WTO).

3.6 Conclusions on Forum Selection between the WTO and RTAs

Based on the preceding analysis, the following conclusions can be drawn and recommendations made:

- Only FTA members may invoke an FTA before the relevant FTA tribunal. From the perspective of forum selection, this is an important limitation.

- Dispute settlement under RTAs often resembles dispute settlement under the WTO Agreement and as a result suffers from many of the same shortcomings outlined in the introduction to this paper, in particular enforcement problems.

- Modelling RTA dispute settlement on WTO dispute settlement is an established trend. There is usually a similar framework in WTO and RTA dispute settlement: consultations, a panel or arbitral process, and frequently an appellate process followed by enforcement procedures. As the framework and general legal principles are often similar, there should be little difference in the outcome of a dispute when the parties are subject to the same rules, and the judges have a similar level of competence and professionalism. This suggests that, assuming similar rules and similar competence with respect to judges, the choice of forum, between and RTA and the WTO may not be that important and may rightfully be influenced by political and cost considerations.

- Consultations remain an important procedural norm in almost all RTAs as well as in the WTO Agreement. Many disputes are solved bilaterally in either informal or formal consultations, thus avoiding many formal questions related to forum selection. From a developing country perspective, resolving a trade dispute through consultations can be cost-effective and may favour the maintenance of good trade relations among trading partners.

- Despite explicit language in an RTA requiring a party to resolve a dispute either (i) only in the RTA or (ii) first in the RTA, a WTO panel is unlikely to give much weight to such a clause, as WTO panels are bound to apply the "covered agreements." A panel will have jurisdiction over any dispute arising under a covered agreement even if the same or a similar dispute can be heard under the rules of a particular RTA. Whether a panel will choose to rule on the merits of a question for which it has jurisdiction is another matter. The likely answer is yes, but such questions will probably be examined on a case-by-case basis.

- In instances when a member of both the WTO and an RTA chooses to bring a related dispute (even if subject to different underlying agreements) either concurrently or consecutively to both the RTA and WTO tribunals, uncertainty remains with respect to how WTO and RTA tribunals will be

influenced by related decisions in the other fora. While it is now clear that the judges in a particular forum will apply the trade and procedural rules of the agreement that created their forum, it remains unclear whether considerations of good faith or estoppel based on a party's actions in another forum will influence their decisions, in particular a decision to rule on the merits.

- One can expect that RTA drafters will continue to insert provisions in future agreements on how conflicts between FTA and WTO dispute settlement jurisdiction should be managed with the expectation that parties will operate in good faith and not seek concurrent or consecutive recourse in a second forum if a member fails to prevail in the first forum.

4. DOMESTIC COURT OPTIONS

Few countries allow private parties to enforce WTO obligations in their courts. In other words, the WTO Agreement is seldom "directly effective."[197] Some countries, nevertheless, allow the private sector to access their courts for certain types of trade problems, particularly matters involving unfair trade practices, such as dumping and illegal subsidies or intellectual property violations. The difficulty that arises is that not all domestic court proceedings are cost-effective and efficient, and not all domestic jurisdictions make their courts available to foreign entities seeking to resolve trade disputes or even to domestic entities seeking to do the same. China, the EU, and the US,[198] each an important trader, have laws and regulations permitting some degree of access, but the Chinese have made little use of their regulation[199] (and for this reason it will not be examined here). In the following section, we provide an overview of various US and EU rules. The intent is not to provide a comprehensive examination of all aspects of these systems, but instead to highlight important tools and examples that may be of interest to prospective litigants contemplating forum selection questions. Several of the tools discussed are open only to domestic stakeholders from the countries whose practices are examined.

4.1 The United States

In the following section, Section 301, Section 337, US anti-dumping and countervailing duty laws and the Foreign Corrupt Practices Act are introduced. Interesting cases are mentioned when constructive.

Section 301: The US has historically maintained a well-known means to open foreign markets to US industry. Known as Section 301 of the US Trade Act of 1974,[200] this provision provides for an investigation and, based on the results of the investigation, sets forth mandatory[201] and discretionary[202] steps that the United States Trade Representative (USTR) must or may take. Section 301 is innovative in that it allows a company or an industry group to petition the USTR to file a case against a foreign government's trade practices and allows the USTR to "self-initiate" a case. In other words, both Section 301 and the Trade Barriers Regulation offer private actors access to 'coercive diplomacy.'[203] As a result of the Uruguay Round negotiations, the US agreed to take WTO disputes raised under Section 301 and involving WTO members to the WTO DSB as opposed to acting unilaterally.

One creative use of Section 301 appeared in 2011, when Azurix Corp., a Texas-based company, announced plans to file a Section 301 petition to pressure Argentina to pay a USD 235 million ICSID award dating back to 2006. The theory behind the Azurix petition is that Argentina's refusal to pay the ICSID award "is unjustifiable and burdens US commerce." If the USTR agrees to move forward, this would be the first time that Section 301 will be used to collect an ICSID award.[204]

Azurix is not the only attempt to use Section 301 to address investment claims. In May 2011, two individuals filed a petition with the USTR, requesting a Section 301 investigation alleging that the Dominican Republic expropriated property without adequate compensation.[205] The petitioners were US nationals and claimed to be the heirs of an individual who had property interests in the Dominican Republic. They asserted a violation of the "fair and equitable treatment and full protection and security" provisions of the CAFTA-Dominican Republic Free Trade Agreement with the United States. The USTR chose not to initiate a Section 301 investigation on the grounds that the original property owner was not a US national and further that the alleged event took place 50 years ago, well before the CAFTA-DR FTA entered into effect.[206]

Section 337: A second US tool is Section 337 of the Tariff Act of 1930,[207] which prohibits unfair methods of competition or unfair acts

(anti-competitive or monopolistic practices) with respect to imports. Section 337 does not require proof of injury to a domestic industry. In recent years, Section 337 has been used increasingly to address serious foreign violations of intellectual property rights – including rights involving patent, trademarks, copyrights, and semiconductor products in instances where US industry is producing or preparing to introduce a product covered by the applicable intellectual property right. In such instances, US industry can initiate a complaint or the International Trade Commission can self-initiate an investigation. Initial hearings are held before an administrative judge. Remedies for violation take the form of exclusion orders, cease and desist orders, or both.

One interesting development is the *Tianrui* decision of the US Federal Circuit Court affirming that Section 337 provides the International Trade Commission with authority to block the import of products produced using US trade secrets misappropriated abroad by a Chinese company.[208] The case involved the manufacture of cast steel railway wheels using trade secrets from a US firm (Amsted) related to a particular manufacturing process. A Chinese firm (TianRui) tried unsuccessfully to license the process from Amsted. When that did not work, it hired employees from DaTong, a second Chinese firm whose employees had been trained in the process and who had signed confidentiality agreements with Amsted. The former DaTong employees disclosed the process to TianRui, and TianRui started selling its railway wheels in the US. The decision means that Section 337 can be applied to disputes involving the misappropriation of trade secrets occurring outside the US.

Also of potential interest is the Section 337 Request for Investigation filed with the US International Trade Commission by an Israeli firm, HumanEyes Technologies Ltd., against Sony Corp., a Japanese firm, seeking to prevent Sony from selling devices in the US that HumanEyes alleges infringe its patents.[209] The complaint demonstrates how a foreign firm with intellectual property (IP) assets can seek to use a US forum (the Section 337 process) to protect its IP assets. This case will be of interest to individuals and companies in developing countries that have IP assets to protect coupled with sales in the US.

Anti-dumping and countervailing duty actions: Anti-dumping and countervailing duty actions are also well-known tools available to domestic industry in the US. They are used to offset dumping and subsidies that cause injury to domestic industry.[210] Dumping occurs when a foreign producer sells a product at a price "below that producer's sales price in the country of origin," or "at a price that is lower than the cost of production," resulting in 'injury' to the domestic industry.[211] A countervailing duty is applied by the US government, in the form of a 'higher import duty' to offset foreign subsidies that violate US law, for example subsidies used to produce or export goods.

> Domestic US industries (including unions) have standing to file anti-dumping and countervailing duty petitions with the Department of Commerce and the International Trade Commission (ITC) provided the petitioners represent 25 percent of domestic production and 50 percent "of the domestic production produced by that portion of the industry expressing support for, or opposition to, the petition."[212] The Department of Commerce in each case is responsible for determining whether the goods are dumped or subsidized. The ITC is responsible for determining if there is material injury to the domestic industry as a result of dumping or a subsidy. Both proceedings are relatively fast. The Department of Commerce has 190 days after initiation of the investigation to make a preliminary determination of dumping and 130 days after initiation of the investigation to make a preliminary determination of unfair subsidization.[213] Once a preliminary determination is made, importers may be required to post a bond to cover the expected anti-dumping or countervailing duties. The final phases of the investigation are normally completed within 12 to 18 months from the date of initiation.[214]

The potential involvement of foreign industry, including developing country industries, in US anti-dumping and countervailing duty decisions is illustrated by a December 2011 decision of the US Court of Appeals for the Federal Circuit (now overturned by the US Congress)[215] ruling that Chinese government payments to Chinese producers cannot be characterized as subsidies in a nonmarket economy and thus cannot be countervailed.[216] The court upheld the judgment of the US Court of International Trade but on different grounds.[217] In March 2011, the WTO's Appellate Body had reached the same result but again on different grounds, ruling that double remedies violated Article 19.3 of the SCM Agreement, as the countervailing duties were not assessed in the appropriate amounts.[218] The Appellate Body also found that the Department of Commerce's concurrent imposition of anti-dumping duties based on its non-market methodology and countervailing duties on the same products also violated Articles 10 and 32.1 of the SCM Agreement.[219]

Foreign Corrupt Practice Act: The US Foreign Corrupt Practice Act (FCPA)[220] also provides an avenue for stakeholders to influence trade relations with the US. US companies, citizens and residents are subject to the FCPA, as are foreign companies with securities registrations in the US. The general public is familiar with this act as a means of addressing bribery of foreign government officials by US citizens and companies to obtain or retain business. However, the FCPA also governs accounting transparency requirements associated with the Securities Exchange Act of 1934. The US Department of Justice and the Securities and Exchange Commission have the authority to implement FCPA enforcement proceedings. Federal Courts may also hear allegations by private parties of alleged FCPA violations.[221]

Perhaps the most famous US FCPA case relates to the USD 450 million criminal fine that Siemens AG and three of its subsidiaries were required to pay in 2008 to the US Government in conjunction with Siemens' bribery of government officials in Iraq in order to obtain contracts under the United Nations Oil for Food Program.[222] Siemens AG is listed on the New York Stock Exchange, making it easier to establish jurisdiction before US courts. Another very famous FCPA case involved BAE Systems PLC, a UK defence contractor that was required to pay a USD 400 million criminal fine in 2010 for conspiring to defraud the US.[223]

4.2 The European Union

In this section the EU Trade Barriers Regulation, its anti-dumping and countervailing duties rules and actions for annulment are introduced, as is a recent development that may affect procurement.

EU Trade Barriers Regulation: The EU Trade Barriers Regulation (TBR)[224] allows businesses, their industry associations, and EU member states to lodge complaints against foreign trade barriers. An EU investigation may result if there is "preliminary evidence that trade barriers or unfair trading practice contrary to international rules in another country is causing commercial harm to a European operation, either within the EU or in that country."[225] The complaint must show material injury in order to trigger an investigation. If the Commission accepts a complaint and begins an investigation, this procedure may eventually lead to bilateral negotiations or multilateral (WTO) dispute settlement.[226] Interim measures do not exist.

The EU notes that since 1996, 24 TBR 'examination procedures' were initiated in a variety of sectors and involving trading countries, such as Brazil, Canada, Japan, and Turkey.[227] The EU investigated complaints involving Brazil and the US most frequently. Some of these cases have led to negotiated solutions and others to WTO dispute settlement. There is a reasonable degree of transparency with a substantial amount of information available on the EU website.[228]

While the TBR has not proven enormously popular, as reflected in the small number of investigations, its availability to businesses, trade associations, and member states is an important element of EU trade policy.

EU Anti-dumping and Countervailing Duty Actions: EU rules also permit EU manufacturers to complain about foreign dumping and subsidy practices. Dumping is regulated by Council Regulation (EC) No 1225/2009 of 30 November 2009.[229] EU industries can bring a complaint, which must (i) allege that "a product originating in a country (or countries) outside the EU is being exported to the EU at dumped prices, and that these imports are causing injury to the EU industry;" (ii) "contain evidence (e.g. invoices, price offers, publications in specialized press, official statistics, etc.) to support the allegations made"; (iii) "be supported by a significant share of EU production (companies accounting for at least 25 percent of total EU production of the product"); and (iv) "not be opposed by EU companies accounting for a larger production volume than the complainants."[230] Pursuant to Article 21 of the Regulation cited above, an anti-dumping duty will be imposed only if such an action is in the community interest. EU anti-dumping procedures protect confidential information but require submission of a non-confidential summary of a complaint to enable interested parties to defend their rights. Investigations must be launched within 45 days of the submission of a complaint.[231]

The application of EU countervailing duties is governed by Council Regulation (EC) 597/2009 of 11 June 2009.[232] The requirements for an EU industry to lodge a complaint are somewhat similar to those of a dumping complaint: (i) there must be a product "originating in a non-EU country" that benefits "from a countervail able subsidy" that "is being exported to the EU"; (ii) the "subsidised imports are causing injury to the EU industry"; (iii) the "complaint must contain evidence (e.g. information from government/public sources, publications in international press) supporting the allegations it makes"; and (iv) the complaint must be supported by "a major proportion of EU production (i.e., not against community interest). Collectively, these companies must account for at least 25 percent of total EU production of the product concerned" and not be opposed "by EU producers accounting for a larger production volume."[233] Again, there must be a finding that the countervailing duty will be in the community interest.[234] EU anti-subsidy procedures protect confidential information but require submission of a non-confidential summary of a complaint to enable interested parties to defend their rights. Investigations must be launched within 45 days of the submission of a complaint.[235]

Actions for Annulment: EU courts also provide a potential avenue for trade disputes. Article 263 of the Treaty on the Functioning of the European Union[236] permits "actions for annulment" of EU regulations, directives, or decisions. Actions for Annulment lodged by individuals proceed to the EU's General Court (formerly the Court of First Instance). Individuals do not need to be European citizens or entities to have standing to file an Action for Annulment before the General Court.

For example, in 2010 the European Parliament voted to close the EU market to products made from commercially harvested seals. Certain commercial interests as well as Inuit communities challenged this ban in the European General Court in *Inuit Tapiriit Kanatami e.a. v Parliament and Council*. In September 2011, the General Court ruled this claim inadmissible, finding the applicants were not directly concerned by the regulation.

Although the General Court never reached the merits of this case,[237] by ruling that the claim is inadmissible, EU restrictions on the sale of seal products remain in place. In April 2011, the WTO DSB established a panel (pursuant to requests made by Canada and Norway) to decide whether the EU trade restrictions violate the WTO Agreement.[238] As of July 2012, the panel had not been composed.

Any decision in the WTO case is likely to be sensitive, highly charged and politicized. If the TBT Agreement applies to the ban, whether the EU restrictions violate the non-discrimination requirement in Article 2.1 is likely to be an issue.[239] Whether the EU restrictions are 'necessary' within the meaning of Article 2.2 of the TBT Agreement may also be an issue. While the illegality of the ban under Article XI

of GATT 1994 seems beyond doubt, it cannot be stated with certainty how the panel and eventually the Appellate Body will choose to apply the general exceptions set forth in Article XX of the GATT.

Finally, it should be noted that, as with many developed countries, EU legislation is largely designed to benefit EU producers. Instead of providing a forum for developing countries to improve market access within the EU, such legislation is more likely to be used to gain market access for EU producers in developing countries or to block access to the EU market by countries that are not providing reciprocal access. A case in point is the recent EU proposal to craft an instrument that could be used to open procurement processes in other countries.[240] The proposal would allow EU national contracting authorities to reject bids for certain large contracts from companies based in countries that have not negotiated international government procurement commitments (the GPA) or bilateral government procurement commitments with the EU.[241]

4.3 Concluding Points on Forum Selection between the WTO and National Laws

Certain conclusions with regard to forum selection of interest to developing countries can be drawn from the above summary of US and EU law.

- US and EU law does not make the WTO Agreement directly effective, meaning that private citizens, business interests, or other stakeholders from developed and developing countries cannot use EU or US courts to enforce WTO obligations directly.[242] Nevertheless, several WTO members, including the US and the EC, provide a legal means for stakeholders to intervene in the trade remedies sphere and with respect to unfair trade practices (generally in the form of IP violations).

- To the extent that stakeholders have access to US and EU courts, remedies are unlikely to be of much use to developing countries unless their stakeholders possess business interests in the US or EU and seek to apply domestic trade remedies law to protect these interests. Establishing standing before US and EU tribunals is a prerequisite.

- Developing countries are often the target of US and EU trade remedies actions – particularly advanced developing countries. These laws and regulations usually serve domestic US and EU interests, but may also serve the interests of foreign companies established in the US and EU.

- Section 337 serves to protect IP holders. Some developing country stakeholders may find themselves able to take advantage of Section 337 to block the sale of goods in the US that violates their IP rights.

- Many legal systems grant standing to foreign companies doing business within their jurisdiction to challenge certain trade-related decisions. Therefore, developing countries should ascertain whether they have standing to bring a particular action in the national courts of another member.

5. ARBITRATION

5.1 Arbitration in General and Commercial Arbitration in Particular

The DSU provides for arbitration in three instances: (i) members can use arbitration to determine the reasonable period of time for bringing an illegal trade measure into conformity with the WTO Agreement;[243] (ii) to address an objection to the level of a proposed suspension of concessions and to contend that certain principles and procedures related to retaliation have not been fulfilled;[244] and (iii) as an alternative means of dispute settlement.[245] Members have used the first two forms of arbitration in many cases, but have rarely used the last form of arbitration.[246]

International arbitration outside the WTO is an increasingly popular means of resolving trade disputes. It can involve private parties, governments, or a combination of the two. International arbitration usually arises as a result of a mutual agreement to arbitrate in a private contract between commercial parties that contains a valid arbitration clause. In such cases, each party alone can invoke arbitration, with enforcement usually assured by the New York Convention.[247] Such arbitration clauses are common in contracts involving companies and governments from developing countries, as many foreign businesses like to avoid the 'uncertainty' that may arise from litigation before national courts in these countries.

International arbitration can also arise as a result of an ad hoc decision between disputing parties, which may include one or more states, to submit an existing dispute to arbitration. In such instances, a mutual decision between disputing parties is required to submit the dispute to arbitration.

Finally, arbitration may be triggered as a result of a treaty provision governing the relationship between two or more parties that prescribes arbitration as the form of dispute settlement. Many investor-state investment disputes arise in this manner as a result of clauses in bilateral investment agreements or FTAs.

From the perspective of forum selection, most national courts recognize the supremacy of a valid arbitration agreement and decline to accept jurisdiction when faced with an arbitration agreement that the parties have entered into in good faith.[248] This is an important consideration favouring international arbitration since, as already noted, in many instances parties choose to insert arbitration clauses in commercial contracts to avoid submitting a dispute to national courts. This is often because one of the parties does not have confidence in the national court that would normally exercise jurisdiction, or because the national judicial process is too slow, lacks effective enforcement measures, or would otherwise be compromised or ineffective.

A typical commercial arbitration (between businesses) clause identifies the 'place' or 'seat' of the arbitration, the substantive law governing the arbitration, and the organization administering the arbitration (if an administering entity is chosen).[249] Frequently, arbitration clauses also indicate the language of the arbitration and seek to reduce the possibility of an appeal. Some arbitration clauses also deal with procedural issues, such as the permissibility or scope of discovery and confidentiality. The seat of the arbitration determines the procedural law applicable in the arbitration as well as the court that may be authorized to hear any eventual appeal of an arbitral decision. Selection of the seat or place of arbitration does not usually restrict where hearings may be held.

Much has been written about the advantages and disadvantages of commercial arbitration, and views on arbitration vary depending on a party's (or non-party's) perspective, objectives, and experience with arbitration. Some promote the privacy and confidentiality of arbitration, others object to arbitration for the same reasons, arguing that shady transactions are heard behind closed doors. Some promote the ability of litigants to choose or influence the composition of tribunals (to ensure specialists

in a particular field), others object, saying there is a clique of arbitrators that control the procedure taking turns acting as arbitrators and counsel. Some support arbitration as a flexible, fast, low-cost solution with limited discovery and limited rights of appeal. Others will tell you that while arbitration may be flexible, it is not always fast or low-cost and, in some countries, the judiciary finds ways to interfere in certain types of proceedings, such as when one party enters into bankruptcy. Lastly, some promote the availability of interim measures and the ease of enforcing arbitral awards, but neglect to mention that enforcement may be difficult in countries that have not signed the New York Convention.[250]

Enforceability of awards under the New York Convention, when ratified by the applicable states, is of course a main strength of commercial arbitration. However, the availability of interim measures is also an important factor in the success of commercial arbitration, particularly in instances when a complaining party fears that evidence may be destroyed or the respondent's assets may be depleted or concealed before the Tribunal renders a final award. Once the domain of national courts, states are increasingly granting arbitral tribunals limited authority to enact interim measures. This grant of power finds support in Article 17 of the UNCITRAL Model Law on Commercial Arbitration, which recognizes the traditional right of courts to award interim measures but also recommends a procedure whereby, unless otherwise agreed by the parties, an arbitral tribunal may grant interim measures.[251]

Commercial arbitration, as a forum, has another strength that separates it from many other fora – the ability of the parties to establish the procedures (including the terms of reference) that will govern the arbitration. These procedures frequently deal with important considerations, such as confidentiality and appeal ability. Even the WTO, which allows the parties to establish terms of reference, tends to operate on the Standard Terms of Reference set forth in Article 7 of the DSU.

Overall, how does commercial arbitration as a forum compare to WTO dispute settlement? There are more differences than similarities:

	WTO	Commercial Arbitration
Parties	The parties must be WTO members. One Member can invoke dispute settlement as a matter of right. Third parties and third participants must also be WTO members. Business interests can sometimes make their views heard through amicus curiae submissions or by asking governments to represent their point of view as parties, third parties or third participants.	Parties agree to use commercial arbitration. Parties may be individuals, states, or legal entities (companies, partnerships, etc.). In commercial arbitration, the parties agree in their contract to arbitrate a dispute or agree subsequently to arbitrate once a dispute arises.
Types of Disputes	Only disputes arising under the covered agreements (WTO Agreement).	Any dispute that the parties agree to arbitrate, either through a prior existing contract or by subsequent agreement once the dispute arises.
Institution	Appeals arising under the covered agreements (WTO Agreement) are heard pursuant to the rules of the WTO and within the WTO's institutional framework.	Parties may designate an arbitral institution (ICC, LICA, AAA, etc.) or provide for an ad hoc arbitration (arbitration without institutional affiliation).

	WTO	Commercial Arbitration
Commencement of Dispute	Formal consultations are required before a dispute may begin, usually resulting in a 60-day delay. A Request for Consultations begins the dispute settlement process. This request is made to the relevant member as well as the DSB and the relevant councils and committees.	A Notice of Arbitration to the other party or parties, and the arbitral institution (if any) usually begins the dispute.
Rules / Working Procedures	Rules are specified in the WTO Agreement. Formal Working Procedures also exist. Parties may agree on different terms of reference (but seldom do so).	Arbitral institutions have their own institutional rules. Parties can agree on their own procedural rules to regulate the proceedings.
Composition of the Tribunal	The parties can agree on the composition of the panel (court of first instance). They usually do not and the Director-General makes the appointment. Unless the parties agree otherwise, nationals from parties and third parties do not sit on a panel.	Can be determined by the parties or by the rules of the institution. In some cases, each party nominates an arbitrator and once named the arbitrators choose the third arbitrator. In other cases, the parties agree on a single arbitrator, or the institution appoints a single arbitrator (or arbitrators).
Discovery	No formal provisions on discovery. Panels draw adverse inferences if a Party does not make information available.	Limited discovery depending on the rules of procedure applicable, the agreement of the parties and the views of the arbitral tribunal.
Confidentiality/ Transparency	Decisions are published. Business confidential information is protected. Hearings can be open by agreement of the parties.	The parties establish the practices. In most commercial arbitrations, the parties choose to keep the proceedings confidential and to not publish the awards. This decision remains at the discretion of the parties.
Appealability	The WTO Agreement provides for an appeal as a matter of right. Appeals are to the Appellate Body – a standing body. Three of seven members hear an appeal. The Appellate Body works by collegiality and meets to discuss ongoing cases.	The Parties can limit the right of appeal unless the law of the place of arbitration provides otherwise (usually for fraud, corruption, etc.). Appealability is limited under Article V of the New York Convention (see below).
Enforcement	Retaliation or cross-retaliation as provided for in Article 22 of the DSU.	Usually through the national courts as provided for under the New York Convention. Note that Article V of the New York Convention sets forth limited circumstances when a national court may refuse recognition and enforcement.

	WTO	Commercial Arbitration
Time Frame	From consultations through to enforcement a WTO proceeding can take approximately three years.	The duration of commercial arbitrations varies depending on the complexity of the proceeding, the availability of the arbitrators and the intention of the parties.
Cost	There is no administrative fee to commence or to participate in a WTO proceeding. Most members engage lawyers – either attorneys on their staff, outside counsel, or attorneys from the ACWL(who work at a very reasonable rate). Proceedings almost always take place in Geneva, which may increase expenses.	Parties in a commercial arbitration pay a fee to the arbitral institution (if any) that is selected to administer the proceedings, and to the arbitrator(s). The fee usually varies depending on the amount in dispute and the complexity of the proceeding. Parties must also pay legal counsel.

In summary, arbitration is suitable for a wide range of disputes, particularly contractual disputes involving private parties or a state and a private party. The involvement of private parties distinguishes commercial arbitration from WTO dispute settlement.

When selecting a forum for arbitration of a commercial dispute, parties should realize that:

- While recourse to arbitration is frequently agreed in advance (by contract, international agreement, bilateral investment agreement, FTAs, etc.) the parties are also free to agree, after an issue arises, to submit a question or dispute to arbitration.

- The parties should choose (by contract or by subsequent agreement) a 'place' or 'seat' of arbitration that is 'arbitration friendly' – in other words whose national laws recognize the validity of an agreement to arbitrate and whose national arbitration law facilitates the arbitration.

- The parties should also assure that the law in the 'place' or 'seat' of the arbitration allows either the arbitrator or the courts (or both) to grant interim or protective measures, and that the courts will respect the finality of an award.

- The parties should scrutinize local court practice in the place of arbitration to ascertain whether the court system is efficient and to assure that it does not interfere without real justification in the arbitral proceedings.

- The country selected as the 'place' or 'seat,' as well as the country or countries where enforcement is likely to be pursued, should be signatories of the New York Convention. This assures the enforcement of the agreement to arbitrate and, if enforcement is sought in a signatory country other than the seat country, the enforceability of the final award.

5.2 Investor - State Arbitration (ICSID)

Investment was historically outside the GATT regime. The most famous GATT "investment" case, the *FIRA* decision,[252] was resolved based on Article III (National Treatment on Internal Taxation and Regulation) and Article XI (General Elimination of Quantitative Restrictions) as opposed to other principles of international investment law. WTO law with respect to trade in goods remains grounded in the *FIRA* decision – the WTO Agreement on Trade-Related Investment Measures (TRIMs) is based largely on the interpretation set forth by the *FIRA* panel

with the result that most investment disputes involving trade in goods remain outside the WTO regime. Efforts to expand WTO rules on investment faltered during the 2003 Cancun Ministerial Meeting.

The situation is somewhat different in the WTO with respect to trade in services. Mode 3 of the GATS deals with establishment of a "commercial presence" – which in itself is a form of foreign direct investment. GATS disputes, as with other WTO disputes, involve members – generally state parties. GATS disputes are rare in the WTO, and there has yet to be a substantial dispute involving Mode 3 investment. Thus, at present, the WTO is not an important forum for investment disputes.

The most well-known forum for investor-state investment disputes is the ICSID, an autonomous forum established under the auspices of the World Bank by the Washington Convention.[253] The Washington Convention is an instrument ratified by 147 states, making ICSID an extremely important institution for the arbitration of international investment disputes involving states and the nationals of state parties.[254] ICSID rules govern conciliation and arbitration of investor-state investment disputes and provide for an enforcement mechanism. Unlike in the WTO, under the Washington Convention certain non-state investors have standing.

From the perspective of forum selection, ICSID is not an automatic forum like the WTO where any member can initiate an action. In ICSID, all prospective parties must irrevocably agree in writing to accept ICSID jurisdiction. States have many different means at their disposal to agree to ICSID jurisdiction: through their national investment laws, in a bilateral investment agreement, through a contractual clause, or through an agreement to arbitrate.

Article 25.1 of the ICSID rules lays down conditions for jurisdiction. There must be a legal dispute arising directly out of an 'investment,' it must be between a contracting state and a national of another contracting State (a foreign investment) and the parties must give their consent in writing to submit the dispute to the Centre.[255]

With respect to forum selection, the requirement that the dispute arise out of an 'investment' is critical.[256] Unfortunately, the Washington Convention does not define 'investment,' leaving it to case law to provide precision. Tribunals have developed criteria in case law determining what is an investment, with the 'restrictive approach' set forth in *Salini* playing a prominent role.[257] Nevertheless, and of great importance for this paper, Mortenson notes (with dissatisfaction) that, "If commentators agree on anything in this area, it is that pure trade transactions should not be subject to ICSID jurisdiction."[258]

Perhaps the most pointed but controversial analysis is that of Joy Mining where the Tribunal stated that: "if a distinction is not drawn between ordinary sales contracts, even if complex, and an investment, the result would be that *any* sales or procurement contract involving a state agency would qualify as an investment."[259] Given its complex fact situation, Joy Mining will appear to many to be overly restrictive, its implicit limitation of ICSID as a forum for ordinary 'trade disputes' remains.

Joy Mining does not stake out a new position. In a well-known article cited in *Salini*,[260] Shihata and Parra note that "A simple sale of goods transaction is often cited as an example of a transaction that clearly is not an investment. They report that the:

> Secretariat recently received a request for arbitration under the ICSID Convention in respect to a dispute arising out of a sale of goods transaction. The Secretary General found that the transaction manifestly could not be considered as an investment. Registration of the request was therefore refused. This was done despite the fact that the request had been made on the basis of a BIT providing for arbitration under the Convention in respect of disputes arising

> out of investments which, as defined in the BIT, could be understood as including sale of goods transactions.[261]

These authors also note "the Additional Facility Rules, which are available for cases that do not arise directly out of investments, provide against their use in connection with ordinary commercial transactions."[262]

Most disputes for the simple sale of a good or a service will be outside ICSID jurisdiction, since in most such trade disputes an 'investment' is lacking. In the rare instances when a trade dispute might meet the definition of an Article 25 'investment,' it is noteworthy that the Washington Convention contains several provisions that make it favourable as a forum. Unless the parties have otherwise agreed, Article 26 makes ICSID arbitration the exclusive remedy once the parties have given consent to ICSID arbitration. Furthermore, pursuant to Article 26, there is no requirement to exhaust local remedies (although a contracting party may require exhaustion as a condition of consent to arbitrate under the convention). Pursuant to Article 27(1) diplomatic protection cannot be invoked (except in the case of noncompliance with an award). Pursuant to Article 47, unless the parties otherwise agree the Tribunal may award provisional (interim) measures to preserve the rights of either party. Pursuant to Article 53(1) awards are final, bind the parties, and are not subject to any appeal other than as provided for in the convention.[263] And, pursuant to Article 54(1) all parties to the convention are required to enforce awards as if they were final judgments of a court in that state.[264] ICSID rules also provide for a reasonable degree of transparency. The Secretary-General must publish information on all requests for arbitration as well as how the dispute was terminated. The Secretary-General must also publish, with the consent of both parties, arbitral awards. Absent consent, the Secretary-General must publish excerpts of the legal reasoning.[265]

While traditional trade disputes may not be amenable to ICSID jurisdiction, many investment disputes have trade implications and are arguably cognizable before ICSID tribunals. Some of these disputes have implications for developing countries. For example, on 19 February 2010 Philip Morris filed a Request for Arbitration with ICSID[266] challenging (based on the Switzerland – Uruguay BIT) Uruguayan tobacco regulations limiting the use of registered trademarks (plain packaging depicting only the brand name), mandating that cigarette packages provide 'graphic images' depicting the 'health consequences' of smoking, that health warnings cover 80 percent "of the front and back of cigarette packages" and that tobacco companies be prohibited from marketing more than one tobacco product under each brand.[267] A tribunal has been appointed and memoranda on jurisdiction exchanged. Given the importance of tobacco production to the agricultural economies of many developing countries and given the cost of health care to treat tobacco-related illnesses, this ongoing dispute has important developing country implications.

In conclusion, while ICSID remains an important forum for investment disputes, it is unlikely to be a viable forum for traditional trade disputes involving the simple supply of a good or service across borders pursuant to a contract. In instances when there is an investment for ICSID purposes and the arbitration clause is broad enough to cover the dispute, there are certain considerations that a prospective petitioner should consider:

- The petitioner should be a national of a contracting state (different from the respondent state);
- A respondent state should be a signatory to the Washington Convention;
- The seat of the arbitration should be in a jurisdiction where enforcement of the award is likely to be successful;
- The dispute should be 'internationalized' (so that state conduct will not affect the legal rights of the parties);
- The state should explicitly waive sovereign immunity in its arbitration clause, and

- The award should be enforceable "against the state" and "in the courts of any nation in accordance" with the laws of that nation.[268]

5.3 UNCITRAL Rules

The UNCITRAL plays an important role in the development of laws and model laws that have an influence on arbitration. UNCITRAL activities include drafting conventions that bind their signatories, drafting model laws that influence the development of national trade laws, and endorsing documents drafted by other organizations.[269] UNCITRAL also collects and publishes "information on court decisions and arbitral awards" involving UNCITRAL-related conventions and model laws.[270] UNCITRAL conventions and model laws frequently arise in discussions about international arbitration of trade disputes. A comprehensive discussion of all UNCITRAL conventions, model laws and arbitration rules is beyond the scope of this paper. They are mentioned only to alert readers considering commercial arbitration to UNCITRAL's role in harmonization activities in this area. A few words about some of the most important UN instruments affecting forum selection in arbitration follow below.

Many trade disputes involving private parties are subject to the UN Convention on Contracts for the International Sale of Goods (CISG).[271] This is a very successful convention that balances exporter and importer interests and counts among its signatories most of the developed trading nations and a growing number of developing countries. The parties to a contract can select the CISG as the governing substantive law by naming it in their contract. The CISG may also apply by virtue of the forum selected or the conflict rules of private international law when these rules point to a state that makes the CISG applicable in a particular transaction. Likewise, the CISG allows parties to exclude or limit its application.[272] Parties to a contract should anticipate whether they want the CISG to apply when they enter into a contract and specify the governing law and, if arbitration is chosen, the place of arbitration. Although the CISG is not free from criticism,[273] its selection or application through choice of law considerations is relatively common, and evaluating whether parties want to apply its rules is one decision they should make when choosing a forum. Alternatively, some parties may prefer to specify the law of a party's home country and exclude the CISG.

In addition to the CISG, UNCITRAL also proposes (i) a Model Law on International Commercial Arbitration[274] that some states have relied upon as a basis for their national laws, and (ii) UNCITRAL Arbitration Rules[275] which some parties to a contract choose to make applicable with respect to the conduct of an arbitration, particularly in ad hoc arbitrations.

While trade disputes may not fall within ICSID purview, a tribunal functioning under UNCITRAL rules called upon to interpret a BIT that contains an expansive definition of 'investment' may find itself involved in an investment dispute that has substantial trade implications. For example, Philip Morris Asia Limited (PMA) has requested arbitration under the Australia – Hong Kong Bilateral Investment Treaty[276] to challenge Australia's Plain Packaging Act,[277] which requires cigarettes to be sold in plain packages without a trademark. Philip Morris contends that the plain packaging law amounts to an unlawful expropriation, fails to provide fair and equitable treatment to its investments in Australia, unreasonably impairs its investments, fails to provide full protection and security for its investments, and breaches Australia's international obligations in relation to PMA's investments by violating Australia's international obligations under the TRIPs Agreement, the Paris Convention, and the TBT Agreement.[278]

Voon and Mitchell note that:

> UNCITRAL Rules contain no separate reference to investment or investor. Accordingly, the traditional approach in UNCITRAL arbitrations would be to conclude that a relevant investment justifying jurisdiction exists simply because the

> investor can demonstrate its ownership or control of one of the assets enumerated in the BIT [bilateral investment treaty] definition of investment (here, shares, intellectual property, and goodwill).[279]

They further note, "On this basis, the debate surrounding the meaning of 'investment' in the ICSID Convention does not arise."[280] They conclude that Australia only has a 'reasonably modest' likelihood of persuading an arbitral tribunal that Philip Morris Asia Limited did not make an investment within the terms of the applicable bilateral investment treaty (BIT).[281] If they are correct, it remains to be seen how the tribunal will rule on the case's merits.

From the perspective of forum shopping, the dispute is highly interesting as it provides an example of a dispute arising from the same fact situation that is now being heard in more than one forum. On 13 March 2012, Ukraine filed a Request for Consultations with the WTO, asserting that the Plain Packaging Act and its implementing regulations violate the TRIPs Agreement (Articles 1, 1.1, 2.1, 15, 16, 20, and 27); Articles 2.1 and 2.2 of the TBT Agreement; and Article III:4 of GATT 1994.[282] The dispute continues to move forward in both the WTO and arbitral fora. Since WTO issues have been raised in both fora (as with the Uruguay ICSID case mentioned above), the possibility of inconsistent rulings exists.

5.4 Concluding Points on Forum Selection between the WTO and Arbitration

To summarize, here are some of the important points regarding arbitration made above. Arbitration:

- Generally requires the consent of all parties;
- May involve both or either states and private parties;
- Can be selected as a forum in advance, by contract or subsequently by agreement of the parties. In addition, industry practice and laws in certain countries require that certain disputes be arbitrated;
- Can, depending on the skill of the arbitrators and the goal of the parties, be a speedy forum for dispute settlement;
- Generally leads to awards that are enforceable provided that the New York Convention applies;
- Usually operates to exclude other fora. If the parties have chosen arbitration, national courts are likely to respect that choice. (Exceptions exist; for example, there may be grounds for national court intervention when a party enters into bankruptcy.)
- Requires careful selection of the place (seat) of arbitration. The decision as to the seat of the arbitration will influence the possibility of an appeal before national courts as well as procedural matters, and
- Offers a means to protect confidentiality and reduce transparency.

In addition to the above points, it should be recalled that:

- Investment remains largely outside the WTO regime. Investment disputes usually arise instead BITs, which often subject such disputes to arbitration.
- BITs often point to ICSID or UNCITRAL rules for the resolution of investor-state disputes.

Finally, although there is no comprehensive international regime governing trade-related investment, many BITs have common provisions regarding the treatment of investment that allow for investor-state arbitration. Furthermore, in April 2012, the EU and the US as the "world's largest sources of and destination for foreign investment" issued a statement setting forth "shared principles for international Investment."[283] Among these principles is a commitment to "fair and binding dispute settlement," including "investor-to-state arbitration." The statement calls for procedures in investor-state arbitrations that are "open and transparent, with opportunities for public participation."[284]

6. CONCLUDING THOUGHTS AND RECOMMENDATIONS ON FORUM SELECTION

6.1 General Concluding Thoughts

In an ideal world, dispute settlement mechanisms should provide for predictability, fairness, transparency, and timely compliance (enforcement). They should be rules-based and allow for a maximum degree of stakeholder access. The subject of forum selection, by its very nature, focuses on the last criteria, stakeholder access to dispute settlement mechanisms and choosing the most appropriate forum for a stakeholder – i.e., a forum where a stakeholder can be heard and have an opportunity for legal redress.

From a practical viewpoint, the obstacles to stakeholders are both legal and political. First, from a legal point of view, international agreements are usually between governments – most often state parties.[285] This is not surprising. Many international problems, such as cross-border environmental issues, or deriving a comparative advantage from lower environmental, competition, or labour norms, require international solutions, and thus government involvement. International law is still largely a state-centric system, with access to international fora by and large restricted to state parties. Few international legal mechanisms provide for significant stakeholder involvement. Private parties usually lack a right of direct access to legal redress.[286] This is particularly true in matters concerning international economic law.

From a political point of view, this is somewhat understandable. Governments generally do not want to give non-governmental stakeholders standing in such fora – in part because this would: (i) erode sovereignty (particularly if the stakeholders are foreign); (ii) subject government to greater political pressure; and (iii) entail a financial price – compensation that governments would have to pay if they lost a case. Even international investment arbitration, where adverse decisions have the potential to result in all three, largely depends upon BITs or an international or regional agreement to provide investors with standing.

Since international agreements are one of the tools to define international law, and frequently create fora for governments to address international grievances, it is not surprising that this study looked first at the international level in its discussion of forum selection – and more specifically for alternatives that states (in particular developing countries) have to WTO dispute settlement. The results are neither encouraging nor surprising for developing countries or other states seeking redress of trade-related problems in other international fora. At the international level, the WTO system remains the strongest and most efficient legal mechanism for resolving trade problems. This is not unexpected for the simple reason that members created the WTO for that purpose. The other organizations studied have other objectives. To the extent that trade-related disputes can be heard in other fora, it is largely because a trade-related dispute is framed around issues that are germane to alternative fora.

This paper then proceeded to look at sub-international fora, beginning with selected regional trade arrangements and then turning to national trade laws and special (arbitral) rules that have a trade focus. Each move away from the international level meant greater opportunities for the legal involvement of stakeholders – particularly economic stakeholders, such as business interests. However, developing country governments do not normally have greater opportunities for effective redress of trade-related complaints at the sub-international level. The enforcement mechanism (suspension of concessions under an RTA) is not much different from that on offer at the WTO. Again, for these governments, the WTO remains 'the best game in town.' There is no magic bullet available at the sub-international level for governments.

The outlook is of course growing brighter for business interests, particularly those operating in the EU and the US, where there are legal mechanisms available to encourage or secure government involvement in potential trade disputes involving unfair trade practices: dumping, illegal subsidies, and intellectual property violations.[287] These mechanisms are designed to protect domestic business interests. As a result, developing countries will take little solace in such arrangements. But, it is unreasonable to expect anything different. The WTO Agreement is not directly effective in either the EU or the US, and it is not realistic to expect that in the EU or the US, foreign entities would be given greater opportunities for legal redress than domestic entities.

The outlook is also brighter for businesses seeking to invest or do business abroad. Governments increasingly want foreign direct investment and the jobs, technology, and trade opportunities that investment brings. This has given governments an incentive to enter into bilateral and regional agreements to protect foreign investors. Many of these agreements are subject to arbitration under ICSID or UNCITRAL rules. Of course, as many developing countries know, they are frequently on the receiving end as respondents in arbitrations conducted under ICSID and UNCITRAL rules.

Having concluded that selecting a forum other than the WTO to address a trade dispute is not always possible, practicable, or even desirable for developing countries, there are several examples discussed in this paper that will lead some readers to question this conclusion. These examples involve the WTO disputes discussed throughout this paper where related cases have been heard (or filed) in other fora:

i) The Chile / EU Swordfish dispute was pending simultaneously before the ITLOS and the WTO.

ii) Japan and the EC requested WTO consultation on whether legislation that limited the ability of public authorities in Massachusetts to procure goods or services from persons doing business with Myanmar (Burma) was WTO consistent. At the same time the ILO was pursuing a complaint against Myanmar for violations of the Forced Labour Convention.

iii) The Argentina / Brazil Poultry dispute was first heard by a MERCOSUR ad hocarbitral tribunal.

iv) Mexico sought to have the US / Mexico Soft Drinks dispute heard first by a NAFTA panel.[288]

v) Portions of the US/Canada Softwood Lumber dispute were heard by both WTO and NAFTA panels.

vi) The US sought to have the 2011 US / Mexico Tuna dispute heard by a NAFTA panel.

vii) The Canada / EU Seal controversy was first heard in the EU General Court and now is pending before a WTO panel (that has yet to be composed).[289]

viii) The tobacco industry's attack on plain packaging is now proceeding in three fora (the WTO and as separate investment arbitrations under ICSID and UNCITRAL rules involving Uruguay and Australia respectively).

These examples would seem to suggest some potential for forum selection – or, in the case of some of these matters, simultaneous proceedings in multiple fora.[290] Perhaps one could call this phenomenon 'forum multiplication.'[291] Parties seem to be launching several torpedoes (litigation in different fora), either simultaneously or consecutively, with the hope that one reaches its target. Nevertheless, before readers become too optimistic, it should be recalled from the above discussion that this list is mostly comprised of 'forum selection failures':

i) Chile and the EU never permitted the merits of the swordfish dispute to reach a WTO panel. Likewise, ITLOS was never

given the opportunity to rule on the swordfish dispute. This was not really a failure, since the parties eventually reached a settlement.

ii) ILO action with respect to Myanmar's violation of the Forced Labour Convention, while strong in voice, produced few tangible results, and forced labour continued in Myanmar after the Commission of Inquiry completed its work. Blame, however, cannot be placed entirely on the ILO. Myanmar received political support from China and India. In a somewhat related matter, the US courts struck down a Massachusetts law restricting government procurement from companies and individuals doing business in Myanmar. As a result of US court action, the WTO panel suspended its proceedings.

iii) In the Argentina / Brazil Poultry dispute, the WTO panel declined Argentina's request that it refrain from ruling in this case, declined to find that it was bound by the MERCOSUR ruling, found that the principle of estoppel was not applicable as Argentina had not relied in good faith on Brazilian statements and proceeded to find against Argentina on many of the important anti-dumping issues present in the case.

iv) The US apparently blocked Mexican efforts to convene a NAFTA panel in the US / Mexico Soft Drinks dispute by refusing to appoint panellists.

v) Mexico blocked the US effort to convene a NAFTA panel in the recent Tunacase by refusing to appoint panellists.

vi) The EU General Court ruled that a complaint by Inuit Communities was inadmissible. The WTO panel hearing this dispute has not yet been composed.

These examples suggest that while fora other than the WTO exist for trade-related disputes, they have produced few convincing results that would benefit developing countries.

Of the two cases not identified in the above list of 'forum selection failures,' the US / Canada Softwood Lumber dispute is indeed a true example of the possible benefits of forum selection (at least as a vehicle for producing a settlement) and as such deserves more study. The softwood lumber dispute was litigated under NAFTA Chapters 19 and 11 of NAFTA, in the WTO and in a proceeding administered by the London Court of International Arbitration. Multiple and sometimes inconsistent awards were rendered. Canada and the US eventually settled the matter (at least for now).

While the softwood lumber dispute may be meaningful to some from the perspective of forum selection, it was nevertheless a controversy between two developed countries. Furthermore, much of the dispute took place pursuant to the NAFTA Agreement, so it is much less interesting from a developing country perspective.[292]

From the perspective of forum selection, it is the cigarette plain packaging dispute that may be of most interest to developing countries. It is conceivable that the three tribunals will reach different conclusions on the disputed TRIPs and Paris Convention provisions. This could pose questions for the coherence of the international intellectual property regime. It is also conceivable that there will be an interesting jurisdictional decision in the *Philip Morris v. Uruguay* case and that states may as a result begin debating the merits of BITs that choose ICSID over UNCITRAL rules. Lastly, as trade in tobacco is an issue of great interest to many developing countries, the decisions in various fora will have implications for developing countries from both an economic and health perspective.

6.2 Specific Recommendations and Observations

Based on the above analysis, the following observations and recommendations are offered. Most are drawn from the foregoing discussion, sometimes verbatim, and cover a wide range of ideas concerning dispute

settlement opportunities at the international, regional, and national levels. They should not be perceived as undermining the central conclusion of this work:

- There are no international organizations that offer a real substitute to the WTO for the resolution of trade disputes.
- Forum selection possibilities do tend to exist, but often in areas not well regulated by WTO law or at 'the edge' of the WTO Agreement – for example in investment, labour, and environmental law. These alternative fora do not offer many opportunities for developing countries seeking alternative fora to the WTO dispute settlement mechanism.
- The WTO dispute settlement system, and the WTO enforcement machinery are far from perfect, but they are frequently faster and more effective than dispute settlement mechanisms in many other organizations. This may be because members have an economic stake in the success of the WTO system and considerable interest in its operation and preservation.

6.2.1. International level

1) Although WTO dispute settlement is limited to members and many international tribunals limit participation to state parties, certain international dispute settlement fora provide for some degree of participation by non-state actors. In particular certain ILO proceedings and WIPO domain-name disputes allow for participation by non-state actors. Those looking for alternative fora need to do their research. Use of the international mechanisms discussed in this paper requires knowledge of the relevant treaties, conventions, and agreements.

2) For both governments and stakeholders, forum selection in international dispute settlement requires a determination of who has standing under the rules of a particular system – whether a government, a stakeholder, or both – then working with and through the entity with standing. Consult counsel with international knowledge and experience before initiating a dispute in order to determine who has standing and to determine the most efficient path forward, taking account of the substantive and procedural rules that would be applied by a particular forum.

3) Before pressuring a government to proceed to dispute settlement in an international forum, businesses, NGOs, and other stakeholders should try to persuade the government to address a problem bilaterally in informal consultations between trade officials (in instances when they cannot act directly themselves). This method can be fast and cost-effective and may avoid protracted litigation.

4) While enforceable solutions may not always result from actions before international fora, since most fora lack effective enforcement machinery, success before certain bodies may have a 'name and shame' effect that may eventually produce results. 'Name and shame' should not be underestimated as a tool for achieving trade objectives. 'Name and shame' campaigns instituted by civil society or the business community often involve sophisticated use of the media and have achieved considerable success.

   a. In many instances, it may be faster and more efficient to take complaints to the media as opposed to international organizations. Dispute settlement in some international organizations is slow, cumbersome, ineffective, and subject to political pressure. There is no guarantee in some international organizations that a particular complaint will be addressed and little guarantee that this will happen in a rapid manner. There is always the possibility that politics may intervene in any discretionary process and limit the effectiveness of work in some international organizations.

b. While 'name and shame' is a useful tool in instances when governments care about their public image, it fails in many cases because either a government does not care or the political or economic price of change is too high to pay.

c. 'Name and shame' is only likely to be effective in disputes that generate some degree of public sympathy. Few people will be engaged if 'name and shame' is used to address the failure to remove anti-dumping duties, but 'name and shame' may be effective in certain labour disputes (such as the Apple / Foxconn controversy), and in some environmental cases – such as marine mammal protection.

5) Some international organizations lack effective enforcement mechanisms and rely to some extent on 'name and shame.' These organizations are also capable of benefitting from media involvement.

6) Successful use of certain international instruments, for example, a coastal state's use of UNCLOS to protect its EEZ from overfishing, requires good national governance in the form of effective executive, legislative, and judicial systems.

7) Effectiveness is the key element and often the missing link in dispute settlement at the international level. Effective systems are likely to be rapid and have a viable means to enforce an award. International dispute settlement systems are often impaired by undue delay and the lack of real enforcement capability. While the ICJ may be a forum that is very much in the public light, its relative slowness undermines its effectiveness, and its prestige makes it less suitable for certain smaller disputes, including most trade-related disputes (assuming jurisdiction).

8) Developing countries may find that, often as not, they are on the receiving end of certain types of international complaints with a trade dimension (labour, investment, environment, etc.).

6.2.2. Regional level

1) Only RTA members may invoke an RTA before the relevant RTA tribunal. From the perspective of forum selection, this is an important limitation.

2) Dispute settlement under RTAs often resembles dispute settlement under the WTO Agreement, and as a result suffers from many of the same shortcomings outlined in the introduction to this paper, in particular enforcement problems.

3) Modelling RTA dispute settlement on WTO dispute settlement is an established trend. There is usually a similar framework in WTO and RTA dispute settlement: consultations, a panel or arbitral process, and frequently an appellate process followed by enforcement procedures. As the framework and general legal principles are often similar, there should be little difference in the outcome of a dispute when the parties are subject to the same rules, and the judges have a similar level of competence and professionalism. This suggests, assuming similar rules and similar competence with respect to judges, the choice of forum, between and RTA and the WTO, may not be that important, and may rightfully be influenced by political and cost considerations.

4) Consultations remain an important procedural norm in almost all RTAs as well as in the WTO Agreement. Many disputes are solved bilaterally in either informal or formal consultations, thus avoiding many formal questions related to forum selection. From a developing country perspective, resolving a trade dispute through consultations can be cost-effective and may favour the maintenance of good trade relations among trading partners.

5) Many RTAs require a party to resolve a dispute either (i) only in the RTA or (ii) first in the RTA. However, WTO panels are bound to apply the 'covered agreements.' A panel will have jurisdiction over any dispute arising under a covered agreement even if

the same or a similar dispute can be heard under the rules of a particular RTA. Whether a WTO panel faced with an RTA exclusion clause will choose to rule on the merits of a question for which it has jurisdiction is another matter. The likely answer is yes, but such questions will probably be examined on a case-by-case basis. Issues such as good faith and perhaps estoppel may be relevant in this regard. To the extent that the principles of 'good faith' and 'estoppel' may be applicable in a WTO dispute, a panel will apply them strictly.

6) In instances when a member of both the WTO and an RTA chooses to bring a related dispute, either concurrently or consecutively to both the RTA and WTO tribunals, uncertainty remains with respect to how WTO and RTA tribunals will be influenced by related decisions in the other fora. Some RTAs incorporate portions of the WTO covered agreements. In such cases, one could imagine some degree of respect for prior WTO decisions interpreting these agreements.

   a. Judges in a particular forum will apply the trade and procedural rules of the agreement that created their forum.

   b. WTO panels are unlikely to accord much deference to the rulings on the merits of RTA tribunals, since in most cases these tribunals will be interpreting the RTA and not the WTO Agreement.

7) One can expect that RTA drafters will continue to insert provisions in RTAs governing choice of forum, with the expectation that parties will operate in good faith and not seek concurrent or consecutive recourse in a second forum (unless allowed) if a member fails to prevail in the first forum.

8) The ability of the Canada, Mexico, and the US to avoid NAFTA Chapter 20 dispute settlement by refusing to appoint panellists may be a factor favouring their utilization of the WTO as a forum for the resolution of trade disputes cognizable under both the WTO and NAFTA agreements.

6.2.3. National level

1) Neither the EU nor the US make the WTO Agreement directly effective, meaning that private citizens, business interests, or other stakeholders cannot generally use the EU or the US to enforce WTO obligations. The EU and the US, however, provide avenues for the private sector to contest unfair trade practices, in particular dumping. Some developing countries also do the same. Others should consider doing so.

2) Developing countries should consider which stakeholders, including business interests, should be able to apply pressure on the government to pursue a trade dispute. The establishment of transparent administrative and judicial procedures governing stakeholder participation can facilitate stakeholder involvement in trade disputes.

3) Developing country members and stakeholders seeking to bring a dispute in the national court of another member should pay particular attention to issues of standing and jurisdiction.

4) EU and US case law reveals that developing countries are often targeted with trade remedies actions – particularly advanced developing countries. Developing countries do not always have sophisticated laws to combat unfair trade practices. (Brazil, China, and India are notable exceptions.) Developing countries may wish to devote more resources to drafting and implementing trade remedies laws and training government officials on the administration, use, and defences to trade remedies actions.

5) The EU permits actions for annulment. While this procedure was not successful in *Inuit Tapiriit Kanatami v Parliament and Council*, it is a potentially powerful weapon for interests 'directly concerned' by an EU regulation.

6.2.4. Arbitration

1) In commercial transactions, negotiate arbitration clauses when dealing with an entity when confidence is lacking in national courts.

2) Institutions that administer arbitrations usually provide examples of model arbitration clauses. Using a model clause for a contractual provision can help avoid problems with respect to the validity and interpretation of the arbitration clause. Also, where possible, an appropriate choice of law clause should be carefully considered.

3) While recourse to commercial arbitration is frequently agreed in advance by a contract, the parties to a contract are also free to agree after an issue arises to submit a question or dispute to arbitration.

4) Parties in a commercial contract that have agreed to arbitration (by contract or by subsequent agreement) should choose a 'place' or 'seat' of arbitration that is 'arbitration friendly' – in other words whose national laws (i) recognize the validity of an agreement to arbitrate; (ii) whose courts defer to this agreement to arbitrate; and (iii) whose national arbitration law facilitates the arbitration.

   a. The country selected as the 'place' or 'seat' should be a signatory of the New York Convention. This should help assure the enforcement of the agreement to arbitrate and the enforceability of the final award in other signatory countries.

   b. The parties should assure that the law in the 'place' or 'seat' of the arbitration allows either the arbitrator or the courts (or both) to grant interim or protective measures and that the courts will respect the finality of an award.

   c. The parties should scrutinize local court practice in the place of arbitration to ascertain whether the court system is efficient and to assure that it does not interfere without real justification in the arbitral proceedings.

5) Many BITs contain clauses mandating arbitration under ICSID or UNCITRAL rules. Certain international agreements, such as the ECT also allow disputes to be settled through international arbitration. Developing countries should study forum selection issues before signing and ratifying such agreements.

6) In the case of ICSID arbitration, the petitioner should be a national of a state that has signed the ICSID Convention (from a state different than the respondent State) and the respondent state should also be a signatory of the Washington Convention.

7) In the case of an ICSID arbitration, the award should be enforceable 'against the state' and 'in the courts of any nation in accordance' with the laws of that nation.

8) There is a tendency in commercial arbitrations for the tribunal seized to maintain jurisdiction. This tendency makes forum selection issues particularly important. Developing countries should be aware of this tendency before initiating arbitration or signing an agreement with an arbitration clause. This tendency is less pronounced in investment arbitrations since the requirement of an 'investment' is a prerequisite for jurisdiction.

6.3 Final Considerations: A Word of Caution

Questions of forum selection should not be divorced from the wider political reality accompanying most trade disputes. WTO members live in glasshouses. Most members have at one time or another taken actions that can be challenged under one or more of the covered agreements. By initiating a trade dispute in one forum or another – particularly highly politicized for a – they may be opening a Pandora's Box. They may be subject to tit-for-tat retaliation as well as political and economic

pressure from other members. Some developing countries are particularly vulnerable in this regard. They may be dependent on market access, PTAs, foreign aid, security guarantees, remittances from guest workers, etc. Such dependencies may limit their political room for manoeuvre.

Likewise, businesses in developing countries may suffer as a result of ill-chosen actions. Industries are becoming evermore dependent on supply chains and ill-chosen disputes may disrupt these valuable private sector trade relationships and have a knock-on effect on employment, exports, balance of payments, et cetera. This in turn may have unintended domestic as well as foreign political and economic implications.

This is not to say that developing country WTO members should not consider bringing disputes in the WTO or in other fora, but instead only to suggest that developing countries carefully consider their actions, and that they anticipate the economic and political effects of launching a particular dispute as well as the expected legal outcome well before commencing litigation.

ENDNOTES

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

1 For many ACP countries, the EU is not only their most important trade partner, but also an important source of technical assistance and financial aid. This may add political pressure to the already complex and resource-consuming process of preparing (or defending) a WTO case.

2 The term "Singapore issues" refers to trade and investment, trade and competition, trade facilitation, and transparency in government procurement.

3 A violation complaint deals with "an infringement of the obligations assumed under a covered agreement. "See Article 3(8) of the Understanding on Rules and Procedures Governing the Settlement of Disputes (hereafter DSU). *See also* 1(a) of Article XXIII of GATT1994.

4 A non-violation complaint may result "where a party to the dispute considers that any benefit accruing to it directly or indirectly under the relevant covered agreement is being nullified or impaired or the attainment of any objective of that Agreement is being impeded as a result of the application by a Member of any measure, whether or not it conflicts with the provisions of that Agreement." See Article 26(1) of the DSU. *See also* Article XXIII:1(b) of GATT 1994.

5 Article 1.1 and Appendix 1 of the Understanding on Rules and Procedures Governing the Settlement of Disputes. The plurilateral Agreement on Trade in Civil Aircraft is not presently covered by the DSU.

6 From the practical perspective of business stakeholders, most legal issues involve day-to-day contractual relationships which, while potentially trade related, tend to be resolved using normal contractual dispute settlement mechanisms – litigation, arbitration, or mediation. While they may raise complex questions regarding private international law and jurisdictional issues, including forum selection at the drafting and enforcement stage, such disputes are generally beyond the scope of this paper.

7 The DSU also provides for conciliation, mediation, and good offices. *See* Article 5 of the DSU. These alternative dispute resolution tools, in particular conciliation and mediation, are not popular among members.

8 In all international litigation, governments must consider the cost in both human and financial terms, the consequences for external relations (both economic and political) and the potential for tit-for-tat retaliation.

9 WIPO fees can be found at http://www.wipo.int/amc/en/arbitration/fees/ (WIPO arbitrations and expedited arbitrations) (Last visited: 17/04/13) and http://www.wipo.int/amc/en/domains/fees/index.html (domain-name arbitrations) (Last visited: 17/04/13).

10 The WIPO website (as of 19 March 2012) reflects that 42 percent of the mediations and arbitrations involved patents, 23 percent information technology law, 12 percent trademarks, and 6 percent copyrights. The remaining 17 percent involved "other matters"). In terms of sectors, 33 percent of the mediations and arbitrations involved information technology, 14 percent were in the mechanical sector, 14 percent in the pharmaceutical sector, 11 percent in the entertainment sector, with luxury goods, life sciences and chemistry sectors involved in 5 percent, 2 percent and 1 percent of mediations and arbitrations respectively

(the remaining 20 percent involved "other matters"). *See* WIPO Caseload Summary, http://www.wipo.int/amc/en/center/caseload.html (Last visited: 17/04/13).

11 WIPO Caseload Summary, http://www.wipo.int/amc/en/center/caseload.html (Last visited: 17/04/13)

12 See http://www.wipo.int/amc/en/index.html (WIPO Arbitration and Mediation Center), http://www.wipo.int/amc/en/arbitration/ (Arbitration), http://www.wipo.int/amc/en/mediation/ (Mediation), http://www.wipo.int/amc/en/domains/ (Domain Name Dispute Resolution), and http://www.wipo.int/amc/en/expert-determination/what-is-exp.html (What is Expert Determination?) (Last visited: 17/04/13).

13 WIPO Caseload Summary, http://www.wipo.int/amc/en/center/caseload.html (Last visited: 17/04/13)

14 WIPO Caseload Summary, http://www.wipo.int/amc/en/center/caseload.html (Last visited: 17/04/13).

15 WIPO Caseload Summary, http://www.wipo.int/amc/en/center/caseload.html (Last visited: 17/04/13).

16 *See* Articles 39 and 59 of the WIPO Arbitration Rules with respect to the place of arbitration and the applicable substantive law, http://www.wipo.int/amc/en/arbitration/rules/index.html (*quoting* Article 59(a)) (Last visited: 17/04/13). The Tribunal, after consultation with the parties, may hold hearings where it considers appropriate (Article 39(b)).

17 WIPO Caseload Summary, http://www.wipo.int/amc/en/center/caseload.html (Last visited: 17/04/13).

18 WIPO Caseload Summary, http://www.wipo.int/amc/en/center/caseload.html (as of 16 March 2012).

19 *See* Interim Measures of Protection and Security for Claims and Costs (Article 46) of the WIPO Arbitration Rules http://www.wipo.int/amc/en/arbitration/rules/index.html (Last visited: 17/04/13).

20 WIPO Arbitration and Expedited Arbitration Compared, (less than two years for normal proceedings and much less than one year for expedited proceedings), http://www.wipo.int/amc/en/arbitration/expedited-rules/compared.html On confidentiality rules for regular arbitrations see Articles 73-76 of the WIPO Arbitration Rules http://www.wipo.int/amc/en/arbitration/rules/#conf2; for Expedited Arbitrations see Articles 66-69 of the WIPO Expedited Arbitration Rules http://www.wipo.int/amc/en/arbitration/expedited-rules/#7 (Last visited: 17/04/13).

21 1958 - Convention on the Recognition and Enforcement of Foreign Arbitral Awards– the "New York" Convention, http://www.uncitral.org/uncitral/uncitral_texts/arbitration/NYConvention.html (Last visited: 17/04/13).

22 1958 - Convention on the Recognition and Enforcement of Foreign Arbitral Awards– the "New York" Convention, http://www.uncitral.org/uncitral/uncitral_texts/arbitration/NYConvention.html (Last visited: 17/04/13), see "Text" Articles 1-3.

23 Status, 1958 - Convention on the Recognition and Enforcement of Foreign Arbitral Awards, http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention_status.html (Last visited: 17/04/13).

24 *See* Status, 1958 - Convention on the Recognition and Enforcement of Foreign Arbitral Awards, http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention_status.html for a list of parties to the New York Convention. The exceptions and defences to recognition and enforcement of an award are set forth in Article V of the New York Convention (see "Text"), http://www.uncitral.org/uncitral/uncitral_texts/arbitration/NYConvention.html (Last visited: 17/04/13).

25 Internet Corporation for Assigned Names and Numbers (ICANN), Uniform Domain Name Dispute Resolution Policy, http://www.icann.org/en/help/dndr/udrp/policy (Last visited: 17/04/13)

26 *See* the 'Policy,' available on the ICANN website: http://www.icann.org/en/help/dndr/udrp/policy. WIPO domain-name services are described at: http://www.wipo.int/amc/en/domains/gtld/. Domain name caseload information is available at: http://www.wipo.int/amc/en/center/caseload.html. and http://www.wipo.int/amc/en/domains/statistics/gtlds.jsp. Certain other organizations also have authority to hear domain-name disputes: http://www.icann.org/en/dndr/udrp/approved-providers.htm (Last visited: 17/04/13).

27 The vast majority of domain-name disputes have involved the valuable ".com" extension, which is very often used for trade in both goods and services, http://www.wipo.int/amc/en/domains/statistics/gtlds.jsp (Last visited: 17/04/13).

28 All gLTDs by Year and Total, http://www.wipo.int/amc/en/domains/statistics/gtlds.jsp (Last visited: 17/04/13).

29 *See* http://www.wipo.int/amc/en/center/caseload.html. For more specific information on procedures involving generic top-level domains see http://www.wipo.int/amc/en/domains/gtld/index.html (Last visited: 17/04/13).

30 "For a case involving between 1 and 5 domain names, the fee for a case that is to be decided by a single Panelist is USD1500 and USD4000 for a case that is to be decided by 3 Panelists." Complainant pays all fees unless the dispute is expanded by respondent to three Panellists, in which case the fees are split. http://www.wipo.int/amc/en/domains/guide/index.html#i1; (Last visited: 17/04/13) 4(g) of the Policy.

31 *See* the Policy: http://www.icann.org/en/help/dndr/udrp/policy (Last visited: 17/04/13).

32 *See* WIPO Guide to the Uniform Domain Name Dispute Resolution Policy (UDRP), http://www.wipo.int/amc/en/domains/guide/#b2 (Last visited: 17/04/13).

33 *Id*.

34 *See* WIPO Domain Name Panellists, http://www.wipo.int/amc/en/domains/panel/panelists.html (Last visited: 17/04/13). There are not many panellists from Africa.

35 See Article 3 of the Policy: http://www.icann.org/en/help/dndr/udrp/policy (Last visited: 17/04/13).

36 WIPO Domain Name Decisions, http://www.wipo.int/amc/en/domains/decisions.html. WIPO also makes a selection of court awards publicly available. Selection of UDRP-related Court Cases, http://www.wipo.int/amc/en/domains/challenged/index.html (Last visited: 17/04/13).

37 Leverage similar to that enjoyed by WIPO in domain-name arbitrations could be achieved in the WTO if a WTO body had the authority to approve or disapprove commercial transactions. Of course, such an idea is so politically, economically, and logistically inconceivable that it does not merit additional discussion.

38 Some commentators criticize the WIPO model as biased in favour of trademark holders and as having implications for freedom of expression. *See generally* Michael Fromkin, "A Commentary on WIPO's *The Management of Internet Names and Addresses: Intellectual Property Issues*," 89-127, http://personal.law.miami.edu/~amf/commentary.htm (Last visited: 17/04/13).

39 *See* Article 7 of the Havana Charter, http://www.wto.org/english/docs_e/legal_e/havana_e.pdf (Last visited: 17/04/13), on "Fair Labour Standards."

40 See 4 of the Singapore Ministerial Declaration, WT/MIN(96)/DEC, 18 December 1996, http://www.wto.org/english/thewto_e/minist_e/min96_e/wtodec_e.htm#core_labour_standardson (Last visited: 17/04/13) on "Core Labour Standards."

41 *See* Report of the Appellate Body, *United States - Measures Concerning The Importation, Marketing and Sale of Tuna and Tuna Products*, WT/DS381/AB/R, adopted 13 June 2012, and *United States - Import Prohibition of Certain Shrimp and Shrimp Products,* WT/DS58/AB/R, adopted 6 November 1998.

42 Japan and the European Community (EC) also launched WTO disputes against the US based on an alleged violation of the GPA. These proceedings were in response to legislation enacted by the Commonwealth of Massachusetts that limited the ability of public authorities in Massachusetts to procure goods or services from persons doing business with Myanmar (Burma). The Massachusetts law was enacted in response to human rights and labour abuses in Myanmar. See WTO Disputes DS88 and DS95, *United States - Measure Affecting Government Procurement*. Pursuant to a request from the Complainants dated 10 February 1999, the panel suspended its proceedings. The matter terminated on 11 February 2000. *See* WTO, Trade Topics, Dispute Settlement, the Disputes, DS88 and DS95, *United States - Measure Affecting Government Procurement*, http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds88_e.htm (Last visited: 17/04/13). These disputes were never ruled on by a WTO panel. The US Supreme Court and two lower courts struck down the Massachusetts law. *See Crosby v. National Foreign Trade Council* 530 U.S. 363 (2000). Myanmar's labour practices were, however, scrutinized by an ILO Commission of Inquiry that examined the violation of an ILO Convention.

43 The controversy including allegations that Foxconn employees, producing products for Apple, were paid low wages, expected to put in enormous amounts of overtime, lived in cramped dormitory conditions, and were subject to demeaning forms of punishment, etc. Allegations of poor working conditions at Foxconn remain widespread in the popular press. See e.g., "Apple's Efforts Fail to End Gruelling Conditions at Foxconn Factories," *The Guardian,* 30 May 2012, http://www.guardian.co.uk/technology/2012/may/30/foxconn-abuses-despite-apple-reforms (Last visited: 17/04/13).

44 As already noted, a non-violation complaint may result "where a party to the dispute considers that any benefit accruing to it directly or indirectly under the relevant covered agreement is being nullified or impaired or the attainment of any objective of that Agreement is being impeded as a result of the application by a Member of any measure, whether or not it conflicts with the provisions of that Agreement." Article 26 of the DSU permits non-violation complaints, but there is no obligation to withdraw measures that do not violate the WTO Agreement and recommendations as to ways and means of reaching a mutually satisfactory solution are non-binding.

45 For a good overview of labour provisions in trade agreements, see Franz C. Ebert and Anne Posthuma, "Labour Provisions in Trade Arrangements: Current Trends and Perspectives,

International Labour Organization International Institute for Labour Studies," Discussion Paper N° 205 (2011), http://www.ilo.org/public/english/bureau/inst/download/dp205_2010.pdf (Last visited: 17/04/13). (I am particularly indebted to Mr. Ebert for comments and input on an earlier draft of this section.

Core labour standards are frequently among these standards. These are: freedom of association and the right to collective bargaining, prohibition of forced and compulsory labour, abolition of child labour, and prohibition of discrimination in the workplace (including gender discrimination). For the WTO Secretariat's summary of the trade-related labour issue, *see* http://www.wto.org/english/thewto_e/whatis_e/tif_e/bey5_e.htm (Last visited: 17/04/13).

46 *Id.*

47 *See* ILO Constitution, Article 3(1), www.ilo.org/public/english/bureau/leg/download/constitution.pdf (Last visited: 17/04/13), and Article 14 (which uses the term "representative organisations" to describe the delegates from workpeople and employers mentioned in Article 3).

48 These reports and requests are published. *See e.g.*, http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:14001:3025413474263557::NO:14001:P14001_INSTRUMENT_ID:312232:NO (Last visited: 17/04/13).

49 Committee of Experts on the Application of Conventions and Recommendations, http://www.ilo.org/global/standards/applying-and-promoting-international-labour-standards/committee-of-experts-on-the-application-of-conventions-and-recommendations/lang--en/index.htm (Last visited: 17/04/13).

50 *Id.*, and Conference Committee on the Application of Standards, http://www.ilo.org/global/standards/applying-and-promoting-international-labour-standards/conference-committee-on-the-application-of-standards/lang--en/index.htm (Last visited: 17/04/13).

51 Information concerning the activities of the Committee on Freedom of Association is available on the ILO website: http://www.ilo.org/global/standards/applying-and-promoting-international-labour-standards/committee-on-freedom-of-association/lang--en/index.htm. A digest of Decisions and Principles of the Committee (5th edition revised) is also available on the ILO website: http://www.ilo.org/wcmsp5/groups/public/---ed_norm/---normes/documents/publication/wcms_090632.pdf (Last visited: 17/04/13).

52 *See* Representations, http://www.ilo.org/global/standards/applying-and-promoting-international-labour-standards/representations/lang--en/index.htm (Last visited: 17/04/13).

53 Articles 29, and 31-34 of the Constitution.

54 ILO Defers Taking Burma to ICJ, Burma News International, 29 March 2007, http://bnionline.net/news/mizzima/1489-ilo-defers-taking-burma-to-icj.html (Last visited: 17/04/13).

55 International Labour Organization, Complaints, http://www.ilo.org/global/standards/applying-and-promoting-international-labour-standards/complaints/lang--en/index.htm (Last visited: 17/04/13).

56 Observation (CEACR) - adopted 2011, published 101st ILC session (2012) Forced Labour Convention, 1930 (No. 29) - Myanmar (Ratification: 1955), http://www.ilo.org/dyn/normlex/en/f?p=1000:13100:2322409273325337::NO:13100:P13100_COMMENT_ID:2698181 (Last visited: 17/04/13).

57 Complaint (Article 26) - 2010 - Zimbabwe - C087, C098, Workers and Employers delegates at the 97th Session of the International Labour Conference.

58 1973 Convention concerning the Social Repercussions of New Methods of Cargo Handling in Docks (C137 Dock Work Convention), http://www.ilo.org/ilolex/cgi-lex/convde.pl?C137 (Last visited: 17/04/13).

59 *See* 28 and 31 in the 2001 Doha WTO Ministerial Declaration, WT/MIN(01)/DEC/1, Adopted on 14 November 2001, www.wto.org/english/thewto_e/minist_e/min01_e/mindecl_e.htm (Last visited: 17/04/13).

60 Unsustainable fishing activities, known as illegal, unreported, and unregulated (IUU) fishing may undermine conservation and management measures established by a coastal state in areas under national jurisdiction and by regional fisheries management organizations and arrangements (RFMO/As) on the high seas.

61 The United Nations Convention on the Law of the Sea of 10 December 1982 (UNCLOS), http://www.un.org/depts/los/convention_agreements/texts/unclos/UNCLOS-TOC.htm (Last visited: 17/04/13).

62 The Exclusive Economic Zone (EEZ) is defined and rights to its use are elaborated upon in Articles 55-75 of UNCLOS. Pursuant to Article 57, the EEZ "shall not extend beyond 200 nautical miles from the baselines from which the breadth of the territorial sea is measured." Within the EEZ, the coastal state has: "sovereign rights for the purpose of exploring and exploiting, conserving and managing the natural resources, whether living or non-living, of the waters superjacent to the seabed and of the seabed and its subsoil…." Article 56(1)(a) of UNCLOS.

63 Article 73 of UNCLOS.

64 Article 106 of UNCLOS.

65 Article 92 of UNCLOS.

66 See Articles 117-119 of UNCLOS.

67 The conclusions or recommendations of these procedures are not binding upon the parties to the dispute.

68 Article 61(2) provides: "The coastal State, taking into account the best scientific evidence available to it, shall ensure through proper conservation and management measures that the maintenance of the living resources in the exclusive economic zone is not endangered by over-exploitation. As appropriate, the coastal State and competent international organizations, whether subregional, regional or global, shall cooperate to this end."

69 Article 62(2) provides "The coastal State shall determine its capacity to harvest the living resources of the exclusive economic zone. Where the coastal State does not have the capacity to harvest the entire allowable catch, it shall, through agreements or other arrangements and pursuant to the terms, conditions, laws and regulations referred to in paragraph 4, give other States access to the surplus of the allowable catch, having particular regard to the provisions of articles 69 and 70, especially in relation to the developing States mentioned therein."

70 This is subject to certain limited reservations authorised by Article 298 on optional exceptions to the applicability of Section 1.

71 *Quoting* Article 290(1) of UNCLOS. *See Article* 290(5) of UNCLOS on the role of the ITLOS.

72 The "Statute of the International Tribunal for the Law of the Sea" is set forth in Annex VI of UNCLOS, http://www.un.org/depts/los/convention_agreements/texts/unclos/annex6.htm (Last visited: 17/04/13).

73 In so far "as it relates to matters in respect of which that State Party intervened." Article 31(3) of the statute of the ITLOS.

74 If "it uses this right, the interpretation given by the judgment will be equally binding upon it." Article 32(3) of the Statute.

75 The WTO Agreement on Subsidies and Countervailing Measures (SCM) does not authorize an import ban on impermissibly subsidized products. While the SCM does permit members to countervail certain subsidies, many members (particularly those without important fishing fleets) would welcome inexpensive fish imports. A ban on fish imports in order to conserve an exhaustible natural resource may be justifiable under the general exception set forth in Article XX(g) of GATT 1994; however, such a ban would not prevent the subsidized fish from being sold to distributors in another member.

76 *Southern Bluefin Tuna Cases (New Zealand and Australia v. Japan)* Case N° 3 & 4, Provisional Measures, http://www.itlos.org/index.php?id=62&L=0#c121 (Last visited: 17/04/13).

77 *See* 90, parts (c) and (d), of the Order (in the Request for Provisional Measures) http://www.itlos.org/fileadmin/itlos/documents/cases/case_no_3_4/Order.27.08.99.E.pdf (Last visited: 17/04/13). Although written diplomatically to cover "the parties," the interim measures were targeted at Japan.

78 *Case Concerning the Conservation and Sustainable Exploitation of Swordfish Stocks in the South-Eastern Pacific Ocean (Chile/European Community),* Case N° 7, http://www.itlos.org/index.php?id=99 (Last visited: 17/04/13).

79 Marcos Orellana, "The EU and Chile Suspend the Swordfish Case Proceedings at the WTO and the International Tribunal of the Law of the Sea," ASIL Insights (February 2001), http://www.asil.org/insigh60.cfm (Last visited: 17/04/13).

80 WTO Dispute DS193 *Chile - Measures affecting the Transit and Importing of Swordfish,* Request for Consultations (19 April 2000).

81 *See* WTO, Trade Topics, Dispute Settlement, the Disputes, DS193 *Chile - Measures affecting the Transit and Importing of Swordfish*, http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds193_e.htm (Last visited: 17/04/13).

82 *The "Tomimaru" Case (Japan v. Russian Federation), Prompt Release*, Case N° 15, http://www.itlos.org/index.php?id=107 (Last visited: 17/04/13).

83 *See* 82 of the Judgement of 6 August 2007, http://www.itlos.org/fileadmin/itlos/documents/cases/case_no_15/Judgement_E_1.09.2010.pdf (Last visited: 17/04/13).

84 An early attempt in this regard was made by the Center for International Environmental Law, "Effective Dispute Resolution: A Review of Options for Dispute Resolution Mechanisms and Procedures" (1999).

85 International Tribunal for the Law of the Sea, List of Cases, http://www.itlos.org/index.php?id=35 (Last visited: 17/04/13). *See, e.g.*, Cases 3&4, 7 and 15.

86 *Fisheries Jurisdiction (Spain v. Canada),* Jurisdiction of the Court, Judgment, I.C.J. Reports 1998, pp.432, 467 (*see* 87).

87 *Fisheries Jurisdiction (Federal Republic of Germany v. Iceland),* Merits, Judgment, I.C.J. Reports 1974, p. 175; *Fisheries Jurisdiction (United Kingdom v. Iceland),* Merits, Judgment, I.C.J. Reports 1974, p. 3; *Fisheries Case (United Kingdom v. Norway),* Judgment of December 18, I951, I.C.J. Reports 1951, p. 116. ICJ Judgments, Advisory Opinions and Orders are available on the ICJ website: http://www.icj-cij.org/docket/index.php?p1=3&p2=5 (Last visited: 17/04/13).

88 *See generally Case Concerning the Gabcíkovo-Nagymaros Project (Hungary/Slovakia),* Judgment of the International Court of Justice, Judgment, I.C.J. Reports 1997, p.7, and *Case Concerning Pulp Mills on the River Uruguay (Argentina/Uruguay),* Judgment of the International Court of Justice (April 2010), Judgment, I.C.J. Reports 2011.

89 Part XV of the Convention, and in particular Article 291, largely limits the use of the UNCLOS dispute settlement mechanism to State parties.

90 The Permanent Court of Arbitration has acted as a registry in five of the six UNCLOS Annex VII arbitrations since UNCLOS came into effect in 1982. Often these cases involve delimitations questions. See generally Ad Hoc Arbitration Under Annex VII of the United Nations Convention on the Law of the Sea, http://www.pca-cpa.org/showpage.asp?pag_id=1288 (Last visited: 17/04/13).

91 This Agreement was signed by only 59 states and entities. The Straddling Fish Stocks Agreement is available at: http://www.un.org/depts/los/convention_agreements/convention_overview_fish_stocks.htm (Last visited: 17/04/13).

92 For a review of the UN Fish Stocks Agreement, *see* Andre Tahindro "Conservation and Management of Trans boundary Fish Stocks: Comments in Light of the Adoption of the 1995 Agreement for the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks," 28 Ocean Development & International Law 1-58 (1997). I am particularly indebted to Mr.Tahindro for comments and input on an earlier draft of this and the previous section of this paper.

93 Articles 6, 7, 10, 18, 19, 21 and 23 of UNFSA.

94 Articles 28-29 of UNFSA.

95 The FAO Compliance Agreement is available at: http://www.fao.org/docrep/meeting/003/x3130m/X3130E00.HTM (Last visited: 17/04/13).

96 *See* Article III of the Agreement.

97 The FAO Port State Measures Agreement is available at: http://www.fao.org/fishery/topic/166283/en (Last visited: 17/04/13).

98 See Article 2 of the Agreement.

99 Articles 117, 118 and 119 of UNCLOS (*quoting* Article 118).

100 *See generally*, The International Commission for the Conservation of Atlantic Tunas (ICCAT), http://www.iccat.es/en/ (Last visited: 17/04/13).

101 *See* ICCAT, Contracting Parties, http://www.iccat.int/en/contracting.htm (Last visited: 17/04/13). There are also five "cooperators."

102 The International Commission for the Conservation of Atlantic Tunas, http://www.iccat.es/en/ (Last visited: 17/04/13).

103 *See* ICCAT, Basic Texts (5th Revision, 2007), http://www.iccat.es/Documents/Commission/BasicTexts.pdf (Last visited: 17/04/13).

104 Alex Renton, "How the world's oceans are running out of fish," The Observer, 1 May 2008, http://www.guardian.co.uk/environment/2008/may/11/fishing.food. *See also* "International Commission for the Conservation of Atlantic Tunas" in Wikipedia: http://en.wikipedia.org/wiki/International_Commission_for_the_Conservation_of_Atlantic_Tunas#cite_note-bare_url-1 (Last visited: 17/04/13).

105 Fisheries and Oceans Canada, "Unprecedented Sanctions Invoked by ICCAT for Overfishing Bigeye Tuna Organization also Takes Steps to Strengthen Fisheries Management," 22 November 2005, http://www.dfo-mpo.gc.ca/media/npress-communique/2005/hq-ac94-eng.htm (Last visited: 17/04/13).

106 *See* "EU takes action to foster international sustainable fishing," Brussels, 29 April 2004, http://trade.ec.europa.eu/doclib/html/116868.htm (Last visited: 17/04/13). For example, at one time or another the EU imposed trade restrictions on certain tuna and/or swordfish imports from Bolivia, Cambodia, Equatorial Guinea, Georgia, Sierra Leone, Belize, Honduras and Saint Vincent and the Grenadines.

107 Richard Black, "EU condemned on tuna 'mockery'," BBC News Website, 25 November 2008, http://news.bbc.co.uk/2/hi/science/nature/7746965.stm (Last visited: 17/04/13).

108 *See* Northwest Atlantic Fisheries Organization, Introduction, http://www.nafo.int/about/frames/convention.html (Last visited: 17/04/13).

109 *See* North Atlantic Salmon Conservation Organization (NASCO), the Convention, http://www.nasco.int/convention.html.

110 *See* South East Atlantic Fisheries Organization, Convention on the Conservation and Management of Fishery Resources in The South East Atlantic Ocean, http://www.seafo.org/AUConventionText.html (Article 24) (Last visited: 17/04/13).

111 Energy Charter Secretariat, *The Energy Charter Treaty and Related Documents: A Legal Framework for International Energy Cooperation* (2004). The treaty can be downloaded from the Energy Charter website: http://www.encharter.org/index.php?id=28 (Last visited: 17/04/13).

112 *See* Energy Charter Secretariat, About the Charter, http://www.encharter.org/index.php?id=7&L=0L0104096501096704id01060008e (Last visited: 17/04/13).

113 *See* Energy Charter Secretariat, Dispute Settlement, http://www.encharter.org/index.php?id=269. These disputes are listed on the Energy Charter website: http://www.encharter.org/index.php?id=213&L=0%3E (Last visited: 17/04/13).

114 *See* Energy Charter Secretariat, Investor-State Dispute Settlement Cases, http://www.encharter.org/index.php?id=213 (Last visited: 17/04/13). The Energy Charter website provides information on the status of the proceedings.

115 *See* Energy Charter Secretariat, Dispute Settlement, http://www.encharter.org/index.php?id=269 (Last visited: 17/04/13).

116 It could also include disputes between a WTO member and an ECT state that is outside the WTO.

117 For example, pursuant to Article 29 of the treaty, non-WTO members, such as Azerbaijan, Bosnia and Herzegovina, Kazakhstan, Tajikistan, Turkmenistan, and Uzbekistan could potentially be

subject to a dispute settlement system based on GATT 1947 rules for state-to-state disputes involving trade in energy materials and products (see Article 29(1) of the treaty).

118 *Vattenfall AB, Vattenfall Europe AG, Vattenfall Europe Generation AG & Co. KG (Sweden) v. Federal Republic of Germany,* ICSID Case N° ARB/09/6.

119 *Request for Arbitration, Vattenfall AB, Vattenfall Europe AG, Vattenfall Europe Generation AG & Co. KG (Sweden) v. Federal Republic of Germany,* at 11 (ICSID Case N° ARB/09/6), http://italaw.com/documents/Vattenfall_Request_for_Arbitration_001.pdf (30 March 2009) (Last visited: 17/04/13).

120 *Id.* at 50-54.

121 *Id.* at 55-58.

122 *Vattenfall AB, Vattenfall Europe AG, Vattenfall Europe Generation AG & Co. KG (Sweden) v. Federal Republic of Germany*, ICSID Case N° ARB/09/6, http://italaw.com/documents/VattenfallAward.pdf (Award) (Last visited: 17/04/13), (11 March 2011).

123 Energy Charter Secretariat, The Energy Charter Treaty and Related Documents A Legal Framework for International Energy Cooperation (September 2004), http://www.encharter.org/fileadmin/user_upload/document/EN.pdf#page=211 (Last visited: 17/04/13).

124 Article 27 arguably could be used to address transit disputes once the procedures set forth in Article 7 have been exhausted. However, as noted above, the ECT Secretariat knows of only one Article 27 dispute, and it was settled diplomatically. In addition, Article 27 would not provide a remedy in the event of an urgent transit dispute.

125 Some states have not ratified the 1994 ECT and Protocol on Energy Efficiency and Related Environmental Aspects. Finally, some states have not ratified the 1998 Treaty Amendment reflecting the creation of the WTO.

126 For example, Azerbaijan, Kazakhstan, Turkmenistan, Tajikistan, and Uzbekistan have each ratified the ECT but are not members of the WTO.

127 *See* Directive 2008/101/EC of the European Parliament and of the Council of 19 November 2008, amending Directive 2003/87/EC so as to include aviation activities in the scheme for greenhouse gas emission allowance trading within the Community, L 8/3, 13/01/2009, and accompanying regulations.

128 Case C 366/10, *The Air Transport Association of America and Others*, Judgment of the Court (Grand Chamber) of 21 December 2011, http://curia.europa.eu/juris/liste.jsf?language=en&jur=C,T,F&num=366/10&td=ALL. *See also* Opinion of Advocate General Kokott, delivered on 6 October 2011, http://curia.europa.eu/juris/celex.jsf?celex=62010CC0366&lang1=en&type=NOT&ancre= (Last visited: 17/04/13).

129 *See* Bartels, "The Inclusion of Aviation in the EU ETS: WTO Law Considerations," ICTSD Trade and Sustainable Energy Series No. 6 (2012).

130 Convention on International Civil Aviation (Chicago Convention), www.icao.int/publications/pages/doc7300.aspx (Last visited: 17/04/13).

131 Case C 366/10, *The Air Transport Association of America and Others*, Judgment of the Court (Grand Chamber) of 21 December 2011, 3 and 60.

132 The ICAO is a specialized agency of the United Nations (UN) charged with the "development of international civil aviation throughout the world." "It sets standards and regulations

necessary for aviation safety, security, efficiency and regularity, as well as for aviation environmental protection," http://www.icao.int/Pages/icao-in-brief.aspx (Last visited: 17/04/13).

133 *See generally* Vernon Nase, ADR and International Aviation Disputes Between States - Part 2, ADR Bulletin, Volume 6, Number 6, Article 2 (2003), http://epublications.bond.edu.au/adr/vol6/iss6/2 (Last visited: 17/04/13), at 113. See also David MacKenzie, *A History of the International Civil Aviation Organization* (University of Toronto Press Incorporated, Toronto, 2010) at 201-202.

134 Decision of the Council and the Representatives of the Governments of the Member States of the European Union, meeting within the Council of 25 April 2007 on the signature and provisional application of the Air Transport Agreement between the European Community and its Member States, on the one hand, and the United States of America, on the other hand, (2007/339/EC); and Decision of the Council and the Representatives of the Governments of the Member States of the European Union, meeting within the Council of 24 June 2010 on the signing and provisional application of the Protocol to Amend the Air Transport Agreement between the United States of America, of the one part, and the European Community and its Member States, of the other part (2010/465/EU).

135 Case C 366/10, *The Air Transport Association of America and Others,* Judgment of the Court (Grand Chamber) of 21 December 2011, 79-157; Opinion of Advocate General Kokott, delivered on 6 October 2011, Case C 366/10, 189-240.

136 This is particularly true given the Appellate Body's decisions ignoring the process and production method. It appears clear from *Tuna II* that the process and production method debate is dead with respect to labelling schemes. It remains to be determined whether this finding (which appears readily defensible under Annex 1.1 of the TBT Agreement) will be extended to transport taxes and emissions trading schemes. Likewise, the Appellate Body ignored the process and production method debate, with respect to GATT 1994, in *US - Shrimp*. *See* Report of the Appellate Body, *United States - Measures Concerning The Importation, Marketing and Sale of Tuna and Tuna Products*, WT/DS381/AB/R, adopted 13 June 2012, and *United States - Import Prohibition of Certain Shrimp and Shrimp Products,* WT/DS58/AB/R, adopted 6 November 1998.

137 Although FTAs increasingly involve countries outside a particular region, the more common term RTA is used rather than PTAs.

138 Considerable literature exists with respect to dispute settlement under RTAs, so there is little need to enter into much detail about these agreements. Instead this chapter focuses on conclusions that may be of assistance to developing countries considering forum selection questions involving FTAs.

139 In principle the tariff treatment of goods and market access conditions for services should be more favourable under an FTA than under the WTO Agreement. This may mean that a claimant finds that selecting the FTA forum is more desirable.

140 Asian Development Bank, "How to Design, Negotiate, and Implement a Free Trade Agreement in Asia," Office of Regional Economic Integration (April 2008), pp. 92-98.

141 *See* Article 222(2) of the CARIFORUM – EU EPA. Economic Partnership Agreement between the CARIFORUM States, of the one part, and the European Community and its Member States, of the other part, 30.10.2008 Official Journal of the European Union, L 289/I/3.

142 Appellate Body Report, Mexico – *Tax Measures on Soft Drinks and Other Beverage (Mexico - Soft Drinks)*, WT/DS308/AB/R, 48-57 (24 March 2006).

143 The NAFTA Agreement is available on the NAFTA Secretariat's website: http://www.nafta-sec-alena.org/en/view.aspx?conID=590 (Last visited: 17/04/13).

144 Appellate Body Report, *Mexico - Soft Drinks*, 10.

145 *Id*. at 42 and 44.

146 *Id*. at 44.

147 *Id*. 48-53 (*quoting* 53).

148 *Id*. at 54.

149 *Id*.

150 *Id*. at 56.

151 Article 1101 of NAFTA.

152 Article 1102 of NAFTA.

153 Article 1103 of NAFTA.

154 Article 1105 of NAFTA.

155 Article 1110 of NAFTA.

156 Article 1120(1) of NAFTA.

157 Article 1134 of NAFTA.

158 Article 1136 of NAFTA.

159 Article 1904 of NAFTA; *Quoting* Patrick Macrory, NAFTA Chapter 19: A Successful Experiment in NAFTA Dispute Resolution," N° 168 The Border Papers (C.D. Howe, September 2002), at p.23. Industry can also appeal the dumping, subsidy and injury determinations of the investigating authorities to domestic courts: in Canada to the Federal Court of Canada, in the US to the Court of International Trade, and in Mexico to the Tribunal Fiscal de la Federación (*see* NAFTA Secretariat, Overview of the Dispute Settlement Provisions, http://www.nafta-sec-alena.org/en/view.aspx?x=226)(Last visited: 17/04/13).

160 Patrick Macrory, NAFTA Chapter 19: A Successful Experiment in NAFTA Dispute Resolution," N° 168 The Border Papers (C.D. Howe, September 2002), at p.1 (n.1).

161 *Id*. at p.16.

162 Article 2004 of NAFTA. Chapter 20 does not apply to matters covered in Chapter 19 (anti-dumping and countervailing duty disputes), nor to

163 Article 2006 of NAFTA.

164 Article 2007 of NAFTA.

165 Articles 2008-2017 of NAFTA.

166 Article 2013-2015 of NAFTA.

167 *See* NAFTA Secretariat, Overview of the Dispute Settlement Provisions, http://www.nafta-sec-alena.org/en/view.aspx?x=226 (Last visited: 17/04/13).

168 *See* Article 2021 of NAFTA (Private Rights).

169 Joost Pauwelyn, "The U.S.-Canada Softwood Lumber Dispute Reaches a Climax" ASIL Insights, 30 November 2005, http://www.asil.org/insights051129.cfm (Last visited: 17/04/13).

170 Report of the Panel, *United States – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products (US – Tuna II),* (WT/DS381/R), (circulated 15 September 2011).

171 Dan Flynn, "'Dolphin Safe' Tuna Decision Muddled," Food Safety News, (16 November 2011), http://www.foodsafetynews.com/2011/11/dolphin-safe-tuna-decision-left-muddled/ (Last visited: 17/04/13).

172 Office of the United States Trade Representative, Press Release, "United States Requests Dispute Settlement Panel in Tuna Dolphin NAFTA Choice of Forum Dispute," http://www.ustr.gov/about-us/press-office/press-releases/2010/september/united-states-requests-dispute-settlement-panel (Last visited: 17/04/13).

173 Pursuant to Article 2005(4) it would appear that Mexico was obligated to bring this dispute to NAFTA. Article 2005(4) provides that:

> 4. In any dispute referred to in paragraph 1 that arises under Section B of Chapter Seven (Sanitary and Phytosanitary Measures) or Chapter Nine (Standards-Related Measures):
>
> (a) concerning a measure adopted or maintained by a Party to protect its human, animal or plant life or health, or to protect its environment, and
>
> (b) that raises factual issues concerning the environment, health, safety or conservation, including directly related scientific matters,

where the responding Party requests in writing that the matter be considered under this Agreement, the complaining Party may, in respect of that matter, thereafter have recourse to dispute settlement procedures solely under this Agreement.

174 *See* "The Tuna/Dolphin NAFTA Panel Request," International Economic Law and Policy Blog, http://worldtradelaw.typepad.com/ielpblog/2010/09/the-tunadolphin-nafta-panel.html (28 September 2010) (Last visited: 17/04/13).

175 Appellate Body Report, *Mexico - Tax Measures on Soft Drinks and Other Beverage (Mexico - Soft Drinks),* (WT/DS308/AB/R), 55.

176 Economic Partnership Agreement between the CARIFORUM States, of the one part, and the European Community and its Member States, of the other part, 30.10.2008 Official Journal of the European Union L 289/I/3.

177 *See* Article 24(4) of the CARIFORUM EPA.

178 Article 222(2) of the CARIFORUM EPA.

179 At the time of writing (March 2012), MERCOSUR's full members were Argentina, Brazil, Paraguay and Uruguay. Paraguay was blocking Venezuela's entry into MERCOSUR. For information on MERCOSUR dispute settlement, *see* Gabriella Giovanna Lucarelli de Salvio and Jeanine Gama Sá Cabral, "Considerations on the MERCOSUR Dispute Settlement Mechanism and the Impact of its Decisions in the WTO Dispute Resolution System," Inter-American Development Bank (2007), http://www.iadb.org/intal/aplicaciones/uploads/ponencias/i_foro_ELSNIT_2007_10_02_Jeanine_Gama_Sa_Cabral.PDF (Last visited: 17/04/13).

180 Article 31 of the Protocol of Olivos for the Settlement of Disputes in MERCOSUR ("Protocol of Olivos"). An English translation is available in 42 ILM 2 (2003).

181 Articles 39 and 40.1 of the Protocol of Olivos for the Settlement of Disputes in MERCOSUR.

182 *Argentina – Definitive Anti-Dumping Duties on Poultry from Brazil,* (WT/DS241/R), 19 May 2003 and *Brazil – Measures Affecting Imports of Retreaded Tyres,* (WT/DS332/AB/R), 17 December 2007.

183 *Argentina – Definitive Anti-Dumping Duties on Poultry from Brazil (Argentina – Poultry),* (WT/DS241/R), 19 May 2003.

184 *Argentina – Definitive Anti-Dumping Duties on Poultry from Brazil,* (WT/DS241/R), 7.17.

185 *Id.* at 7.34.

186 *Id.* at 7.34-7.35 (*citing* Appellate Body Report, *United States – Continued Dumping and Subsidy Offset Act of 2000 ("US –Offset Act (Byrd Amendment)")*, (WT/DS217/AB/R), (WT/DS234/AB/R), adopted 27 January 2003, at 298.

187 *Argentina – Definitive Anti-Dumping Duties on Poultry from Brazil,* (WT/DS241/R), 7.37-7.39 (quoting 7.38).

188 *Id.* at 7.38.

189 *Id.* at 7.39.

190 *Id.* at 7.41.

191 *Brazil – Measures Affecting Imports of Retreaded Tyres,* (WT/DS332/AB/R), 17 December 2007.

192 *Id.* at 225-227.

193 *Id.* at 228.

194 *Id.* at 228-233.

195 *Id.* at 246-247.

196 *Argentina – Definitive Anti-Dumping Duties on Poultry from Brazil,* (WT/DS241/R), at 7.38 (quoting the Panel report and not the Protocol).

197 Even famous European Court of Justice cases, such as *Nakajima* which dates back to the "GATT days," do not stand for direct effect of the GATT or the GATT Anti-dumping Code, but instead for the principle that a foreign firm could seek annulment of an EC Regulation (2423/88) enacted to fulfil an international obligation based on the theory that the foreign firm had predicated its challenge to the regulation not on the direct effect of the GATT Anti-dumping Agreement, but on Article 184 EEC (based on the inapplicability or illegality of the regulation). *See Case C-69/89, Nakajima All Precision Co. Ltd v. Council,* [1991] ECR 1-2069.

198 Investigation Rules of Foreign Trade Barrier, BizChina (18/4/2006) http://www.chinadaily.com.cn/bizchina/2006-04/18/content_570345.htm (Last visited: 17/04/13).

199 *See generally* Bronkers, citing the EU, US, and China as jurisdictions with private complaint procedures. Marco Bronkers, "Private Appeals to WTO Law: An Update," 42(2) *Journal of World Trade* 245-260 (2008). Bronkers notes that the Chinese modelled their regulation on the EC Trade Barriers Regulation. He also notes that as of 2008, China appears to have initiated only one investigation. Bronkers at p. 255.

200 Section 301 is codified as Public Law 19 U.S.C. § 2411 as amended. Commonly associated with Section 301 are "Special 301" and "Super 301," two provisions created in 1988. Special 301 is in effect. It requires the USTR to produce an annual report identifying countries that do not adequately protect intellectual property rights. The intent is to focus on countries with the most serious violations and to target the violators for negotiations. The 2011 report is available at: Office of the United States Trade Representative, 2011 Special 301 Report, http://www.ustr.gov/about-us/press-office/reports-and-publications/2011/2011-special-301-report (Last visited: 17/04/13). Super 301 is not now in effect. It required the United States Trade Representative (USTR) to compile a list of priority countries that violate their international trade obligations. These countries were targeted for negotiations to liberalize their trade practices.

201 § 2411(a) provides that action is mandatory:

(1) If the United States Trade Representative determines under section 2414(a)(1) of this title that–

(A) the rights of the United States under any trade agreement are being denied; or

(B) an act, policy, or practice of a foreign country–

(i) violates, or is inconsistent with, the provisions of, or otherwise denies benefits to the United States under, any trade agreement, or

(ii) is unjustifiable and burdens or restricts United States commerce;

202 § 2411(b) provides that action is discretionary:

If the Trade Representative determines under section 2414(a)(1) of this title that -

(1) an act, policy, or practice of a foreign country is unreasonable or discriminatory and burdens or restricts United States commerce, and

(2) action by the United States is appropriate, the Trade Representative shall take all appropriate and feasible action authorized under subsection (c) of this section, subject to the specific direction, if any, of the President regarding any such action, and all other appropriate and feasible action within the power of the President that the President may direct the Trade Representative to take under this subsection, to obtain the elimination of that act, policy, or practice. Actions may be taken that are within the power of the President with respect to trade in any goods or services, or with respect to any other area of pertinent relations with the foreign country.

203 The phrase "coercive diplomacy" is used by Richard Sherman and Johan Eliasson, "Trade Disputes and Non-state Actors: New Institutional Arrangements and the Privatisation of Commercial Diplomacy," p.474 (Journal compilation, Blackwell Publishing Ltd. 2006).

204 "U.S. Firm Readies Section 301 Petition To Collect ICSID Award From Argentina," Inside US Trade, 12 August 2011, reprinted at http://www.embassyofargentina.us/v2011/files/articulosinsideustrade.pdf (Last visited: 17/04/13). The ICSID claim was *Azurix Corp. v. Argentine Republic* (Case N° ARB/01/12). In 2009, the USTR accepted a petition from Azurix aimed at revoking Argentina's GSP benefits. Id.

205 Simon Lester, International Economic Law and Policy Blog, Section 301 and Investor-State, 20 July 2011, http://worldtradelaw.typepad.com/ielpblog/2011/07/section-301-and-investor-state.html (Last visited: 17/04/13).

206 *Id*.

207 Section 337 is codified as Public Law 19 U.S.C. § 1337 as amended.

208 *Tianrui Group Co. Ltd. v. ITC* (2010-1395) involves an appeal from the ITC's finding of a violation of Section 337 in *Certain Cast Steel Railway Wheels, Certain Processes For Manufacturing or Relating to Same and Certain Products Containing Same* (Inv. No. 337-TA-655). See Eric Schweibenz and Lisa Mandrusiak, "Federal Circuit Affirms in Tianrui Appeal (2010-1935)," ITC 337 Law Blog (7 November 2011), http://www.itcblog.com/20111107/federal-circuit-affirms-in-tianrui-appeal-2010-1395/; and Richard G. Gervase and Ping Hu (Mintz Levin) "United States: Federal Circuit Affirms ITC's Extraterritorial Authority in Trade Secrets Cases" (26 October 2011) http://www.mondaq.com/unitedstates/x/150430/Trade+Secrets/Federal+Circuit+Affirms+ITCs+Extraterritorial+Authority+In+Trade+Secret+Cases (Last visited: 17/04/13).

209 *See* Inv. 337-TA-2891, *Re: Certain Mobile Devices, Related Software and Firmware, Components Thereof and Products Containing the Same* (Complaint filed 28 March 2012). The Complaint is available at: https://www.docketalarm.com/cases/United_States_International_Trade_Commission/337-2891/Certain_Cameras_and_Mobile_Devices_Related_Software_and_Firmware_and_Components_Thereof_and_Prods_Containing_the_Same%3B_DN_2891/docs/476102/1.pdf?download=true (ongoing matter) (Last visited: 17/04/13).The International Trade Commission (ITC)TC has now issued a Notice of Receipt of Complaint; Solicitation of Comments Relating to the Public Interest, Docket N° 2891, 29 March 2012.

210 US Department of Commerce, Import Administration, Anti-dumping (AD)/Countervailing Duty (CVD) Petition Counseling and Analysis Unit, Overview of Trade Remedies, http://ia.ita.doc.gov/pcp/pcp-overview.html (Last visited: 17/04/13).

211 *Id.*

212 *Id.*

213 *Id.*

214 *Id.*

215 *See* H.R. 4105, http://www.gpo.gov/fdsys/pkg/BILLS-112hr4105ih/pdf/BILLS-112hr4105ih.pdf, which is now Public Law No: 112-99 ("To apply the countervailing duty provisions of the Tariff Act of 1930 to nonmarket economy countries, and for other purposes"), http://www.gpo.gov/fdsys/pkg/PLAW-112publ99/pdf/PLAW-112publ99.pdf (Last visited: 17/04/13).

216 *GPX International Tire Corporation and Hebei Starbright Tire Co., Ltd et al v. United States et al.,* Slip Opinion Numbers 2011–1107, 2011–1108, 2011–1109 (US Court of Appeals, Federal Circuit, 19 December 2011).

217 The US Court of International Trade had struck down the application of countervailing duties applied in conjunction with anti-dumping duties due to the likelihood of "double counting."

218 *United States – Definitive Anti-Dumping and Countervailing Duties on Certain Products from China*, WT/DS379/AB/R (25 March 2011), at 604-606.

219 *Id.* at 607-610.

220 The Foreign Corrupt Practices Act of 1977 as amended (FCPA) (15 U.S.C. §§ 78dd-1, *et seq.*).

221 See generally, United States Department of Justice, "Foreign Corrupt Practices Act: Antibribery Provisions" ("The Lay Person's Guide"), http://www.justice.gov/criminal/fraud/fcpa/docs/lay-persons-guide.pdf (Last visited: 17/04/13).

222 *See* Press Release, US Department of Justice, "Siemens AG and Three Subsidiaries Plead Guilty to Foreign Corrupt Practices Act Violations and Agree to Pay $450 Million in Combined Criminal Fines: Coordinated Enforcement Actions by DOJ, SEC and German Authorities Result in Penalties of $1.6 Billion"(15 December 2008), http://www.justice.gov/opa/pr/2008/December/08-crm-1105.html (Last visited: 17/04/13).

223 *See* Press Release, "US Department of Justice, BAE Systems PLC Pleads Guilty and Ordered to Pay $400 Million Criminal Fine" (1 March 2010) http://www.justice.gov/opa/pr/2010/March/10-crm-209.html (Last visited: 17/04/13).

224 Council Regulation (EC) No 3286/94 of 22 December 1994 laying down Community procedures in the field of the common commercial policy in order to ensure the exercise of the Community's rights under international trade rules, in particular those established under the auspices of the World Trade Organization, (OJ L 349, 31.12.1994, p. 71).

225 European Commission, Trade, "What is the Purpose of a TBR Complaint?" http://ec.europa.eu/trade/tackling-unfair-trade/trade-barriers/complaints/ (Last visited: 17/04/13).

226 Crowell & Moring, Final Report, Interim Evaluation of the European Union's Trade Barrier Regulation (TBR) (June 2005).

227 European Commission, Trade, Trade Barriers, Investigations, http://ec.europa.eu/trade/tackling-unfair-trade/trade-barriers/investigations/ (Last visited: 17/04/13).

228 *Id*.

229 Council Regulation (EC) No 1225/2009 of 30 November 2009 "On protection against dumped imports from countries not members of the European Community," L 343/51 Official Journal of the European Union (22.12.2009).

230 European Commission, Trade, Anti-dumping Complaints, http://ec.europa.eu/trade/tackling-unfair-trade/trade-defence/anti-dumping/complaints/ (emphasis omitted) (Last visited: 17/04/13).

231 *Id*.

232 Council Regulation (EC) No 597/2009 of 11 June 2009 "On protection against subsidised imports from countries not members of the European Community," L/188/93 Official Journal of the European Union (18.7.2009).

233 European Commission, Trade, Anti-Subsidy Complaints, http://ec.europa.eu/trade/tackling-unfair-trade/trade-defence/anti-subsidy/complaints/ (Last visited: 17/04/13).

234 *See* Articles 15 and 31 of Council Regulation (EC) No 597/2009.

235 *Id*.

236 Consolidated Version of the Treaty on the Functioning of the European Union, Official Journal of the European Union, C 83/47 (30 March 2010). Formerly this provision appeared as Article 230 of the TEC.

237 Action brought on 11 January 2010, *Inuit Tapiriit Kanatamie.a. v. Parliament and Council*, Case T-18/10 requesting the annulment of Regulation (EC) No 1007/2009. The decision is reported at http://eur-lex.europa.eu/Notice.do?val=607414:cs&lang=en&list=622312:cs,607414:cs,574783:cs,560632:cs,554238:cs,554694:cs,518050:cs,516537:cs,515029:cs,511487:cs,&pos=2&page=1&nbl=11&pgs=10&hwords=&checktexte=checkbox&visu= (Last visited: 17/04/13). The General Court avoiding reaching the merits by finding in paragraphs 75 and 79 that most of the Applicants were not directly concerned by the Regulation:

> *75. Consequently, the contested regulation directly affects only the legal situation of those of the applicants who are active in the placing on the market of the European Union of seal products. That regulation does not in any way prohibit seal hunting, which indeed takes place outside the European Union market, or the use or consumption of seal products which are not marketed. Consequently, it should be observed that, while it cannot be precluded that the general prohibition of placing on the market provided for by the contested regulation may have consequences for the business activities of persons intervening upstream or downstream of that placing on the market, the fact remains that such consequences cannot be regarded as resulting directly from that regulation (see, to that effect, order of the General Court in Case T 40/04 Bonino and Others v Parliament and Council [2005] ECR II 2685, paragraph 56). Furthermore, as regards the possible economic consequences of that prohibition, it must be borne in mind that, according the case-law, those consequences do not affect the applicants' legal situation, but only their factual situation (see, to that effect, Joined Cases T-172/98 and T-175/98 to T-177/98 Salamander and Others v Parliament and Council [2000] ECR II-2487, paragraph 62).*
>
> *79. Consequently, it must be held that the contested regulation affects only the legal situation of the applicants who are active in the placing on the market of the European Union of seal products and affected by the general prohibition of the placing on the market of those products. By contrast, that that is not the case for the applicants whose business activity is not the placing on the market of those products and/or those who are covered by the exception provided for by the contested regulation since, in principle, the placing on the market of the European Union of seal products which result from hunts traditionally conducted by Inuit and other indigenous communities and contribute to their subsistence continues to be permitted.*

In paragraph 86, the court found that only Ta Ma Su Seal Products, Nu Tan Furs, GC Rieber Skinn, and the Canadian Seal Marketing Group were directly concerned by the regulation. However, in paragraphs 92 and 93, the court found that they were not "individually concerned by the contested regulation" and ruled the action inadmissible with respect to them as well in paragraph 94.

238 *European Communities – Measures Prohibiting the Importation and Marketing of Seal Products*, DS 400 and DS401.

239 For a brief commentary on this dispute see Simon Lester, "The WTO Seal Products Dispute: A Preview of the Key Legal Issues," 14(2) ASIL Insight, 13 January 2010.

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241 *See* European Commission, Brussels, 21.3.2012, COM(2012) 124 final 2012/0060 (COD), Proposal for a Regulation of The European Parliament and of The Council on the access of third-country goods and services to the Union's internal market in public procurement and procedures supporting negotiations on access of Union goods and services to the public procurement markets of third countries. See also Hogan Lovells, EU Procurement, "The EU's international procurement initiative: opening foreign markets or acting as a new EU trade barrier?" 26 March 2012, http://ehoganlovells.com/cv/265ce6ca4b06822b7a7d1c28e8d631b1d2309fd3 (providing a summary and a link to the Proposal) (Last visited: 17/04/13).

242 *See however* the discussion of *Case C-69/89, Nakajima All Precision Co. Ltd v. Council*, [1991] ECR 1-2069, in a footnote accompanying the introduction to this section.

243 Article 21.3(c) of the DSU.

244 Article 22.6 and 22.7 of the DSU.

245 Article 25 of the DSU.

246 The EC and the US conducted an arbitration under Article 25 in the *Irish Music* dispute. *See* Award of the Arbitrators, *United States – Section 110(5) of the US Copyright Act*, Recourse to Arbitration Under Article 25 of the DSU, WT/DS160/ARB25/1 (9 November 2001).

247 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the New York Convention), http://www.uncitral.org/uncitral/uncitral_texts/arbitration/NYConvention.html (Last visited: 17/04/13).

248 *See* Article 2 of the New York Convention.

249 If an administering institution is not identified, the arbitration will usually proceed as an ad hoc arbitration. The parties save the cost of paying an institution, such as the International Chamber of Commerce, to administer the arbitration, and they are not bound by the rules of the administering institution. However, the parties must then bear more responsibility for the day-to-day management of the arbitration, particularly until an arbitral tribunal is seated.

250 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the New York Convention), http://www.uncitral.org/uncitral/uncitral_texts/arbitration/NYConvention.html (Last visited: 17/04/13). The New York Convention was introduced in more detail in Section II.A(1).

251 *See* Article 17 of the UNCITRAL Model Law on Commercial Arbitration 1985 with Amendments as Adopted in 2006 (Vienna 2008), www.uncitral.org/pdf/english/texts/arbitration/ml-arb/07-86998_Ebook.pdf (Last visited: 17/04/13). *See also* the "Emergency Arbitrator" provisions in Article 29 and Appendix V of the 2012 ICC Rules of International Arbitration permitting a party who needs urgent interim or conservatory measures to apply for such measures prior to the constitution of an arbitral tribunal (potentially applicable if the arbitration agreement is dated on or after 1 January 2012).

252 *Canada – Administration of the Foreign Investment Review Act (FIRA),* Report of the Panel adopted 7 February 1984 (L/5504 – BISD 30S/140).

253 The Washington Convention, which entered in force in 1966, is more formally known as the Convention on the Settlement of Investment Disputes between States and Nationals of Other States, http://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=ShowHome&pageName=AboutICSID_Home (Last visited: 17/04/13).

254 As of March 2012, 157 States had signed the Washington Convention, and 147 States had "deposited their instruments of ratification, acceptance or approval." *See* ICSID, Member States, http://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=ShowHome&pageName=MemberStates_Home (Last visited: 17/04/13).

255 *See* ICSID, ICSID Convention Regulations and Rules, ICSID/15, April 2006, http://icsid.worldbank.org/ICSID/ICSID/RulesMain.jsp (Last visited: 17/04/13). Article 25.1 also provides that "When the parties have given their consent, no party may withdraw its consent unilaterally."

256 To be considered an investment, the action must satisfy both the requirements of Article 25 and the terms of any applicable international investment agreement – often a BIT.

257 *Salini Costruttori SpA and Itals trade SpA v Kingdom of Morocco* (Jurisdiction), ICSID Case No.ARB/00/4, Decision on Jurisdiction (23 July 23, 2001), 6 ICSID Reports 398, at 52-57. Paragraph 52 of *Salini* is particularly important as the Tribunal suggests criteria based on the writing of academics and adds a criteria from the preamble of the Convention. The Tribunal considers these criteria in subsequent paragraphs of the decision (52-57) and concludes in paragraph 58 that the matter at issue is an investment.

258 For a critical summary of applicable case law on what constitutes an investment, see Julian Davis Mortenson, "The Meaning of 'Investment': ICSID's *Travaux* and the Domain of International Investment Law," 51(1) Harvard International Law Journal 257 (2010), arguing for a more expansive definition of investment,"Given the drafting history of the ICSID Convention and the practical advantages of restraint, tribunals should exercise near-total deference to state definitions of 'investment.' So long as an activity or asset is colourably economic in nature, it should constitute an investment under Article 25," (*quoting* p.315). Under Mortenson's analysis, a single shipment of toys in transit from one country for sale into another country would constitute an investment. Id. at 316.See also Mahnaz Malik, International Institute for Sustainable Development, Recent Developments in the Definition of Investment in International Investment Agreements, Second Annual Forum of Developing Country Investment Negotiators, 3-4 November 2008, Marrakech, Morocco, www.iisd.org/pdf/2008/dci_recent_dev.pdf (Last visited: 17/04/13).

259 *Joy Mining v. Arab Republic of Egypt* (Jurisdiction), ICSID Case No. ARB/03/11 (6 August 2004), 13 ICSID Reports 121, at 58. *See* the criticism of *Joy Mining* in Julian Davis Mortenson, "The Meaning of 'Investment': ICSID's *Travaux* and the Domain of International Investment Law," 51(1) Harvard International Law Journal 257, 316 and n.282 (2010), *quoting Joy Mining* and suggesting a more expansive interpretation that would bring some trade transactions within the scope of ICSID jurisdiction.

260 *Salini Costruttori SpA and Itals trade SpA v Kingdom of Morocco* (Jurisdiction), ICSID Case No.ARB/00/4, Decision on Jurisdiction (23 July 23, 2001), 6 ICSID Reports 398, at 52.

261 Ibrahim F. I. Shihata and Antonio R. Parra: "The Experience of the International Centre for Settlement of Investment Disputes," 14 *ICSID Review-Foreign Investment Law Journal* 299, 308 (1985). *See also* Omar E. García-Bolívar, "Protected Investments And Protected Investors: The Outer Limits of ICSID's Reach," Vol. II, N° 1, *Trade Law and Development* 145, 148 (2010).

262 Ibrahim F. I. Shihata and Antonio R. Parra: "The Experience of the International Centre for Settlement of Investment Disputes," 14 *ICSID Review-Foreign Investment Law Journal* 299, 308 n.27 (1985). ICSID rule 25 requires that both the investor's country of nationality and the host country be ICSID members. In Additional Facility cases only one of the two countries must be a member of ICSID. In Additional Facility cases, it is not necessary that the dispute arise "directly" out of an investment (Additional Facility Rules Article 2(b)). These cases are outside the Washington Convention. Recognition and enforcement of awards is subject to national law (the law of the forum).

263 Article 52 allows either party to request the Secretary-General to annul an award on one or more of the following grounds: "(a) that the Tribunal was not properly constituted; (b) that the Tribunal has manifestly exceeded its powers; (c) that there was corruption on the part of a member of the Tribunal; (d) that there has been a serious departure from a

fundamental rule of procedure; or (e) that the award has failed to state the reasons on which it is based."

264 *See generally* Professor Christoph Schreuer, "The World Bank/ICSID Dispute Settlement Procedures," www.oecd.org/dataoecd/47/25/2758044.pdf (Last visited: 17/04/13)., which provides a brief introduction to ICSID arbitration.

265 *See* ICSID, "ICSID Cases," and references cited therein (including ICSID Convention Article 48(5); ICSID Administrative and Financial Regulations, Article 22; ICSID Arbitration Rules Article 48), http://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=ShowHome&pageName=Cases_Home (Last visited: 17/04/13).

266 *Philip Morris Brand Sàrl (Switzerland), Philip Morris Products S.A. (Switzerland) and Abal Hermanos S.A. (Uruguay) v. Oriental Republic of Uruguay* (ICSID Case No.ARB/10/7). Pending: The Tribunal was constituted on 15 March 2011. The respondent filed a memorial on jurisdiction on 24 September 2011, and the claimants filed a counter-memorial on jurisdiction on 24 January 2012.) Details on the status of the case are available at: http://icsid.worldbank.org/ICSID/FrontServlet?requestType=GenCaseDtlsRH&actionVal=ListPending (Last visited: 17/04/13).

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281 *Id.* at 7-8.

282 *Australia - Certain Measures Concerning Trademarks and Other Plain Packaging Requirements Applicable to Tobacco Products and Packaging*, DS434, (in consultations) 13 March 2012. See generally Tania Voon and Andrew Mitchell, "Implications of WTO Law for Plain Packaging of Tobacco Products" (forthcoming as a chapter in A. Mitchell, T. Voon, and J. Liberman (eds), *Public Health and Plain Packaging of Cigarettes: Legal Issues* (Edward Elgar, 2012) (available at: http://ssrn.com/abstract=1874593 (Last visited: 17/04/13)).

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284 *Id.*

285 The WTO Agreement is largely among state parties. Customs unions and customs territories with authority over trade and customs matters are also members.

286 Exceptions exist – for example WIPO domain-name arbitrations. Likewise, labour and employer associations have some degree of standing in ILO matters.

287 Such regimes are largely absent in developing countries.

288 Appellate Body Report, *Mexico - Tax Measures on Soft Drinks and Other Beverage (Mexico - Soft Drinks)*, WT/DS308/AB/R, 54, n.106 (24 March 2006).

289 *European Communities - Measures Prohibiting the Importation and Marketing of Seal Products*, DS 400 and DS401 (Panel Established 25 March 2011).

290 Of course, investment and labour lie at the periphery of the WTO. However, intellectual property rules are one of the three core areas of the WTO Agreement.

291 On so-called multi-fora disputes, see Michael E. Schneider, "Multi-Fora Disputes," 6(2) Arbitration International 101 (1990).

292 It would be interesting in another work on forum selection to isolate elements that were heard in various fora and compare results.

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