Dispute Settlement at the WTO: The Developing Country Experience

ICTSD International Trade Law Programme

The World Trade Organization (WTO) dispute settlement mechanism can be critical for developing countries seeking to defend their trade rights and development interests. The system has been essential for challenging harmful subsidy programs, eliminating unfair anti-dumping duties and ensuring that least developed countries (LDC) can pursue strategies to diversify trade in order to create new employment and income opportunities.

But countries can only take advantage of the WTO dispute settlement mechanism if they can effectively pursue their rights in this complex legal regime. Their ability to do so largely depends on having staff with adequate legal, economic and diplomatic experience and a large network of external experts and private sector representatives. Research by ICTSD has shown that a lack of such legal capacity has impeded developing countries’ ability to participate fully in the system.

In order to further identify best practices, ICTSD developed a set of country studies that examine the strategies selected by nine WTO members from South America, Asia and Africa to meet the challenges of WTO dispute settlement, strengthen their legal capacity and manage trade litigation at the national level. The studies address developing countries of varying size and wealth, including very heavy WTO users such as Brazil and China, other frequent visitors including Argentina, India and Thailand, and less experienced members such as Egypt, Kenya, South Africa and Bangladesh - the only LDC to date to initiate a WTO dispute.

In 2010 the studies were published in the Cambridge University Press volume “Dispute Settlement at the WTO - The Developing Country Experience”, edited by Gregory Shaffer and Ricardo Meléndez-Ortiz. This information note presents the main findings and recommendations of the nine studies. For further information please visit: ictsd.org/dsu.

Although industries are usually the most affected by trade barriers, the decision to pursue a case at the WTO lies with governments. Therefore, the successful use of the WTO dispute settlement necessarily requires strategic coordination and effective cooperation among different governmental agencies as well as between the public and private sectors. As of today, many developing countries are among the members that face the most severe difficulties in meeting these coordination challenges primarily due to their lack of experience and also their failure to prioritise litigation coordination. On the other hand, half a dozen developing countries that are more frequently confronted with dispute settlement – be it as complainant or defendant – have been able to develop solid internal and external structures to manage dispute settlement.

**Internal front: Inter-agency coordination**

Coordination between different ministries or departments is crucial for the proper functioning of any government, particularly in the formulation, adoption, implementation and evaluation of policy. This is even more indispensable in the context of international trade policies and dispute resolution, the competence of which is not restricted to one agency. As the studies show, a lack of inter-ministerial coordination directly impedes a developing country’s ability to respond effectively to a complaint. Studies on the experiences of China, Kenya and South Africa further show that many countries face similar challenges in this regard.

Indeed, China still lacks an institution with a specific mandate to coordinate its various ministries. The Ministry of Commerce (MOFCOM) is assigned to assume responsibility for WTO affairs including dispute settlement. Nonetheless, other ministries can prove important for the specific subject matter of a case. For instance, the Vice Premier in charge of MOFCOM can intervene to facilitate inter-ministerial coordination when the ministries in question fall under his responsibility. If not, however, coordination can prove a “tortuous” process, as the study reports. This is particularly critical for cases that are of less political weight and, thus, assume less support and attention.

Kenya witnesses a similar problem as it lacks a department within the government specifically tasked with handling trade negotiations and dispute resolution. Kenya’s coordinating body - the National Committee on WTO - instead operates on a non-regular basis and is not recognised as a formal institution. Thus, it cannot properly perform inter-agency cooperation as it has no authority to delegate other agencies.

The case of South Africa further provides a good example of the way a lack of coordination can impede a government’s ability to deal with the dispute settlement process in practice. In South Africa, the Department of Trade and Industry (DTI) handles all trade matters within its different divisions and the permanent mission in Geneva is staffed by DTI employees. In theory, the mission is supposed to inform the DTI’s WTO desk in the International Trade and Economic Development Division (ITEDD) of any official request from a WTO member for consultations. Yet, in all but one dispute such procedures were not followed. Thus, the ITEDD, which is responsible for all political aspects of international trade and for negotiations, has generally not been involved in many dispute instances. Instead, the International Trade Administration Commission (ITAC) assumed ITEDD’s responsibility for most trade disputes even though ITAC jurisdiction formally ends at the investigation level. The study reports that, here, a lack of clear procedural guidelines for dealing with trade disputes has resulted in a lack of coordination which severely affected South Africa’s ability to respond efficiently to consultation requests and other communication. In the one case in which these procedures were followed, however, ITEDD played a crucial role as a coordinator.

It should also be noted that inadequate coordination between various agencies might result from the fact that a coordinating body is understaffed or lacks specific knowledge and expertise. For instance, by 2009, Kenya’s mission in Geneva was overburdened having only three trade officers among whom no one held a law degree or received specific training in WTO dispute settlement resolution. The study on South Africa illustrates how the loss of knowledgeable people impacts a country’s ability to properly engage in dispute
settlement: Key officials of ITEDD and ITAC resigned their positions in the government after receiving WTO specialised training, which resulted in a loss of institutional knowledge and expertise. This issue of “brain-drain” is one of the main problems that small economies tend to struggle with. Deficiencies in human resources (though not expertise) was also identified as a main problem in the study on Thailand. The Permanent Mission of Thailand to the WTO remains understaffed when it comes to dispute settlement affairs. Since the Ministry of Foreign Affairs struggles to support the secondment of more than one international lawyer at a time to work in Geneva, the mission has a shortage of expertise in international law and litigation.

Establishing a dedicated international trade law unit may thus be desirable in order to improve coordination among governmental agencies. Both Argentina and Thailand provide interesting examples of the benefit that such unit can bring to a government’s structure.

Argentina’s experiences are best analysed in relation to its involvement in the Textile\(^2\) and Footwear\(^3\) cases. These cases helped the government understand the importance of building consensus among different ministries as well as the need for an institutionalised structure that handles WTO dispute settlement proceedings. Indeed, back in 1997 when the US requested the establishment of a panel in the Textile case, the Argentine government was not prepared to handle disputes under the new WTO legal regime. Its ministries and government agencies lacked the configuration necessary to delegate responsibilities and to handle an international trade dispute at the WTO. Originally, the Directorate of Multilateral Economic Affairs (DIREM) under the Ministry of Foreign Affairs, which usually heads general WTO matters such as negotiations and committee work, was put in charge of the litigation process. However, as ICTSD’s study shows, the lessons learned from the two mentioned cases provided an incentive for Argentina to form a dispute settlement division under the Ministry of Foreign Affairs and International Trade.

In 2000, the Division of International Economic Dispute Settlement (DISCO) was created with staff consisting of diplomats, economists and trade lawyers. Its main functions are to advice on institutional and legal WTO issues, to lead the Argentinean administration of WTO disputes and to compile information related to dispute settlement among WTO members. DISCO soon created a solid base of expertise and the defensive nature of Argentina’s initial participation in international dispute settlement turned into an offensive exercise marked by three WTO complaints: Chile-Price Band, US-Oil Country Tubular Goods, and EC-Biotech.\(^4\) In particular, during the Price Band case DISCO coordinated with other agencies, including the Secretary of Agriculture and Undersecretary of Trade, in order to put forward and defend Argentina’s position before the WTO.

Thailand is another positive example of a governmental structure that allows for inter-ministerial coordination and international collaboration among different complainants. As a general rule, in Thailand, all WTO matters fall under the jurisdiction of the Ministry of Commerce based in Bangkok. The Department of Trade Negotiations, a body under the Ministry, serves as the focal point for inter-agency coordination and ensures that the Thai mission receives appropriate inputs and instructions in a timely manner.

Moreover, since the EC-Sugar case,\(^5\) the Thai mission in Geneva performs most functions requiring coordination with the co-complainants during actual litigation proceedings. Officials working at the mission come from several government agencies. They are called upon and transferred to assist the WTO mission as necessary, often on a rather ad hoc basis, when cases or other processes emerge. Although some inconveniences can result from such a system (in particular the arrangements before and after the transfer can take time) this approach has proven very effective. It has served the purpose of mobilising officials to work with the mission on a needs-basis so that the Ministry of Commerce need not recruit new officials but can rely on specialised officials from other

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5. European Communities - Export Subsidies on Sugar, WT/DS283.
government agencies. Moreover, it provides the Chief of Mission with full authority to manage the litigation process and involved staff, thus easing the coordination process among various agencies.

Another very positive experience is that of Brazil. In order to successfully use the WTO dispute settlement system, Brazil organised its government in a ‘three pillar’ structure. This structure consists of a specialised WTO dispute settlement division, coordination between this unit and Brazil’s WTO mission in Geneva and coordination between both of these entities and Brazil’s private sector.

Brazil’s establishment of the Chamber of Foreign Trade (CAMEX) - an inter-ministerial body to formulate, coordinate and implement foreign trade policy - marked this reorganisation. Three ministries have the responsibility for implementing Brazil’s trade policy under guidelines set by the Chamber. Externally, the Ministry of Foreign Affairs plays a central role in trade negotiations and dispute settlement by coordinating with the Ministry of Development, Industry and Foreign Commerce and the Ministry of Agriculture, both of which are responsible for implementing Brazil’s trade policy on import protection and export promotion.

In addition, Brazil established a specialized general dispute settlement unit with WTO legal expertise within the Ministry of Foreign Affairs. As a second pillar, it works with other units and other ministries in order to gather data and evaluate substantive legal and factual issues in the context of trade disputes. Members of the unit are based in both Brazil and Geneva to ensure smooth coordination and cooperation as well as consistent strategies and policies between the capital and the WTO mission.

Finally, CAMEX also includes a formalized body for coordination with the private sector - the Private Sector Consultative Council (CONEX). This entity provides legal and technical assistance to private entities in trade negotiations and dispute related issues. It also gives data and factual support to counsel in dispute settlement procedures. This pillar helps to minimise disagreements between the government and the company or trade associations that are funding outside counsel.

**External front: Public-private partnerships**

Collaboration between governments and industry is especially crucial where a clear identification of common interests prompts the two to act in a concerted manner. Private sectors can substantially contribute to the WTO dispute settlement process. Often, domestic industries actually petition government authorities to raise market access concerns. They may also assist in the preparation of formal legal briefs and provide economic evidence to support cases at the WTO. In parallel, the private sector may also help to induce compliance or manage conflicts in a non-adjudicative manner by building alliances abroad or working with the international press to increase public awareness. Thus, strengthening a country’s public-private partnerships has been an essential enabling element for many successful users of dispute settlement.

Given its experience in the Sugar case, Thailand stresses that the involvement of the private sector in any dispute is a good indicator of serious trade damage in real economic terms. While an assessment of the impact of trade barriers and the viability of legal action to remedy them fall into the competence of the government, any claim at the WTO is more easily justified if the industries affected by those barriers have petitioned the government to initiate the WTO dispute. In the case of Thailand, the country’s institutional structure allows the private sector to take the initiative in practice by meeting with high-ranking officials at the Ministry of Commerce. The ministry may conversely hold consultations with representatives of industries affected by trade barriers. In the Sugar case, the Thai Sugar Association closely followed the development of the dispute and was encouraged to send a representative to Geneva to participate in formal discussions among the Thai government and the associations of other complainants.

In other cases, industry may play an even more crucial role by offering, for instance, financial contributions to engage a law firm to help argue the country’s position. For instance, in the Steel Bar case, Egyptian industry absorbed all legal costs and assisted the authorities in bringing and defending Egypt’s imposition of antidumping duties on steel bar from Turkey.

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6 Egypt - Definitive Anti-dumping Measures on Steel Rebar from Turkey, WT/DS211.
Obviously, strengthening public-private partnerships is not an easy task, particularly if industry stakeholders are not fully aware of their country’s WTO rights and obligations or the Dispute Settlement Understanding (DSU) rules that comprise a means of enforcing them. An example of this challenge is the “potato spat” between Egypt and the EU in which Egyptian producers and exporters of potatoes did not provide sufficient evidence to support the government’s position. The ICTSD study on Kenya reveals a similar occurrence. Agricultural producers, farmers’ unions, trade unions and professional organisations are conspicuously absent from international trade processes in Kenya, including dispute settlement. The authors of this study attribute this absence to the government negotiation structure, which does not provide for broad stakeholder participation and consultation. Moreover, in one conflict over EU trade barriers for cut-flowers, the Kenya Flower Council did not consider WTO dispute settlement a strategic option for a lack of “moral authority” since the EU was assisting the horticultural producers to comply with EU sanitary and phytosanitary (SPS) measures.

Public-private partnerships can also help increase public support by raising awareness. Brazil, for example, works with broad trade law networks that include academia, media and civil society. The importance of such networks was underlined in the Embraer case. In this case, Canadian industry criticized Brazil’s civil aircraft subsidy program which led the Canadian government to ban Brazilian agricultural products in turn. This drew a strong counter-reaction from the Brazilian agricultural sector that was followed by a general boycott of Canadian products all over Brazil. This spurred widespread media coverage and focused public attention on the WTO dispute settlement system. Extensive positive coverage also followed Brazil’s 2005 victories in EC-Sugar and US-Cotton. The media also examined the implications of these cases on Doha Round agricultural negotiations, highlighting the systemic importance of news in the development of a national knowledge network for trade law.

Recommendations for establishing institutional structures

The inter-ministerial coordination and public-private partnerships that aid dispute settlement are not automatic in light of different political and business cultures in developing countries. However, they both can be developed over time as the parties learn how they can mutually benefit from coordination. In this regard, Brazil should be considered an example of a country that successfully built an institutional structure to create and maintain strategic inter-agency coordination as well as public-private partnerships. However, not all countries will be able to replicate this model despite its great success. Many smaller and less active countries do not have the human and financial resources to establish such a comprehensive model. In particular, it might not always be viable for LDCs to allocate the amount of resources needed for such a mechanism as it likely that they will be not be involved in a large number of cases. Nonetheless, there is merit in examining Brazil’s experience more closely when developing national strategies.
Political dimension

Political will is another factor that has an enormous impact on any decision to initiate a dispute at the WTO. Often, developing and less experienced countries refrain from using the WTO dispute settlement mechanism or rather settle when facing a complaint by a developed country because they fear political repercussions.

Studies of smaller countries provide illustrative examples in this context. The decision not to pursue a dispute, as described in the study on South Africa, is often influenced by a fear of detrimental effects on the country’s political agenda. For instance, the negotiations between South Africa and the EU on the Trade, Development, and Cooperation Agreement (TDCA) reportedly prevented South Africa from initiating a dispute against the EU on the latter’s anti-dumping investigation process. In another case, the South African government was keen on reaching a free trade agreement with China which led it to refrain from triggering a safeguard investigation even though ITEDD and domestic producers recommended it. Egypt’s reluctance to use the DSU more proactively in the EC-Bed linen case also needs to be mentioned in this context. Furthermore, the study on Kenya shows that political considerations have played a pivotal role for the Kenyan government in determining whether or not to engage in international trade dispute settlement. For instance, Kenya decided to take steps to comply with EU directives to implement export restrictions on its Nile perch in spite of the fact that the need for such restrictions lacked scientific support.

Finally, the study on Bangladesh’s experience notes the so-called “psychological barrier” to dispute settlement exemplified in Bangladesh’s difficult decision to contest India’s anti-dumping duties on batteries. Bangladesh was in the midst of a delicate trade negotiation with India when the conflict first arose. This exposed the Ministry of Commerce - the key agency in charge of dispute settlement - to significant pressure from the Ministry of Foreign Affairs, which believed that such action would have untoward diplomatic ramifications. The advisory body arguing for the dispute raised counterarguments that finally convinced the minister to take the dispute with India to the WTO. With that decision, Bangladesh broke through a significant psychological barrier in its understanding of trade and diplomatic relations. The case was settled during formal consultations between Bangladesh and India and the latter withdrew its anti-dumping duties. Bangladesh’s victory in this case demonstrates that legal challenges between rich and poor, large and small or even trading partners often have no significant effect on diplomatic relations. Moreover, the use of WTO dispute settlement by Bangladesh expeditiously removed the major irritant in the trade relations of the two countries.

Legal Capacity-Building

The discussion above demonstrates that the development of expertise in and enthusiasm for international trade law contributes to the diffusion of WTO experience which can strengthen a WTO member’s overall capacity to make use of the DSU. Taking advantage of existing capacity-building opportunities such as joining a dispute as a third party or using the academic and training programs offered in Geneva and elsewhere are obvious starting points.

Comprehensive capacity building strategies

The experiences of Brazil and China show two rather comprehensive strategies for capacity building. As part of the three-pillar structure developed by the Brazilian government, the mission in Geneva started an internship program for young Brazilian attorneys as well as for trade specialists from government agencies. One Brazilian representative noted that they are

7 European Communities - Antidumping Duties on Imports of Cotton-type Bed Linen from India, WT/DS141.
8 India - Antidumping Measures on Batteries From Bangladesh, WT/DS306.
“trying to spread the knowledge of the system in order to create a critical mass.” Another interviewee stated that the program can “train Brazilian lawyers to facilitate their contact with WTO rules and procedures so that in the future they can help Brazil’s private sector.” In doing so, Brazil has developed an inside-out development network of international trade law experts. Within the government, Brazil also created career tracks for foreign trade analysts that require candidates to have a strong background in international law, international economics or international relations and to pass a very competitive exam.

Furthermore, the study on China shows that legal capacity programs are most beneficial if they are tailored to government officials, the private sector and public awareness. In China, legal experts and educational institutions provide WTO-specialised training seminars and workshops to governmental officials and judicial officers. WTO law has become a focus of research and education in various colleges and research institutions in China, marking the establishment of WTO-specialised institutes in Chinese universities. China has also built its legal capacity through overseas education to resolve the challenges raised by language and technical barriers.

Learning by doing

Studies of frequent dispute settlement users among developing countries indicate that positive participation in dispute settlement is an important part of the legal capacity-building process. For instance, China adopted a constructive approach to maximising its participation in WTO dispute proceedings. Since its very first WTO case, US-Steel Safeguard, MOFCOM’s strategy has been to nurture a homegrown team for future WTO disputes. China has actively participated as a third party in almost every case since 2003, giving domestic law firms a large number of chances to learn the rules and practice of WTO dispute settlement during actual cases. MOFCOM hand-picked domestic law firms and included them as part of the official Chinese delegation to participate in full WTO proceedings, including panel and Appellate Body hearings. This strategy is a relatively simple and low-cost way of developing legal capacity. In cases involving China as a main party, the government would generally retain a foreign law firm to assume the main responsibilities for developing legal argument. At the same time, the foreign law firm would be asked to work with a domestic law firm assigned to the case. This method gave domestic lawyers the opportunity to observe, practice and learn from experienced foreign litigators.

Internship and training programs

A series of internships and training courses are offered in Geneva by the WTO, the Advisory Centre on WTO Law (ACWL), foreign countries’ missions and non-governmental organisations (NGOs).

The WTO provides training courses and internship programs for mission officials or domestic lawyers from all WTO member states. ACWL’s training program is slightly different. The Centre maintains a program for trade lawyers, during which three government officials per year can join the staff to gain practical experience in WTO law and dispute settlement procedures. However, this program is only intended for government officials of LDCs or ACWL members that are entitled to the organisation’s services. Finally, in Geneva, the United Nations Conference for Trade and Development (UNCTAD) and a number of NGOs such as the International Centre on Trade and Sustainable Development (ICTSD) also offer internships or courses in the field of international trade and dispute settlement.

Involvement and Assistance of NGOs

The increasing complexity of international trade disputes provides fertile soil for the participation of NGOs. Developing countries should make effective use of these entities to offset their lack of legal capacity on specialised or technical matters. This is well illustrated from the experience of Brazil in US-Cotton. Brazil’s Integration of Peoples (REBRIP) - a coalition of NGOs - worked closely with Oxfam to evaluate the impact of US subsidy programs on West African cotton farmers. Brazil used this evaluation to
demonstrate the inconsistency of the subsidy which contributed to its victory in the case.

Another example of the support provided by NGOs in dispute settlement is reflected in Brazil’s response to the EU’s 2005 complaint against a Brazilian ban on the importation of retreaded tires. In this case, Brazilian NGOs filed their first-ever amicus curiae brief before a WTO panel to support Brazil’s position. They also worked together with a US-based NGO that helped stimulate media coverage of the case from an environmental and health perspective, further backing Brazil’s position.

Finally, the study on Thailand also recognises the crucial role of NGOs. In the EC-Sugar case, data and analysis provided by civil society, Oxfam in particular, were highly valuable. Oxfam proved that export subsidies under the EC sugar regime distorted sugar prices and the global market for sugar. This analysis formed part of Thailand’s legal argumentation and reasoning in the case.

Conclusion

The introduction of the DSU has significantly altered the way in which international trade disputes are processed and resolved. This has created both opportunities and challenges for developing countries. While enjoying a more balanced playing field, these countries face difficulties in terms of resources and capacity to effectively utilise the system. The experiences of the nine WTO members examined in ICTSD’s studies show that countries at alternative levels of development and facing various resource constraints can develop different specific strategies to resolve economic disputes. However, the studies also reveal a common approach that should be taken into consideration in order to make better use of the system. This includes development of a strong institutional structure with one coordinating focal point and a strategic, comprehensive approach to legal capacity building for WTO litigation or even international economic law disputes in general.

With respect to the former, ICTSD’s legal capacity work has shown that any successful use of WTO dispute settlement procedures inherently requires strategic inter-agency coordination as well as public-private partnerships. Interdepartmental cooperation may go beyond the ministry-ministry or capital-mission interaction and extend to coordination among public agencies of different countries with shared economic interests. Strengthening public-private partnerships is also crucial for a complete institutional structure. Such a synchronisation process may take place under the lead of a dedicated unit specialised in dispute settlement. Such a body would operate as a focal point for the triangle of government agencies in the capital, in Geneva-based missions and in the private sector.

Sufficient coordination as such also facilitates the political process when the government is exposed to a clash of interests among different agencies and departments and/or different industries or public and private interests.

With regard to legal capacity building, it should be noted that no perfect system for managing economic disputes can be created overnight. In the beginning, developing countries exposed to disputes can rely on the support of ACWL and other counsel. Working with outside counsels and experts also facilitates learning. However, it is advisable to develop a long-term plan to build up internal legal staff. This requires a long-term process based on learning-by-doing experiences. In this regard, training and internship programs to educate government officials as well as third party participation are crucial. Such efforts make it possible to develop a trade law network that includes governmental actors, industry as well as academia, media and civil society.

10 Brazil - Measures Affecting Imports of Retreaded Tyres, WT/DS332.
Dispute Settlement at the WTO: The Developing Country Experience

“The book’s analysis on the Brazilian experience is, from our perspective, a valuable contribution to the understanding of how, despite significant resource constraints, a developing country may make good and effective use of the WTO dispute settlement mechanism”.

Ambassador Roberto Azevêdo,
Ambassador of the Permanent Representation of Brazil to the WTO

“‘Dispute Settlement at the WTO - The Developing Country Experience’ provides a very useful analysis on the situation of developing countries with respect to the WTO dispute settlement mechanism. The nine country cases presented are a valuable source of lessons and approaches that were part of the challenges and efforts faced by those countries in order to make good use of the system.”

Ambassador Mario Matus,
Ambassador of the Permanent Representation of Chile to the WTO

“‘Dispute Settlement at the WTO - The Developing Country Experience’, It is not a user manual, but a set of very valuable experiences, reflections and aspirations of a diverse selection of users from developing countries with a wide variety of trade volumes, trade diversification levels and capacities.”

Ambassador Ronald Saborio,
Ambassador of the Permanent Representation of Costa Rica to the WTO, Chair of the Special Session of the Dispute Settlement Body

“This innovative book [...] proves once again that the two editors - Prof. G. C. Shaffer and Ricardo Meléndez-Ortiz, Chief Executive of the International Centre for Trade and Sustainable Development (ICTSD) at Geneva - remain among the most thought-provoking researchers on matters of international trade law and policies. The book offers a unique documentation of the challenges, strategies and options available for improving the legal capacity of developing countries to make the best use of the existing WTO dispute settlement procedures and ‘law in action’.”

Prof. Dr. Ernst Ulrich Petersmann,
European University Institute Florence, Italy.
This Information Note is produced as part of ICTSD’s International Trade Law Programme. The Programme seeks to facilitate access to dispute settlement systems to enable developing countries to make use of the options that are available to defend their trade rights and advance trade objectives.

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

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

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About the International Centre for Trade and Sustainable Development, www.ictsd.org

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