



How to Successfully Manage Conflicts and Prevent Dispute Adjudication in International Trade



By Roberto Echandi,
Director Program on International Investment, World Trade Institute (WTI) University of Bern, and
former Ambassador of Costa Rica to the European Union, Belgium, and Luxembourg



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LIST OF ABBREVIATIONS AND ACRONYMS

ACT	WTO Agreement on Textiles and Clothing
ADR	Alternative Dispute Resolution
ASTAC	Ad Hoc Shrimp Trade Action Committee
CITAS	Consuming Industries Trade Action Coalition
DOC	US Department of Commerce
DR-CAFTA	The Free Trade Agreement between the Dominican Republic, Central America and the United States
DG SANCO	EU Directorate General for Health and Consumers
DSB	Dispute Settlement Body
DSD	Dispute System Design
DSU	Dispute Settlement Understanding
EU	European Union
GATS	General Agreement on Trade in Services
GATT	General Agreement on Tariffs and Trade
ICTSD	International Centre for Trade and Sustainable Development
ITC	International Trade Commission
MPEDA	Indian Marine Products Export Development Authority
MRL	Maximum Residue Limit
LAFTA	Latin American Free Trade Association
LAIA	Latin American Integration Association
OATAs	Offices of Administration of Trade Agreements
PTA	Preferential Trade Agreement
SEAI	Seafoods Exporters Association of India
SPS	Sanitary and Phytosanitary
SSA	Southern Shrimp Alliance
TBT	Technical Barriers to Trade
UNCTAD	United Nations Conference on Trade and Development
US	United States
WTO	World Trade Organization

FOREWORD

Lauded as a major achievement of the Uruguay Round, the World Trade Organization (WTO) dispute settlement system is today characterized by a rapidly growing body of jurisprudence that has become ever more legalized and increasingly complex. This, in turn, has put demands on the capacity of member countries seeking to engage in the system to advance and defend their trade interests. Developing country participation has increased dramatically since the time of the General Agreement on Tariffs and Trade (GATT), but just 5 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 Robert Echandi, this paper examines the different approaches available to developing countries prior to the filing of a WTO case, thus focusing on the very first step of a trade conflict.

While enhancing capacity with a view to performing effective dispute litigation is important, it must also be recognized that most trade conflicts never reach the WTO or if they do, the panel stage. It is, therefore, essential that capacity-building efforts, particularly in developing countries, do not ignore this crucial phase of the conflict management process.

Against this background, the paper focuses on approaches to conflict management, such as negotiations with state officials of a trading partner - or even direct negotiations with their industry officials - reliance on preferential trade and investment agreements, and alternative dispute resolution at the WTO. In order to be better placed to embrace this broad range of alternative conflict management techniques, the paper recommends that developing countries implement dispute prevention strategies on both the domestic and international levels.

We hope that you will find it interesting and insightful.

A handwritten signature in black ink, appearing to read 'R. Ortiz', with a horizontal line underneath.

Ricardo Melendez-Ortiz
Chief Executive, ICTSD

EXECUTIVE SUMMARY

Non-judicial settlement of trade conflicts is important for many reasons. It may be more efficient, less costly and faster than formal dispute settlement, and for export-dependent developing countries, it can provide an inexpensive, swift, and effective means of removing trade barriers.

From the outset, it is necessary to recognize the difference between the notion of a ‘conflict’ and a ‘dispute.’ Conflicts are unavoidable, while disputes on the other hand, can be prevented. A dispute is the result of a conflict continuum, and determining when a conflict has evolved into a dispute is of central importance, because in international trade, the political economy of conflict management is quite different from the political economy of dispute resolution.

Unlike power-based or rights-based dispute resolution, the outcomes achieved through the reconciling of interests tends to generate a higher level of mutual satisfaction. The growing body of WTO jurisprudence can help facilitate rules-based negotiations as a way of avoiding formal litigation more than ever before, and developing countries are now in a position to reap the benefits of the WTO dispute settlement system to solve trade problems without ever having to submit a formal dispute.

The author examines the dynamics of the conflict continuum in international trade, from domestic exporters identifying a trade restriction and being supported by their government to the decision-making processes involved in elevating what is a private problem into an international conflict. Beyond this, various factors play a part in escalating that conflict into an international dispute. These factors range from complex political dynamics at the governmental and private industry levels to the nature of the measure generating the conflict.

Often, developing countries face challenges that make it difficult for them to resolve conflicts outside the formal WTO system. For instance, smaller developing countries may have difficulty getting their developed country counterparts to sit down and listen to their complaints, or there may be instances where a developing country would benefit from approaching the private industry engaging in the trade adverse practice instead of complaining to that country’s government and vice versa. One alternative approach to managing a trade conflict is to look at the alternatives available in the domestic jurisdiction of the importing country; another is to pursue informal direct negotiation at a state-to-state level. Finally, a party can invoke alternative dispute resolution (ADR) procedures.

For developing countries, forging alliances with domestic industry can be particularly useful in big and highly regulated markets where local players can regulate the political and legal intricacies of the internal market better than others. In European and Latin American countries, where international agreements often have direct effect, the private sector can use the local courts to trump laws and regulations that are inconsistent with obligations assumed by the importing countries.

Government-to-government bargaining, regardless of the modality that applies, is often most effective within the WTO framework, given its quasi global nature. Adverse rulings from the WTO go beyond potential retaliatory measures and become an important precedent for the international trade system. The effectiveness of conflict management is enhanced even further if the parties involved are also members of a preferential trade agreement (PTA). Political authorities involved in a PTA not only meet regularly, acting as catalysts to solve problems, but also provide institutional avenues for the private sector to become involved, such as seen in the Association Agreement between the European Union (EU) and the Central American countries, where consultative committees for civil society and members of Parliament have also been established.

Finally, alternative dispute resolution (ADR) models can be applied in the context of international trade conflict in the form of mediation, neutral evaluation and fact finding. Preventive ADR techniques can provide a useful political shield, whereby an independent expert is called on to assess the opportunity and/or cost that a party may face if agreement is not reached. It can be an effective way for smaller developing countries to engage the authorities of bigger trade partners in trying to solve a conflict at an early stage.

Recommendations for developing countries to effectively embrace conflict management techniques are made on two levels. At the domestic level, capacity building for government officials is crucial, supported by institutional structures allowing proper administration of trade agreements along with information and communication protocols with the private sector. At the international level, developing countries must foster greater activism in the institutional framework of the WTO, for example by participating in the different committees and bodies of the WTO. They must also take full advantage of the implementation of PTAs in order for smaller developing countries, in particular, to foster closer working relationships with larger trading counterparts. Finally, ADR should be taken more seriously by developing countries and be given a formal – even compulsory – footing in PTAs as a way of managing trade conflicts.

1. INTRODUCTION

The WTO dispute settlement system has made significant contributions to the governance of international trade relations. After almost two decades of practice, the benefits of the system run deeper than the very visible and tangible adjudication process. In a quieter and more subtle manner, it has also enabled countries to develop innovative approaches for dealing with everyday problems arising in international trade. This study purports to draw attention to the fact that a myriad of trade-related conflicts among WTO members are solved every day through means other than adjudication.

When discussing such non-judicial means of dispute resolution in the context of the WTO, it is important to distinguish between two different types of “alternative procedures.” On the one hand, there are the ADR procedures that the Dispute Settlement Understanding (DSU) provides as complements or substitutes to the formal panel and appeal adjudication procedures. These include good offices, conciliation, or mediation under Article 5 of the DSU. Yet, the use of official WTO ADR has been quite limited in the almost 20 years of DSU practice.¹ On the other hand, there is a myriad of controversies that are resolved without ever reaching the formal consultation phase under Article 4 of the DSU. The latter are the kind of problem-solving methods that are the focus of this study.

Understanding non-judicial settlement of trade conflicts is important for many reasons. First, in certain circumstances, avoiding formal dispute settlement may be more efficient, less costly, and faster. This is particularly important for export-dependent developing countries that need swift, inexpensive, and effective means for removing trade barriers. Exploring non-judicial conflict resolution further unveils the fact that rules-based negotiation has developed as a primary means

to manage international trade conflict. As this study will explain, the ‘legalization’ of trade relations through the WTO and enforcement through the DSU in the background is why non-judicial conflict management works in practice. Operating in the shadow of the law is what makes informal mechanisms frequently used and effective methods for dealing with everyday international trade problems.

The objective of this study is to provide an overview and assessment of the different challenges, experiences, and approaches available to developing countries to prevent international trade disputes. In particular, we focus here on non-judicial conflict management techniques, and explain what they are, how can they work in practice, and how developing countries can deploy novel approaches in their implementation.

In addition to this introduction, this guide comprises five sections. To place the study in its proper context, Section 2 explains what conflict management is, why it is different from dispute resolution, and some of the implications for developing countries. Section 3 describes how international trade disputes evolve in practice and analyzes the dynamics of the trade conflict continuum. In particular, this part of the study explains the key factors that determine the chances of successfully managing a conflict as opposed to those that make dispute settlement the only option likely to succeed. Section 4 presents an overview of the different mechanisms that, in practice, have proved successful to manage conflicts. Further, this part also discusses under which circumstances each approach may be more likely to render better results. Section 5 presents some practical recommendations for developing countries to make the management of conflicts work properly. Finally, Section 6, by way of conclusion, presents some final remarks.

2. CONFLICT MANAGEMENT: AN INTRODUCTION TO THE CONCEPT

Conflict management can be defined as the use of different techniques to enable government authorities, on the basis of the rules and disciplines included in trade agreements, to find mutually agreed solutions to trade-related conflicts before they escalate into full-blown disputes under the DSU or any other applicable international trade agreement. In international trade, the concept of conflict management is new and unexplored, and it implies two fundamental ideas that are worth bringing to light.

First, conflict management presupposes that the terms “*conflicts*” and “*disputes*” are neither interchangeable, nor are the appropriate mechanisms to address them the same (for a detailed discussion see Box 1 below). Thus, “*conflict management*” is not the same as “*dispute resolution*”. While conflict is a process, a dispute is one of the by-products of an unresolved conflict. Furthermore, conflicts are inherent to all levels of human interaction, and consequently, although they can be managed, in the end they are unavoidable. Disputes, though, can be prevented. These ideas will be further developed below.

Second, the use of conflict management to complement dispute resolution implies that conflict management cannot- and should not - be a substitute for adjudication or dispute resolution. Instead, in the context of international trade, conflict management should serve as an additional option available to countries to enable them to address their trade-related problems in particular circumstances. Furthermore, the use of conflict management is based on the notion that different situations may require different methods and techniques. Thus, litigation cannot be perceived as the single one-size fits all method to properly address all the needs of all potential parties involved in a trade conflict or a dispute. For instance, direct negotiation may work in a particular set of circumstances, while recourse to the establishment of a panel under the DSU may be the most adequate means to solve another problem. The challenge for the concerned parties is to be aware of available options and select the appropriate mechanisms for a given situation.

Box 1: The Conflict Continuum and the Distinction between Conflicts and Disputes

In most contexts - and the field of international trade law is not an exception - there has been a trend of using the terms conflict and dispute interchangeably. Both are used to refer to a difference or a problem between the parties in a relationship. However, conflict theory and dispute system design (DSD)² make a clear conceptual distinction between these two concepts, and understanding this differentiation is critical for creating trade dispute avoidance protocols.

A conflict is a process, while a dispute is one of the typical by-products of conflict. *“Conflict is the process of expressing dissatisfaction, disagreement, or unmet expectations with any organizational interchange; a dispute is one of the products of conflict...[w] hereas conflict is often ongoing, amorphous, and intangible, a dispute is tangible and concrete-it has issues, positions, and expectations for relief.”*³

A dispute is the result of a continuum. It stems from a process of degradation, whereby a state of agreement among parties in a relationship devolves into the identification of a problem, a conflict arising from that problem, and then to a dispute arising from that conflict. Thus, a conflict is a problem unattended, and a dispute is an unattended conflict that has evolved into a *“defined, focused disagreement, often framed in legal terms.”*⁴

The sequential distinction explained above helps us to understand that relationships are not static, but dynamic, and that they evolve over time and according to the circumstances. As conflicts are an inherent part of relationships, they are also dynamic and evolve over time. The processes that can be used to attempt to solve those conflicts must take this into account, which is why DSD also makes the distinction between conflict management on the one hand, and dispute resolution on the other. Conflicts are managed, while disputes are resolved.

Disagreements among human beings, organizations, and states happen all the time. Thus, what really matters is not preventing conflicts, but effectively managing them in order to prevent those conflicts from escalating into full-blown disputes. This is the rationale of conflict management techniques. Given the amorphous nature of conflict, the parties can resort to a wide fan of alternatives – based either on their interests or on previously agreed rules or a mix of both – to address the state of dissatisfaction or disagreement existing between them. Further, at the conflict stage, the parties themselves are the ones in charge of deciding how to address the situation and deal with the conflict.

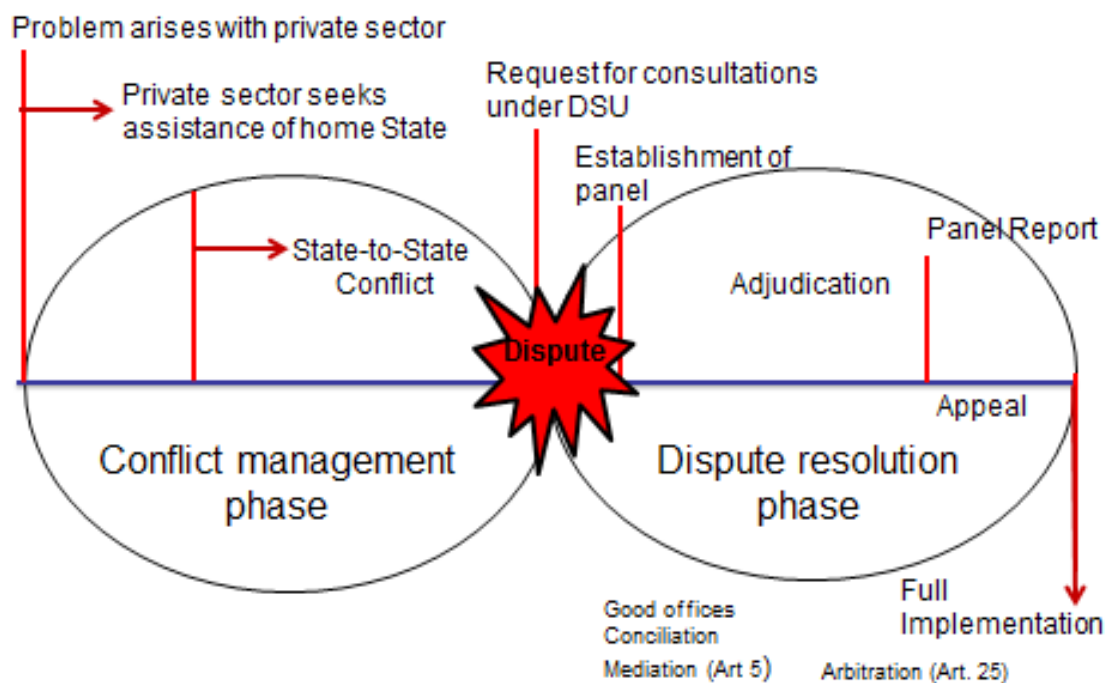
A disputes, on the other hand, being the concrete materialization of an unresolved conflict that has evolved into a defined and focused disagreement framed in legal terms, entails the use of dispute resolution techniques. Disputes are often resolved with rights-based adjudication. Adjudication entails the participation of a third neutral party, totally alien to the origin of the conflict, which is in the end the one who imposes a binding decision on the parties to the dispute on the basis of previously agreed rules and disciplines. For instance, in the WTO system, it is the Dispute Settlement Body (DSB) based on the findings of the panels and Appellate Body that will adjudicate a trade dispute according to the rules and disciplines of the WTO Agreements. In sum, at the end of the day, both conflict management and dispute resolution mechanisms are different approaches that deal with conflicts at different levels of maturity.

3. THE DYNAMICS OF THE CONFLICT CONTINUUM IN INTERNATIONAL TRADE

As illustrated by Figure 1 below, conflicts that become trade disputes submitted to the WTO dispute settlement system rarely start at the state-to-state level. Rather, they begin as problems affecting the relationship between exporters and/or importers of goods or services of one country and the regulatory authorities of the importing country. If not resolved, the affected business may seek the assistance

of its home government, which may initially attempt to amicably solve the matter with the government of the importing country. At this stage, the matter is an international conflict—that is, a general disagreement between two or more states that may be dealt with through a solution mutually acceptable to the parties. Finding such a solution would be tantamount to successful management of the conflict.

Figure 1. The conflict continuum of a trade dispute under the DSU



If the attempts to reach an informal solution to the matter do not render positive results, the state affected by the challenged measure can escalate the conflict to the next stage. This requires translating the general sense of dissatisfaction into a precise and defined claim framed in legal terms with expectations of relief. The affected state becomes a complainant arguing that the respondent state's measure is inconsistent with WTO law or another applicable trade agreement. Consequently, the complainant will have an expectation of relief and will request that the inconsistent measure be brought into conformity with WTO rules and other applicable trade laws. At this stage, the conflict has crystallized into a dispute.

Once the dispute begins, the conflict has left the conflict management phase and entered the dispute resolution stage. Still, although a formal dispute is underway, the parties would have a last chance to resolve the dispute amicably through consultations in accordance with Article 4 of the DSU. However, if the dispute is not settled by the parties, it will be submitted to adjudication. Here, a third party—a panel or the Appellate Body in the case of the WTO—will determine whether or not the challenged measure is consistent with the applicable substantive rules and disciplines. A final report would be adopted by the Dispute Settlement Body (DSB), which makes the findings of the adjudicator legally binding as a matter of international law.

The description and illustration of the conflict continuum in the context of international trade depicted above does not, however, explain why some conflicts may be successfully managed without ever reaching the dispute resolution phase or why other conflicts escalate to the dispute resolution phase. This question requires a focus on the political economy of international trade conflict. In this regard, it is possible to distinguish between two different sequential stages within the conflict management phase depicted in Figure 1 above.

First, during the very initial phase of the conflict, one or various exporters affected by the trade restriction will request the assistance of their home government to elevate the matter to the government-to-government level. Here, the home governmental authorities may have to decide whether and how to espouse such grievance. As will be explained in section 3.1 below, many factors might prevent a problem affecting exporters from being elevated to state-to-state conflict management. Thus, in many cases, problems affecting providers of goods or services are not taken over by the competent national authorities and remain in the private domain.

A second stage of the conflict management phase starts from the moment the home government opts to sponsor the request of its export sector. The private trade-related problem is then elevated to the state-to-state level, giving rise to an international trade conflict. Once governments become involved, it is possible to manage the conflict through amicable and informal consultations. It is important to note that at this second stage of the conflict management phase, it is very likely that the home government may not yet have decided to submit a claim to international adjudication. In fact, as illustrated by Figure 1 above, once the decision to litigate has been taken, the conflict has evolved into a dispute,

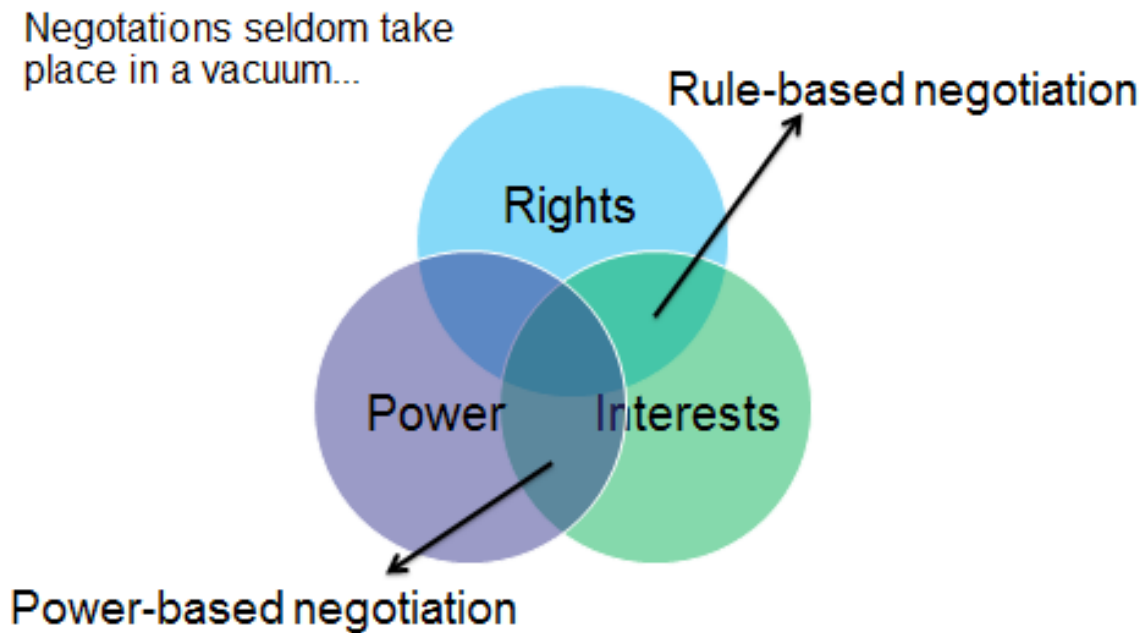
and the dispute resolution phase would have started. Indeed, it is one situation for the government to assist the private sector in the conflict management phase but a totally different matter for a state to accuse another sovereign state of acting inconsistently with its international trade obligations in an international forum.⁵

3.1 Implications for Developing Countries

Developing countries have always seen in the rule-oriented system of the WTO the means to balance power-oriented diplomacy and unilateralism from governing international trade relations. Thus, the rule-oriented dispute resolution system enshrined in the DSU plays a critical role, ensuring the stability and predictability of trade in the current globalized world. However, international litigation should not be the only way developing countries could benefit from the existence of a rule-oriented regime.

Today, trade dependent developing countries – many of them relying on exports from small businesses – require swift, low cost, and effective means to solve the myriad of trade-related problems that arise every day. Despite its advantages, international legal disputes can entail significant costs, and more important, often take time. In practice, most WTO dispute settlement procedures take between one and two years, with a minority lasting much longer. Many small and medium enterprises affected by trade restrictions cannot withstand long periods being practically left out of business. Within this context, it is important for developing countries to find effective ways to maximize the benefits of a rule-based system and simultaneously minimize its potential costs. Managing conflicts through rule-based negotiations and other approaches provide countries – both developing and developed alike – with such an opportunity.

Figure 2. The Tree Fundamental Approaches to Deal with Conflict



As illustrated in Figure 2, in addition to power and rules, conflicts can also be managed on the basis of interest-based processes, such as negotiation, conciliation, or mediation. These processes rarely focus exclusively on the interests of the parties involved. Negotiations do not take place in a vacuum. Rather, they often occur in the shadow of the law or of power. Thus, some interest-based negotiations focus on determining who is right, such as when the negotiating parties compete to prove whose position has greater merit. This is what is called rules-based negotiation, or negotiation in the shadow of the law. Other negotiations take place in the shadow of determining who is more powerful, such as when nations exchange threats and counter-threats - that is power-based negotiation. Other negotiations involve a mix of all these variables.⁶ Thus, in the process of resolving a dispute, frequently the focus may shift from interests to rights to power and back again to interests.

After almost two decades of practice under the DSU promoting the effective enforcement of WTO Agreements, a significant body of case law has developed. To a great extent,

such jurisprudence has clarified the breadth and content of numerous provisions of WTO Agreements, which makes it easier for the members to anticipate the likely outcome of a dispute in the eventuality it is submitted to the WTO dispute settlement system. In this sense, today the WTO dispute settlement system has facilitated members with the use of rules-based negotiation as a means to prevent formal litigation more than ever before. It is precisely because of this evolution that developing countries might reap the benefits of rule-oriented dispute settlement systems to solve trade problems without even having to submit a claim to adjudication under the DSU.

As stated in the introduction of this section, conflict management cannot be a substitute for adjudication or dispute resolution. Attempting to manage a conflict may be the most efficient course of action in certain circumstances; however, resorting to litigation may be the most appropriate option in other situations. Thus, the critical decision for a developing country is to discern the different options available and select the most suitable mechanisms for a given situation.

Box 2. When would conflict management turned out to be counterproductive?

When the complaining party needs to set a legal precedent

When power-based negotiation would prevail over rule-based negotiation

When the party adopting the measure does not have any political space to compromise

In at least three distinct situations devoting time and effort to find a mutually acceptable solution to the conflict may in fact be counterproductive. The first is when the developing country wishes to set a legal precedent that may transcend the specific conflict at stake. A case illustrating this situation occurred in *United States - Restrictions on Imports of Cotton and Man-made Fibre Underwear* (DS 24). That case submitted by Costa Rica entailed not only the very first dispute involving the WTO Agreement on Textiles and Clothing (ATC), but also the first time that this small country had brought a claim against a major trading partner like the United States (US). In the initial phase, Costa Rica made a real effort to find a mutually agreed solution to the conflict on the basis of rule-based negotiation, using the ATC as a basis. However, once the US refused to negotiate with reference to the ATC and furthermore refused to withdraw an import quota, Costa Rica opted to submit the dispute to the DSU. At that point, the Central American country was interested not only in the particular dispute, but rather, in setting the precedent that after the long negotiations of the Uruguay Round, the rules and disciplines of the ATC would be effectively implemented.

A second situation in which devoting time and resources to attempt to manage a trade-related conflict may be counterproductive would be in those situations where negotiations may in the end be based more on power than on rules, putting the weaker party in a less advantageous situation than if adjudication had taken place. In this regard, it is worth noting that Article 3.7 of the DSU provides that “... *The aim*

of the dispute settlement mechanism is to secure a positive solution to a dispute. [However] a solution mutually acceptable to the parties to a dispute and consistent with the covered agreements is clearly to be preferred.”

Last but not least, a third situation where the chances of successful management of a conflict would be limited, and where devoting time and resources to attempt to manage the conflict may be counterproductive, would be when the nature of the measure leading to the conflict would leave the government of that party with practically no political space to negotiate. That would be the case involving measures reputedly adopted for reasons of sensitive public policy, such as health or environmental protection and responding to domestic political demand. This point is further developed in section 3.2 below.

Beyond these three considerations there are a number of situations that might induce countries to refrain from engaging in an ongoing conflict, or from raising a dispute. The following subsections, will address these three different situations. First, it examines the factors that may explain why home governments may or may not elevate a problem affecting its national private sector into an international trade conflict. Second, it discusses the factors that may prevent governments from being able to successfully manage a conflict, forcing an escalation of the conflict into the dispute resolution phase. And third, it highlights the factors that may prevent governments from submitting an unresolved conflict to international dispute resolution.

Box 3. How does a private trade-related problem become an international conflict?

- Appropriate administrative channels have to be in place to enable the private sector to interact with governmental authorities
- Governments must intercede in favour of the private sector
- Government officials must have the capacity to use the institutional procedures provided for in international trade agreements

3.2 Determinants for Elevating a Private Problem into an International Conflict

In their export markets, private businesses have various means at their disposal to deal with problems that occur every day in international trade transactions. It is only when those mechanisms prove ineffective and the economic costs generated by the unattended problem become sufficiently significant that the affected business will seek legal advice and explore different alternatives to obtain redress at the domestic or international level. It is at this point that the affected business may seek the support of its home government to elevate the matter to a state-to-state conflict.

For any international state-to-state action to take place, affected businesses need to communicate and convince their home government authorities to provide assistance, formulate their claim and elevate it to international discussions with the other country. In practice, three basic conditions must be present for this to happen. First, governments must have a minimum degree of political empathy to intercede in favour of the private sector. Second, there must be appropriate administrative channels in place to enable the private sector to interact with governmental authorities and enable the latter to process the request, and third, government officials must have the capacity to use the institutional procedures provided for in international trade agreements to deal with these matters. Unfortunately, in many developing countries, these three basic conditions are not always present.

In a number of developing countries, particularly those experiencing deep political or economic transformations, the domestic political environment may be volatile and polarized. Ideological differences and conflicting interests between ruling regimes and the private sector may lead them to perceive each other more as adversaries than allies. In contexts where the private sector and governments may have a fragmented relationship, it is unlikely that businesses will seek any support from public authorities to defend their interests in the international trade arena. That may be the situation in countries governed by regimes with an explicit political discourse against private enterprise. Further, a lack of confidence by the private sector in the government may also stem from such situations. The case of a Central American government during the negotiations of The Free Trade Agreement between the Dominican Republic, Central America and the United States (DR-CAFTA) illustrates this point. As a reprisal for lacking the support of the private sector to foster a series of initiatives on the domestic front, the government authorities, at a given point in the negotiations, opted to propose a radical tariff liberalization program to rapidly expose the national productive sector to international competition.⁷

Political relations between the private sector and governments may be relatively harmonious, and yet governments may be prevented from effectively addressing the grievances of the private sector, owing to a lack of appropriate internal administrative structures. This might

arise for different reasons. For instance, governments may not have a clearly designated lead ministry or agency in charge of administering international trade agreements. Inter-agency turf fights are not uncommon in many countries. To illustrate this point, in many countries the private sector does not really know to whom to turn for assistance to deal with an international trade conflict: should it turn to the Ministry of Foreign Affairs or the Ministry of Trade, or if the problem concerns a barrier affecting an agricultural export, the Ministry of Agriculture? Often the private sector knocks on the doors of all of them - as the interest of exporters is to have their problem resolved as quickly as possible. However, in certain cases, government agencies fail to respond in a coherent manner. The agencies might pass the ball between one another or, conversely, more than one may claim the matter falls within its competence, thus leading to an intra-governmental turf conflict. Further, a more typical situation in many developing countries is that a lead agency with a clear competence to deal with international trade may exist in theory, but in practice lacks resources to properly perform its functions. In the case of many developing countries, institutional challenges remain an important barrier to maximizing the potential benefits of the international trade system, including the possibility to foster early management of trade-related conflicts.⁸

Last but not least, governments must have the legal capacities to properly take advantage of the negotiating avenues that international trade agreements provide to address trade-related conflicts. State-to-state trade conflict tends to be framed within the parameters of a legal instrument that may be used as reference for bargaining in the shadow of the law. Thus, against the background of preliminary and amicable consultations, subtle allusion to rights or obligations under the WTO or other applicable trade treaties is common, and such references act as subtle threats to implement adjudication if the conflict is not amicably resolved at an earlier stage. Accordingly, direct

rules-based negotiation between states is the conflict management technique *par excellence* in international trade. However, for such active rule-based negotiation to take place, the government must rely on an assertive team of well-informed and skilled professionals. If public officials do not know how to bargain in the shadow of the law, it will be very difficult for them to manage conflicts successfully. The need to promote trade capacity building of government officials has been widely acknowledged by different international organizations, such as the WTO, the World Bank, the United Nations Conference on Trade and Development (UNCTAD) and multiple regional development agencies. The promotion of conflict management in international trade is then one more among many reasons to continue to promote these efforts.

3.3 From an International Conflict to an International Dispute: Factors of Escalation

It is reasonable to assume that many states do not consider international litigation as the first option for dealing with a trade conflict. Most governments would prefer to manage a conflict rapidly and efficiently rather than embark on a litigation quest that may potentially entail significant costs and yet not lead to a swift resolution of the problem. However, if this presumption is correct, it is then important to consider what factors explain the escalation of trade conflicts into litigation. Experience suggests that, in addition to the domestic factors in the exporting country referred to in section 3.1 above, political dynamics in an importing country are also critical in determining whether international trade conflicts can be successfully managed. One of these key variables is the potential political cost for the government of the importing country for remedying the problem. Another is, regardless of such cost, the level of attention that the importing country may devote to address a conflict raised by a smaller developing country.

3.3.1 Political Cost in Solving the Problem

Like any law, regulation, or act of government, the adoption of trade-restrictive measures rarely takes place in a political vacuum. Trade-restrictive measures tend to respond to complex political dynamics that should be unveiled in order to fully understand a problem between an exporter of one country and a government authority in an importing country.

Most of the time, an international trade conflict is just the tip of the iceberg that reveals an underlying clash of interests with respect to the challenged measure between at least two groups. Usually there are sectors in both the exporting and importing country that benefit economically from fostering free trade of the good or service affected by the

conflict. Providers of these goods or services in the exporting country, as well as importers and consumers in the importing country may fall within this category. These sectors will argue that the measure challenged is a trade restriction inconsistent with the WTO or another applicable trade agreement.

Conversely, there are also groups which, for many reasons, support the challenged measure and view its dismantlement as contrary to their legitimate interests or political agendas. Frequently, this category comprises the domestic sector competing with foreign providers of the goods and services, as well as other groups with anti-free trade ideologies or groups with agendas that subordinate the promotion of free trade to other policy objectives.

Box 5. The four key determinants of the political space required to successfully manage a conflict

1. The legal nature of the measure challenged;
2. The kind of public policy considerations involved in the dispute;
3. The degree of political visibility of the trade conflict; and
4. The power of the interest groups benefiting from the challenged measure

Every time a foreign government challenges a trade restrictive measure, the authorities of the importing country may have to consider the political consequences that their reaction might have in the domestic political arena. In principle, any reasonable government may prefer to manage a conflict swiftly and effectively rather than bear the many potential economic and political risks of international litigation. However, in practice, governments do not always have sufficient political space to successfully manage a conflict before escalation into a full-blown international trade dispute. There are four key determinants of such political space: the legal nature of the measure challenged; the kind of public policy considerations involved in the dispute; the degree of political visibility of the trade conflict; and the power of the interest groups benefiting from the challenged measure.

The first factor affecting a country's chances to successfully manage a trade conflict is the nature of the measure generating the conflict. From a legal or political standpoint, whether the measure at stake is a law, regulation, or administrative action entails different implications. The higher the hierarchy and mandatory character of the challenged measure, the less space the government may have to negotiate a solution to the conflict. Clearly, the level of discretion of a public agency when negotiating a solution to the conflict will not be the same if the controversy stems from the application of laws or regulations that are obligatory for the administration as compared with a lower-ranking measure that provides an ample degree of discretion to domestic authorities for implementation. Furthermore, the nature of the challenged measure may also provide more or less political space

for the government to act. The increase in the use – and sometimes abuse – of trade defence mechanisms, such as the imposition of antidumping measures, illustrates this point. Indeed, it is almost impossible politically and legally for a government not to apply its antidumping legislation when invoked by the domestic private sector. This might explain why up to mid-2012, more than 20 percent of the complaints submitted under the DSU in the WTO relate to the imposition of antidumping duties.⁹

Second, a government's political space to negotiate and prevent a conflict from escalating into a dispute may also depend on the underlying policy objectives of the challenged measure. Settlements affecting measures dealing with sensitive societal values, such as ethics, religion, human rights, health, environmental protection, or national security, among others, tend to be much less politically feasible. It is very difficult for a government to explain to its constituents that the protection of these values must be compromised and subject to the give and take of negotiation. Securing a political victory with regard to such sensitive principles often requires precedents that show the government's commitment to upholding protection. Consequently, conflicts involving these sensitive matters tend to escalate into full-blown disputes. The hormones case brought by the US and Canada against the European Communities under the DSU illustrates this point.¹⁰ One of the key issues debated in this dispute was whether the use of synthetic and natural hormones to raise cattle led to hormone residues in beef that could be harmful to human health. Even assuming that at some point the parties to the dispute may have been interested in settling the dispute amicably, the space for a mutually agreed solution was extremely limited, as it would not be politically feasible for the importing party to give its constituents the impression that its level of protection for human health could be compromised.

A third determinant of the political space of a government to amicably deal with a conflict is the degree of political visibility of the

controversy. Conflicts involving relatively small amounts of trade in the importing country may remain undetected on the political radar of protectionist interests, providing the importing government with significant leeway to deal with the matter through amicable informal consultations.¹¹ In this regard, small can sometimes be beautiful.

An example illustrating this trend may be found in the administration of the various PTAs that Mexico has negotiated with several countries in Central America. For instance, the bilateral trade flows between Mexico and Costa Rica have grown significantly after the entry into force of their PTA in 1995. The dynamism in trade flows has also resulted in numerous trade conflicts. However, after almost two decades of operation, not a single conflict has escalated into formal dispute settlement.¹² It is true that the governments of both countries have diligently used the institutional channels provided for in their bilateral agreement to foster a smooth flow of their reciprocal trade. However, the lower quantity of Costa Rican imports into the Mexican market partly explains why Mexican authorities have had enough political leeway to solve conflicts at an early stage. In contrast, the experience between Mexico and Guatemala has been somewhat different. The geographic vicinity and greater volume of trade between Mexico and Guatemala may have something to do with the fact that both countries have been involved in four WTO disputes, two submitted by each.¹³

Finally, the most important variable determining the political space that any government of an importing country may have in managing a trade conflict is the political clout of the interest groups backing the challenged measure. In this regard, the dynamics can be explained by a political equation; the possibility for an importing country to successfully manage a conflict and prevent it from escalating into a full-blown trade dispute is inversely proportional to the political power of the interest groups supporting the challenged measure. The more powerful the vested interest groups, the less chance there will be for the government to

manage the conflict successfully and prevent it from reaching the dispute resolution phase. Further, in some situations, the power and the degree of influence of certain interested groups over the government may be of such intensity that public authorities become their *de facto* proxy, frustrating any chance to prevent international adjudication.¹⁴ A real anecdote is quite useful for illustrating this situation. Informally commenting on a ruling of the Appellate Body, a government representative of a country found acting inconsistently with the WTO obligations recognized that he, personally, was glad of the adverse ruling, as it would be the only way the authorities of his government could counterbalance the pressure of powerful domestic interest groups pushing to maintain a measure that was clearly inconsistent with the WTO agreements.¹⁵

The explanation of these four variables illustrates the critical political role that adjudication – either actual litigation or a threat to use it – plays in international trade governance. International dispute settlement may act as a shield for the government of the importing party to foster compliance with its international obligations, even against the opposition from domestic interest groups, obligatory measures being challenged, or domestic political considerations.

From this vantage point, the function of international adjudication is to translate the political cost entailed by the dismantlement or modification of a challenged measure to the international tribunal from the national government. Because the resolution of the dispute by adjudication is legally binding, it is easy for governments to shield themselves from the controversy that might be generated by a domestic decision since they can disassociate with the ruling and criticize it, and still comply with the result enacted by a legitimate international tribunal.

The political environment of trade disputes summarized above also helps explain why, in the history of the WTO, non-litigious forms of dispute resolution envisaged in Article 5 of the DSU such as conciliation, mediation, or good

offices are rarely used. Indeed, by the time a conflict has evolved into a dispute, the importing country already lacks enough political space to successfully manage the conflict and avoid adjudication. In this sense, the impossibility of reaching a mutually agreed solution during the conflict phase is a clear signal that the importing country needs the pressure of international adjudication to comply with its commitments.

Often, formal consultations under Article 4 of the DSU constitute the last chance for the parties to avoid adjudication and prevent a conflict from escalating into a full-blown dispute. An important number of disputes are resolved at this stage between the parties. However, that is not always the case. By the time a dispute reaches the stage of formal consultations under Article 4 of the DSU, and no mutually agreed solution has yet been reached by the parties to the dispute, to insist on non-litigious alternative dispute settlement to deal with the dispute is likely to be counterproductive. If the importing party does not have any political space to modify or dismantle the challenged measure, attempts to invoke the procedures envisaged in DSU Article 5 may be a waste of time and resources. In such a situation, an importing government may need to save face vis-à-vis its domestic constituents; thus, forcing negotiation may lead to further polarization of positions rather than a mutually agreed solution. Arguably, at any subsequent stage of the dispute settlement procedure, the parties may reach an amicable settlement and end the dispute. However, such a situation would be the result of a change in the *ceteris paribus* of the dispute, such as a change in government in any of the parties or greater clarity regarding an imminent loss in the case. These scenarios might enable the government of the importing country to recover enough political space to craft a deal resolving the controversy.

3.3.2 Attracting the Attention of the Importing Country

There may be situations where managing an international trade conflict may not entail any significant political cost for the government in

the importing country, and yet the possibility to solve a conflict before it escalates to litigation may be frustrated by the low level of attention that the exporting country may attract from the importing country to address the conflict. Frequently, smaller developing countries might have difficulties in getting their developed country counterparts to sit down and listen to their complaints.

Understandably, major global trading countries tend to devote their time and resources to managing trade with main partners that account for exponentially higher amounts of commerce and investment than small developing exporters. Accordingly, when a problem arises between a small exporter and a big importer, the former has to compete to attract the attention of the importing authorities, which usually have many other priorities. Small developing countries then may have to opt for different strategies to attract the attention of larger trade partners. One possibility may be to request consultations under Article 4 of the DSU, as the responding party is forced to react if it wishes to explore

the chances of avoiding the establishment of a panel. Another possibility is to take advantage of trade negotiations to raise the issue. An example of this situation is illustrated by the case of ornamental plants from Costa Rica exported into the US – see box 6 below.

Within this context, if the successful management of trade conflicts is to be promoted, smaller developing countries need to explore effective ways to secure the same results of a consultation request under Article 4 of the DSU at a much earlier stage. In some cases, in particular those concerning small claims and/or smaller developing countries trading with more powerful economies, negotiating specialized rules may support efforts to be heard. One of the more novel structures to address this imbalance might be mechanisms that force the respondent country to listen to the complaining country's grievances. An example of this can be found in the Association Agreement between the European Union and the Central American countries – see Box 11 below.

Box 6. The Challenge of Small Developing Countries to Attract the Attention of Bigger Trade Partners: the case of exports of ornamental plants from Costa Rica

An old piece of US legislation enacted in the early 1920s provided that ornamental plants, the size of which was larger than ten inches, could not be imported into the country. The rationale behind this measure was that, at that time, the autoclaves used to fumigate imported ornamental plants brought into the country were small and could not take plants bigger than ten inches in size. Clearly, as new technologies evolved over time, the measure became obsolete. However, as late as 2000, the 10-inch size limitation for imports of ornamental plants into the US remained in place. Apparently, no domestic interest group was advocating in favour of maintaining the measure; however, no domestic constituents had requested its modification either. As the profit margin derived from exports of ornamental plants is affected by its size, Costa Rican exporters were interested in securing authorization to export bigger products, and in 1999 requested the assistance of the Costa Rican government to raise the matter with US trade authorities. It took several months before the US agricultural authorities granted an audience to Costa Rican trade officials to address the matter. Further, when faced with the Costa Rican request to modify the measure, US authorities were in principle receptive to the request, but noted that modifying the legislation would entail a lengthy bureaucratic process. A couple of years went by without any formal action by the US government. It was not until the negotiations for the DR-CAFTA negotiations were launched in 2003, when the Costa Rican authorities could take advantage of the attention that the negotiation process generated within the US government. Accordingly, the matter was raised again in the context of the negotiations of the sanitary and phytosanitary (SPS) chapter of this PTA and the conflict was finally resolved.

4. LESSONS FROM EXPERIENCE

In broad terms, the alternative approaches to manage a trade conflict can be grouped into three categories. First, one can explore the different alternatives available within the domestic jurisdiction of the importing country. Second is the option to pursue informal direct negotiation at a state-to-state level. Third, a party can invoke preventive alternative dispute resolution (ADR) procedures that entail the participation of a third party in facilitating the management of the conflict.

4.1 Exploring the Domestic Front in the Importing Market: Forging Alliances with the Private Sector

The option of exploring the domestic front in the importing country may be a useful approach for managing trade conflicts. This alternative would require one to forge a working relationship between the affected exporters and the local business community in the importing market in order to solve the problem. This approach may be particularly useful in at least two situations. First, in certain circumstances, attempting to resolve the matter in domestic instances may be politically or legally easier than pursuing negotiation or adjudication at the international level. Second, there may be situations where international negotiation or adjudication is not a viable option, owing to the lack of any applicable international trade agreement.¹⁶

Trade conflicts usually stem from the implementation of government measures. Thus, except in the field of voluntary technical standards - where the private sector of the importing country may have a major regulatory role - a trade conflict cannot be solved purely through bilateral negotiations between private sector representatives. Nevertheless, this approach may work in circumstances when the measure at stake provides local authorities with ample levels of discretion. In such situations, there are windows of opportunity for exporters to seek alliances with their buyers in the exporting market and use the political

weight of the latter to foster a lobby to dismantle the measure that led to the conflict.

Practice provides many examples where this approach has turned out to be quite useful for developing countries. For instance, in many developed countries the local industry tends to be dependent on the imports of certain inputs from abroad. This is the case of raw materials or even industrial inputs where the chain of production starts abroad. In these situations, local distributors of imported products or local manufacturers interested in getting the most efficient inputs for their production are natural allies in the promotion of free flows of trade.

On many occasions, these groups are the ones that become the most active advocates of promoting imports. They might help to exert important political pressure on the government to open markets or even use the domestic legal system to try to dismantle laws or regulations that are inconsistent with WTO law or other international trade agreements. This alternative is a particularly feasible option in legal systems that provide international agreements with direct effect. This is the case in some European and Latin American countries where the private sector can invoke international agreements in local courts just like national laws and regulations. The private sector in these countries can take advantage of the direct effect of international agreements and attempt to trump laws and regulations that are inconsistent with the international obligations assumed by the importing country. A case in point can illustrate this situation.

In a Latin American country the price for obtaining a licence to sell beer and spirits in bars varied according to the origin of the products to be sold. Bars that sold imported beer and spirits had to pay for more expensive licences than if they exclusively sold domestically produced beer and spirits. Clearly, this measure is a violation of GATT Article III. The important point to stress here is that, the measure was challenged by local importers in domestic courts on this

basis, and after finding that such legislation was inconsistent with WTO rules, the measure was left with no effect by the domestic courts.

To seek alliances with the domestic private sector and manage the conflict from within may be particularly useful in big and highly regulated markets where local players may master the political and legal intricacies of the internal market better than anyone else. It might be very convenient for developing country exporters to establish a close cooperative relationship, including joint production ventures, with business entities that are nationals of the exporting market and that are familiar with navigating its political and legal waters.

By establishing such an alliance, any conflict affecting exporters in developing countries will become a domestic problem for the importers in the importing market. Foreign exporters do not vote, but domestic importers and distributors do. As governments intuitively favour their own constituents, importing governments will find it easier to solve trade problems arising from their own nationals than those coming from foreigners.

4.2 Direct Government-to-Government Bargaining

In international trade direct government-to-government negotiation – both informal and formal – is the most frequently used technique to manage conflicts. Even those conflicts that escalate to the initial phase of dispute resolution under the DSU are frequently resolved directly by the parties concerned. The WTO has estimated that about half of the total cases filed under the DSU since 1995 have been settled in this manner.¹⁷

As explained in section 3 above, government-to-government bargaining usually entails rules-based negotiation. Accordingly, the dynamics will vary depending on whether or not the rules of the WTO and/or other international trade agreements containing dispute settlement procedures can be used as background for the negotiations. Indeed, the effectiveness of rules-based negotiation depends to a great extent on the implicit underlying threat of resorting to adjudication in the event the parties do not reach an agreement.

Box 7. Exploring the domestic front in the importing market: the case of the Indian Shrimp Industry Organized to Fight the Threat of Anti-Dumping Action

Excerpts from case study prepared by B. Bhattacharyya, and published in *“Managing the Challenges of WTO Participation: 45 Case Studies.”*

On 31 December 2003, the Ad Hoc Shrimp Trade Action Committee (ASTAC), an association of shrimp farmers in eight southern states of the US, filed an anti-dumping petition against six countries – Brazil, China, Ecuador, India, Thailand and Vietnam. The petition meeting statutory requirements, on 21 January 2004 the US Department of Commerce (DOC) announced the initiation of anti-dumping investigations against the six countries. The Department notified the International Trade Commission (ITC) of its decision on initiation. On 17 February 2004 the ITC announced its decision that there was a reasonable indication that the US shrimp industry was materially injured or threatened with material injury by imports, allegedly at less than fair value, from the six identified countries.

The trouble had started much earlier than December 2003. On 26 February 2002, Reggie Dupre, a Louisiana state senator, alleged that tainted farm-raised Asian shrimp was being diverted from Europe and dumped on the US market. Dupre was calling for a congressional investigation into food safety and unfair pricing, as local fishermen voiced concern that imports had depressed the prices they got for the locally harvested shrimp. By September 2002, shrimp industry representatives from eight southern states had gotten together to fight the case against imported shrimp from certain countries. On 22 October 2002,

representatives of the shrimp industry from the eight southern states voted to form the Southern Shrimp Alliance (SSA) to fight unfair competition from imported farm-raised shrimp from certain countries. There was, however, a basic problem. It was estimated that it might cost more than USD3 million in legal expenses to go for an anti-dumping petition.

There were also problems associated with divergent trade interests. Shrimp importers and distributors were afraid that a long-drawn-out battle would affect the supply of imported shrimp and adversely affect their business. Wally Stevens, president of the American Seafood Distributors Association, described how the salmon industry in Maine had filed an anti-dumping petition against Norway in 1990, hoping to stabilize prices. Twelve years after winning and spending up to USD10 million, salmon was selling at half the price prevailing at the time of the beginning of the dispute. “This is definitely not the right way to go. It consumes an immense amount of money and is not a long-term solution in terms of maintaining viability.” In a statement in January 2003, Stevens said that his organization, in support of ‘free and fair trade,’ would oppose any anti-dumping action by the SSA.

After the statement of the Commerce Minister on the possible threat to Indian shrimp exports to the US, the Indian Marine Products Export Development Authority (MPEDA), and the Seafoods Exporters Association of India (SEAI) went into action. To explore the possibilities of avoiding the anti-dumping action and, if necessary, to take legal action, a delegation comprising senior members of the SEAI went to Washington in September 2003, and after discussions in various quarters, decided to sign an agreement with the law firm, Garvey, Schubert, and Barer, to be the counsel in the US for the anti-dumping investigations. After returning to India, the SEAI informed its members through a circular letter that “Ms Lisbeth Levinson, a partner in the firm, will personally and exclusively handle our case.” The game plan worked out by the MPEDA and the SEAI was comprehensive. Among other aspects, it involved contacts with US trade lobbyists. The trade lobbyists in the US, such as the Consuming Industries Trade Action Coalition (CITAC), the Seafood Distributors Association and others, were against the imposition of anti-dumping duties on imported shrimp.

The US anti-dumping investigation against imported shrimp in the end could not be easily resolved. It even entailed a dispute submitted by Thailand, *United States – Measures Relating to Shrimp from Thailand* (DS 343). However, this case illustrates the importance of exploring forging alliances with the domestic private sector in the importing market to attempt to successfully manage the conflict.

Depending on the applicability of the rules that provide a framework for intra-governmental rules-based bargaining, three scenarios can be envisaged. First, there is the situation where neither the rules of the WTO nor of any trade agreement can apply to the particular measure causing the conflict. A second scenario would be when the rules of the WTO could apply; and a third situation would be when not only the WTO rules, but also a PTA could serve as background for the negotiations. The dynamics of the conflict management vary significantly

among these different scenarios, and each deserves a separate explanation.

First, there may be a situation in which neither the rules of the WTO nor any other trade agreement can serve as background for the negotiations. This might be because the importing country may not be a member to the WTO or a party to a PTA to which the exporting country is a party. Alternatively, the lack of reference rules to frame the negotiation may stem from a situation where the importing

country is a WTO member, yet the conflict arises from a measure to which the rules and disciplines of the WTO agreements do not apply – and, furthermore, there is not a PTA available to fill the regulatory vacuum. For instance, a WTO member may impose a new discriminatory measure favouring local service suppliers in a sector in which the country has not undertaken any commitment under the General Agreement on Trade in Services (GATS), and there is no PTA regulating trade in services.

In such a scenario, the management of a trade conflict becomes complicated, since negotiations depend completely on the goodwill of the importing party. Without any legal framework serving as a reference to the conflict, rules-based negotiation is difficult to envisage. Furthermore, in such a scenario, there is no pressure of the possibility of having a conflict elevated to international adjudication. In these circumstances, there are two possible avenues to manage a conflict.

One would be to foster government-to-government negotiations, not in the shadow of the law – as there would not be any applicable rule – but on the basis of a strategy emphasizing the political credit that a goodwill gesture by the importing country to solve the conflict could generate vis-à-vis the exporting country. Such a strategy would involve politicizing the dispute. Such politicization may entail many risks in the long term, including impairing the future bargaining position of the party that now is requesting the favour to dismantle the measure generating the conflict. Indeed, sooner or later, all favours have to be somehow reciprocated, and it would be difficult for the exporting party to anticipate what the other party may in the future request in return for solving the conflict of today.

Despite their potential disadvantages, negotiations on the basis of the good will of the parties used to be typical in the Latin American context in the 1970s and 1980s, when most intra-regional trade used to be governed exclusively by Partial Scope Bilateral Trade Agreements negotiated first, under the Latin

American Free Trade Association (LAFTA) and later under the Latin American Integration Association (LAIA). These agreements lacked a rule-oriented dispute settlement procedure, and the solution of trade conflicts had to rely on ministerial consultations. This approach rendered mixed results. In sum, in a situation where neither the WTO rules nor the disciplines of a modern PTA may serve as background for the negotiations, the exploration of the mechanisms available on the domestic front of the importing country may be more likely to succeed.

A second scenario for direct government-to-government bargaining is when at least the disciplines of the WTO can serve as background for rule-based negotiations. In this case, the exporting country has the advantage of relying on useful conflict management at an early stage to prevent a dispute. From the outset, if the importing country is a member of the WTO, there is ample opportunity to foster rule-based bargaining in different modalities.

The countries' permanent missions to the WTO in Geneva would be a first channel for fostering direct government-to-government talks to address the conflict. Although some least-developing countries may not have a strong presence there, the majority of the other WTO members do have representation in Geneva. Thus, in addition to direct negotiations in the capitals of the respective parties, it is always possible for missions from one's capital to travel to Geneva to address a matter on a preliminary basis with the permanent trade representative of another member. The WTO provides ample opportunities for informal exchanges between the parties at different levels, and a particular problem may be addressed at an informal meeting among technical officials or at a higher ambassadorial level.

If informal bilateral consultations turn out to be unsuccessful, the WTO also provides a useful institutional framework for managing a conflict. One of the key advantages of a multilateral forum like the WTO is the possibility for small countries to forge alliances with others

– including major trade heavyweights- to balance out the power asymmetries of acting individually.¹⁸ In particular, the affected government may raise the matter in one of the many specialized committees that regularly hold sessions in the WTO. This alternative may be particularly useful for smaller developing countries seeking potential alliances with other WTO members who might be affected by the same measure or even countries that may not be directly affected but have a systemic interest and are keen to set a precedent against certain types of measures or practices. In practice, rather than serving as a direct forum to manage the conflict, raising a concern against a measure in the context of a committee can be a useful way to test the level of support or opposition that such a measure may have among the various WTO members. Thus, for smaller developing countries, committees can serve as

useful instruments to identify potential allies to subsequently pursue joint direct government-to-government negotiations with the party applying the measure causing the conflict.

The third approach for fostering rule-based bargaining in the WTO context is to request formal consultations under Article 4 of the DSU. Technically, by the time formal consultations are requested, a conflict has already crystallized into a dispute; however, as explained in section 3 above, formal consultations are actually the last chance for the parties to prevent adjudication. Direct government-to-government bargaining in the phase of consultations pursuant to Article 4 of the DSU is one of the most frequent ways disputes are resolved in the WTO context. As previously discussed, approximately half of the cases initiated under the DSU are settled in this initial stage of the dispute resolution process.

Box 8. Combining the different approaches to manage a conflict: the case of Ethephon and pineapple exports from Costa Rica

Ethephon is a chemical product that is used as a regulator of plant growth and maturity. It is often used in the production of various crops, such as wheat, tobacco, coffee, cotton, and rice to help the plant's fruit reach maturity more quickly. Ethephon is also widely used by pineapple growers to spray mature-green pineapple fruits to de-green them and meet produce marketing requirements. To ensure safety for consumers, the EU Directorate General for Health and Consumers (DG SANCO) had set a maximum residue limit (MRL) for Ethephon in pineapples equivalent to 2mg/Kg.

Through information provided by European businesses potentially affected by the measure, in 2007 the Costa Rican authorities learned that DG SANCO was assessing the possibility to reduce the MRL for Etephon in pineapples from 2mg/Kg to a new MRL of 0.5 mg/Kg.

Being among the world's top exporters of pineapple, the Costa Rican government and private sector immediately started to assess the potential impact that such a potential MRL reduction might have on its exports to the EU. It was found that while major pineapple producers had technologically advanced production methods, and were thus able to monitor and ensure compliance with the new MRL, smaller producers lacked the sophisticated technology and know-how required to monitor such a small MRL. Accordingly, an intense capacity building program started to be implemented together with the private sector to provide small pineapple producers with infrastructure and techniques necessary to ensure compliance with the potential new MRL. Such a program would, however, take time and significant resources. Consequently, at the same time, the Ministries of Foreign Trade and Agriculture of Costa Rica together with the private sector started to develop a strategy to manage the conflict that entailed three different approaches.

First, the Costa Rican government embarked on direct negotiations with DG SANCO, aimed in particular at pursuing two key objectives. First, it sought to question the scientific

basis for the proposed new MRL and request the reconsideration of the new MRL proposed. And second, if the imposition of the new MRL could not be prevented, to request from DG SANCO the maximum time possible to enable Costa Rican producers to adjust for complying with the new measure.

The Costa Rican private sector would work together with their European importers – and also the producer of Ethephon that happened to be an European company – to explore all legal means to question the scientific basis of the new MRL as well as to lobby European member states who through specialized committees in Brussels would have to participate in the approval of the new measure.

Finally, , the Costa Rican private sector, working together with their European counterparts would lobby to request that European member states assess the situation on the basis of an additional independent scientific assessment of the merits of the new MRL.

After two years of arduous work, the strategy seemed to render results. In the end, the proposed reduction for the MRL from 2 to 0.05 mg/Kg for Ethephon in pineapples was not adopted.

This particular case study provides various key lessons regarding the management of trade conflicts. One of them is the importance of acting as early as possible. Had the affected parties waited for the adoption of the new MRL, it would have been extremely difficult to make the EU authorities withdraw the measure. Further, this case also illustrates the critical role that fluid and effective coordination between public and private sector play in successfully managing trade conflicts. This story also demonstrates the importance of exploring not only one, but also all possible approaches available to manage a conflict. In this example, all approaches were simultaneously implemented. Legal and political action was taken on the domestic front; direct government-to-government negotiation was pursued; and, it could even be argued that, preventive fact finding on ADR – through the scientific studies undertaken – was explored at the same time.

Regardless of the particular modality for direct government-to-government bargaining, the WTO framework – and the possibility for adjudication – is the most effective threat for promoting successful conflict management. From the perspective of an importing party, the impact of potential adjudication at the WTO is greater than in other venues. The quasi-global nature of the organization means that an adverse ruling at the WTO would have higher costs and a more persuasive effect when compared to an adverse ruling in a different forum with a more limited membership, such as in the case of a regional trade agreement.

A dispute brought to the WTO by a small country entails the possibility for the claim to be seconded by one or more members as either co-complainants or third parties. The possibility of

joint rules-based negotiation requested by more than one party may, at least in theory, increase the chances of success. It will be easier to attract the attention of a big importing member, and the potential opportunity cost for the importing member in case the conflict escalated into a dispute would increase. However, it also has to be noted that coordinating a joint strategy to tackle a trade conflict or dispute is easier said than done. Each country has its own internal political dynamics to which national negotiation teams must respond. Coordinating the management of a conflict or a dispute is then an arduous task that can also entail significant costs in terms of time, resources, and political “give and take” for the members of the coalition. Moreover, to settle the conflict, the importing member may provide a solution that may be acceptable to some members of the coalition but not to others,

leading in the end to a situation of additional conflict among the members of the coalition.

The experience of the *EC-Bananas* cases clearly illustrates the difficulties involved in attempting to manage conflicts and resolve disputes on the basis of coalitions. The adoption of the European Regime for the Import, Sale, and Distribution of Bananas affected the interests of many countries in different parts of the world, and not surprisingly, led to many panels and procedures, first under the GATT, and later in the WTO. Over the years, the coalition of members challenging the EC measures varied. The complainants and third parties in Bananas I, II and III were not exactly the same, and this was the result of the diversity of interests - which also evolved with time - existing among the multiple parties.

A third scenario for trade conflict management based on direct government-to-government bargaining is when in addition to the WTO rules, the parties involved in the conflict can also negotiate in the shadow of the rules and disciplines of an applicable PTA. Of the three potential scenarios addressed in this section, this may be the most favourable for a small country to foster swift management of a conflict and prevent an international trade

dispute. In addition to all the advantages of being a WTO member, being a member of a PTA provides the opportunity to foster effective non-judicial conflict management stemming from the institutional structures set up under those other agreements and the politics involved in their implementation.

After more than a decade of intense PTA negotiations, numerous countries are now placing more emphasis on how to properly implement and administer these agreements. In most Latin American countries, but also in Asia, countries' governments have established specialized institutional arrangements to properly administer PTAs. Departments of Administration of International Trade Treaties have been set up to pursue three fundamental objectives. These departments first coordinate all measures required to comply at the domestic level with the international obligations assumed by the state in its PTAs. Second, they oversee, together with the other trade partners, the proper implementation of all commitments related to the administration of the agreements, including attempts to solve all problems raised by the private sector in the process of PTA implementation. Third, such offices prepare regular reports on the evolution of trade and investment flows resulting from the implementation of the PTAs.

Box 9. Typical PTA Committees

- Trade in Goods
- Trade in Agriculture
- Sanitary and Phytosanitary Measures
- Rules of Origin
- Customs Procedures
- Technical Barriers to Trade
- Government Procurement
- Services and Investment
- Temporary Entry of Physical Persons
- Institutional matters
- Small and Medium Enterprises

Most PTAs have a relatively simple institutional structure. The highest decision-making instance is usually an Administrative Commission that is composed of political representatives of the governments of the signatory states. Most often, such political authorities are Ministers of Trade, who meet periodically to oversee the progress of the agreement.

The actual administration of the PTAs is usually handled by a virtual secretariat that includes a national section that represents each party of the agreement and is based at the respective ministries in the capital. Such a secretariat is often coordinated by the highest technical officials (Trade Directors) who respond to their respective political authorities (Vice Ministers and Ministers).

Each national section of the secretariat coordinates and oversees compliance with the tasks assigned to the diverse committees established by the treaty. Usually there are committees to deal with each of the major areas governed by the agreement, and they meet at least once a year to monitor the implementation of their respective chapter of the PTA.

The implementation of PTAs generates political dynamics that are conducive to early management of trade conflicts. This is because the political authorities of the parties meet on a periodic basis either at the ministerial or presidential level to monitor the progress of bilateral relations. This situation generates a dynamic in which the performance of the agreement is assessed regularly at summits. Political authorities need good news when they meet, and there is nothing worse than an unresolved conflict to dampen the goodwill that summits attempt to portray. These dynamics generate annual or biannual cycles of opportunity to solve problems related to the administration of the agreements.

To maximize the potential role of summits as catalysts to solve problems, government officials should take advantage of the administrative structures set up under the institutional framework of PTAs. Well before

the annual or biannual summit takes place, the committees and the meetings of directors of trade take care to iron out all the issues that will be dealt with by political authorities, making these processes very efficient conflict management mechanisms.

The management of the political cycle in the administration of PTAs can take place bilaterally or multilaterally, depending on the number of members to the agreement. In plurilateral agreements peer pressure is an additional mechanism that fosters an early solution to trade-related conflicts. For instance, in the context of the Central American Common Market, the parties agreed to set up a mechanism of peer review of trade barriers. Every six months when the pro-tempore chair of the integration scheme rotates and after prior consultation with their respective private sectors, representatives of the parties prepare a list of all the problems that at that particular moment are negatively affecting the free flow of trade in goods and services in the region. The list of measures is consolidated, published, and used as a basis to prepare a working program to be implemented during the following semester. At the end of this period, a report incorporating the results in the progress of solving those problems is submitted to Ministers. Those unmanaged conflicts at a technical level may be put forward for ministerial consideration, and if not resolved, the affected party may decide whether to elevate the conflict and invoke the available dispute settlement procedures.

Furthermore, some PTAs also provide institutional avenues for the private sector to become involved in the administration of the agreement. There are two main channels through which the private sector gets involved. First, prior to the meeting of each committee of the PTA, governments may consult with interested private sector representatives in order to prepare the agendas. Second, although not originally designed to handle conflicts or disputes, some committees do provide a platform where the private sector has a voice regarding the implementation of

the PTA. For instance, some agreements have committees on small and medium enterprises while others incorporate dispute settlement among businesses and professional services. Furthermore, other PTAs, in particular the Association Agreement between the European Union and the Central American countries also establish consultative committees for civil society and members of Parliament in order to provide these latter constituencies with a formal platform where they can express their views and discuss with governments those matters relevant to the implementation of the agreement.

4.3 Preventive Alternative Dispute Resolution: Managing Conflict with Facilitators

In addition to exploring the domestic front in the importing market and direct government-to-government bargaining, another possible approach to manage trade-related conflicts is to explore the use of preventive ADR. ADR usually involves the intervention of a third party to assist the parties to the dispute in negotiating a settlement. The basic role of the third party is to remove the barriers to a negotiated solution.

Box 10. ADR in the DSU. Article 5. Good Offices, Conciliation and Mediation

1. *Good offices, conciliation and mediation are procedures that are undertaken voluntarily if the parties to the dispute so agree.*
2. *Proceedings involving good offices, conciliation and mediation, and in particular positions taken by the parties to the dispute during these proceedings, shall be confidential, and without prejudice to the rights of either party in any further proceedings under these procedures.*
3. *Good offices, conciliation or mediation may be requested at any time by any party to a dispute. They may begin at any time and be terminated at any time. Once procedures for good offices, conciliation or mediation are terminated, a complaining party may then proceed with a request for the establishment of a panel.*
4. *When good offices, conciliation or mediation are entered into within 60 days after the date of receipt of a request for consultations, the complaining party must allow a period of 60 days after the date of receipt of the request for consultations before requesting the establishment of a panel. The complaining party may request the establishment of a panel during the 60-day period if the parties to the dispute jointly consider that the good offices, conciliation or mediation process has failed to settle the dispute.*
5. *If the parties to a dispute agree, procedures for good offices, conciliation or mediation may continue while the panel process proceeds.*
6. *The Director-General may, acting in an ex officio capacity, offer good offices, conciliation or mediation with the view to assisting Members to settle a dispute.*

Throughout the ADR procedures, the parties retain control of the process and preserve their right to approve or refuse a proposed settlement or even to withdraw from the ADR process entirely. The specific methods by which a third party intervenes to facilitate the settlement of a dispute varies widely depending on the nature of the dispute in question, the interests and needs of the parties, and the mandate, talents, and resources of the intervener. As a result, ADR does not offer a single 'magic formula' to settle a dispute. ADR techniques are most often used to deal with conflicts that have evolved into disputes. However, that does not always need to be the case. ADR techniques are processes that could also be used to solve problems at the conflict management stage well before the conflict has evolved into a dispute, thus the coined term "preventive methods of ADR."¹⁹

To date, relatively little attention has been focused on preventive methods of ADR. Furthermore, the role of ADR in international trade, both as a dispute prevention or dispute resolution technique, has been extremely limited. Indeed, Article 5 of the DSU provides ADR techniques as good offices, conciliation, or mediation. However, in almost two decades of practice under the DSU, its use as a conflict management technique has been extremely limited.

Further research may be needed to reveal the factors behind this trend. However, a tentative reason that could explain the infrequent use of preventive ADR in the management of trade conflicts may stem from the fact that the WTO is inherently a negotiation forum where governments embark on bargaining and dialogue on a daily basis. Within this context, the need for an intermediary bridging or facilitating the communication between the parties involved in a conflict may be the exception rather than the rule.

Further, as previously explained, a point to stress is that by the time a country requests consultations under Article 4 of the DSU, it is often because informal direct negotiations have failed to resolve the conflict. Accordingly, by that time, the affected country is determined

to pursue dispute resolution, and within that context, the prospect of obtaining a binding ruling by the panel, Appellate Body, and DSB may seem a more attractive prospect than obtaining a non-binding settlement through ADR pursuant to Article 5 of the DSU. Despite its potential shortcomings as a dispute resolution method, the potential benefits of preventive ADR in the early conflict management phase should be seriously considered. In certain circumstances, a conflict may be managed more expeditiously with the assistance of a third facilitator, and there is no reason why preventive ADR should not be more frequently used. It may be that over time, as conflict management systems evolve, preventive methods of ADR will become increasingly important.

The parties to a conflict might choose among a variety of preventive ADR techniques. Which particular method of conflict management one chooses may depend on the particular circumstances of the case. Furthermore, the parties may opt to use one or a combination of preventive ADR mechanisms. The main types of preventive ADR that may be more suitable in the context of international trade conflict would be mediation²⁰, early neutral evaluation, and fact finding.

Mediation is a rather informal process of facilitated negotiation that involves the assistance of a third party (the mediator) in conflict resolution between parties. At the request of the disputing parties - and subject to terms and conditions specified by them - mediators intervene in the conflict in order to assist in working out a viable solution. The role of the mediator is to bring together the parties involved in the conflict and assist them in compromising and reaching a mutually agreed solution. The involvement of the mediator may vary, ranging from fostering dialogue between the parties, to effectively proposing and arranging a workable settlement to the problem.

Early neutral evaluation involves an evaluator, usually an attorney or other expert with specific knowledge of the subject matter of a case, who hosts an informal meeting with

clients and counsel. At such a meeting, both sides involved in the conflict present their evidence and arguments, which the evaluator uses to identify areas of agreement and issues of divergence to focus on. The evaluator then writes a confidential evaluation of the prospects of a case and offers to present it to the parties involved. Should the parties not arrive at a successful settlement, the evaluator may assist them in devising a plan for expedited exposure, assess realistic adjudication costs, and explore the feasibility of a follow-up session for concluding a successful settlement of a case.²¹

Early neutral evaluation may be particularly useful for conflicts that have the legality of implemented measures as the central point of discussion. In such situations, an early neutral assessment as to whether the particular measure causing the conflict may violate the rules of the WTO or a PTA becomes particularly relevant. In practice, formal neutral evaluation has not been common in the trade context. Albeit outside the context of an ADR procedure and in a completely informal way, the Advisory Centre on WTO law has also played an important role in advising WTO members on the consistency of proposed or implemented measures with the WTO Agreement.

Fact finding is a procedure in which the parties submit contested facts like technical, scientific, accounting, or economic information to an expert for a neutral evaluation. The key objective of such a procedure is to gain an impartial assessment about the facts of an issue in order to prevent the escalation of disputes. Where it has been used – in contexts other than trade – fact-finding proceedings usually end with a report that is limited to the facts at issue and does not offer recommendations to the parties. The parties must then determine what legal and practical effect the report will have.

In the international trade context, just as with any other kind of ADR, fact finding has not been frequently used as a conflict management tool. However, it is a technique that may be particularly useful in factual-intensive conflict. These situations might be those related to trade remedies where certain factual findings are

critical to determine whether a safeguard, a countervailing duty, or an antidumping duty can legally proceed or to conflicts arising out of SPS or technical barriers to trade (TBT) measures where scientific evidence may be critical to determine the compatibility of a particular measure with the WTO Agreements. A critical aspect to ensure the success of this technique, however, would be for the parties to agree on a single expert to carry out the fact-finding process. The experience in the WTO dispute settlement processes, where pursuant to Article 13 of the DSU, the panel and the parties can seek factual or scientific information from experts, shows the problems that can arise when each party provides scientific evidence that contradicts each other, often complicating rather than facilitating the solution of the dispute.

Given that direct government-to-government negotiation tends to be the dominant conflict management technique used in international trade, one might question the merits of considering ADR in this context. Although in practice ADR has not yet been widely used, two important considerations make preventive ADR an option worth considering for managing trade-related conflicts.

First, preventive ADR may be an effective means to provide trade officials with a “political cover” – vis-à-vis their domestic constituents – to voluntarily amend or dismantle the measure causing the conflict at a stage well before adjudication. Second, preventive ADR could be an effective way for smaller developing countries to engage the authorities of bigger trade partners in order to solve the conflict at an early stage and overcome the lack of attention to their grievances.

Through ADR, an external expert may act as an independent referee enabling the parties to have an objective and accurate assessment about the potential outcome of the conflict in the event it is escalated into a full-blown dispute and resolved by adjudication. External experts therefore play a fundamental role providing “external cover” to government authorities. Indeed, as previously explained,

in the context of a trade conflict, government officials may be genuinely interested in solving the matter. However, in practice they may be unwilling or unable to do so because of the potential political cost they face domestically as a result of assuming the decision to solve the conflict.

Preventive ADR techniques can play this fundamental role of a political shield for the agencies involved in solving the conflict. This is the result of the assessment of the conflict being made by the independent expert. Such a third party would provide objective advice regarding the costs and benefits of striking a settlement and solving the conflict relative to the costs and benefits of proceeding to litigation.

For the external experts to properly provide political cover for the government agencies involved in the conflict, their assessment should provide clarity regarding two particular aspects. First, the assessment would have to clearly indicate the likely existence of a violation of the obligations of the applicable trade agreement. Second, the assessment should also indicate with sufficient clarity the likely legal and economic consequences if the conflict is not resolved and allowed to escalate into a

dispute with consequent adjudication. In sum, the role of the external expert is to provide a clear and credible assessment of the opportunity cost that the parties - in particular an importing country - may face if an agreement is not reached at the conflict management stage. The higher the opportunity costs for the state to proceed to litigation, the more likely it is that government agencies will be motivated to settle, and the easier it will be for them to sell the mutually agreed solution to their domestic constituencies.

The inclusion of preventive ADR may also be an effective way for smaller developing countries to engage the authorities of bigger trade partners in trying to solve the conflict at an early stage and overcome the problem of lack of attention to their grievances. Although ADR cannot impose a mutually acceptable solution to the parties because of its voluntary nature, treaties could make the consideration of the use of ADR compulsory and thus force an importing party to pay attention to a request solicited by the exporting country. This approach has recently been incorporated into the Association Agreement between the EU and the Central American countries. This is further described in Box 11 below.

Box 11. Mediation Mechanism in the Association Agreement between the EU and the Central American Countries

This mediation mechanism is totally independent from the dispute settlement procedures established by the Agreement. The mediation mechanism shall apply to non-tariff measures which adversely affect trade in goods between the Parties. Thus, measures affecting trade in services or dealing with other chapters such as sustainable development, regional economic integration or institutional provisions will not be covered by the mechanism. The justification for limiting the mechanism to conflicts arising from trade in goods derives from the nature of the trade between the Central American countries and the European Union. Most of Central American exports are in primary products, and the typical trade problems affecting the exports to the region derive from the strict sanitary and phytosanitary measures (SPS) or technical regulations and standards required to enter the European market. Thus, the main purpose of the mechanism is to find mechanisms to make European authorities dedicate attention to jointly finding creative solutions to deal with these issues in an expedited manner. That is why the Agreement provides for a compulsory and quasi-automatic procedure, attempting to facilitate the operation of the mediation as much as possible.

Prior to the selection of the mediator, the Parties shall endeavour in good faith to reach an agreement through direct negotiations. If the matter is not resolved within this period, the Parties shall then appoint the mediator.

The Parties shall agree on the mediator by consensus or by lot if no agreement is possible within 15 days. For such purposes, each Party shall establish a list of at least 3 persons that are not nationals of that Party. If a Party fails to establish the list or to select one name from the other Party's list, the Chair or the Chair's delegate shall select the mediator by lot from the list provided by the other Party.

Unless agreed otherwise, the mediation procedure shall take place in the territory of the Party to which the request was addressed. In order to fulfil of his duties, the mediator may use any means of communication with the Parties. The mediation shall normally be completed within 60 days from the date of the appointment of the mediator.

Where the Parties have agreed to a solution to the trade obstacles caused by the measure subject to this procedure, each Party shall take any action necessary to implement said solution without undue delay. The implementing Party shall regularly inform the other Party, as well as the Association Committee (AC) in writing of any steps or measures taken to implement the mutually agreed solution. This obligation of informing the other Party and the AC shall cease to exist once the mutually satisfactory solution has been adequately and completely implemented.

5. PRACTICAL RECOMMENDATIONS FOR DEVELOPING COUNTRIES

5.1 Measures to be Implemented at a Domestic Level

To enable developing countries to use and maximize the benefits of conflict management techniques, a series of steps should be undertaken, at the very least, on the following fronts:

- Capacity building for government officials;
- Institutional structures enabling a proper administration of trade agreements, and;
- Design and implementation of information and communication protocols with the private sector.

Regarding capacity building for government officials, efforts should be geared towards three fundamental areas. First, officials should become familiar with the basic notion of conflict management and how it interacts with dispute resolution. Second, in order to be fully capable in undertaking rules-based negotiations with their trade counterparts, officials should also master the rights and obligations derived from the WTO Agreements and PTAs. They should, in particular, be updated on recent case law derived from the implementation of relevant treaties. Third, government officials should also become familiar with the administration of trade agreements and how to maximize the use of the various committees and working groups that are usually part of the institutional structure of these treaties. They should also know how to design and administer domestic structures to enable the proper administration of trade agreements. Several of these aspects have been already covered by trade capacity building programs implemented by various international agencies. Consequently, it is not necessary to start from scratch, but rather build on the work already done.

The establishment of institutional structures enabling the proper administration of trade agreements is a second area that is important for fostering the use of conflict management

techniques. This study has reviewed some successful experiences in various developing countries, and again, this is an area where some capacity building has already been undertaken. The important point to stress here is that in addition to capacity building, it is paramount that action is taken at an administrative level and that governments are provided with specialized authorities legally authorized to properly administer trade agreements.

Authorities should have the necessary legal resources and knowledge to coordinate with other government agencies. This includes developing the faculties to oversee effective compliance with mutually agreed settlements to conflicts. In addition to having legal authority to properly administer trade agreements, these offices of administration of trade agreements (OATAs) should also have personnel dedicated to monitor and follow up on the commitments undertaken by a country in treaties. Experiences in several countries of Latin America demonstrate that it is not necessary to have big teams to achieve this objective. At least in developing countries, a small but dedicated group of government officials should be enough to do the job.

The tasks of the OATAs include the maintenance of a fluid and regular channel of communication with the competent authorities in the main export markets where most of the problems are likely to arise. To this end, and to the extent it is possible, the country's permanent representation before the WTO could play an important role. The OATAs will also be primarily responsible for implementing information and communication protocols with the domestic private sector so that the latter can receive assistance from home trade authorities.

A third critical area for fostering the use of conflict management techniques involves creating information and communication protocols with the domestic private sector. Such systems should pursue at least two

fundamental objectives. First, the private sector should know and have access to the OATAs and understand the offices' tasks and the kind of assistance they can provide in solving their trade-related problems. Second, the private sector should have confidence that national authorities are capable of defending interests abroad. This second aspect is particularly critical for various reasons. For instance, a pragmatic advantage of gaining the confidence of the private sector regarding the capacity of the government to deal with a conflict is that it will be easier for businesses and governments to join forces and articulate a coordinated strategy to deal with the matter. Such a strategy may entail exploring the domestic front in the importing country and getting financial and human resources to contribute to manage the conflict more effectively.

The private sector should be involved in the regular implementation of trade agreements on a routine basis and have the independent ability to identify specific problems when they arise. National entrepreneurs should understand the normal operation of the administration of the agreements through discussion of annual plans and regular presentations. They should also participate, through previous consultations in their capitals or in the modality of side rooms, in the regular meetings of committees and other higher administrative meetings of the international agreements.

5.2 Measures to be Implemented at the International Level

On the domestic front most of the recommendations are geared towards generating greater capacities of developing countries to take advantage of trade agreements and foster effective management of trade conflicts. At the international level, developing countries must be able to design and implement efficient strategies to engage their trade counterparts in positive processes in the early management of conflicts. In this regard, there are three specific steps that developing countries could undertake.

A first fundamental step would be to foster greater activism of the country in the institutional framework of the WTO. On the basis of a list of trade priorities for the country, which should be prepared in consultation with the private sector, governments from developing countries should promote a constant, informed, and constructive participation in the different committees and bodies of the WTO. Constructive participation cannot be overstressed.

Either by acting individually or through a group, smaller developing countries should understand the importance of attracting international attention to positive and constructive ideas rather than exclusively relying on criticism of the *status quo*, no matter how accurate and fair such criticism may be. In a multilateral setting where so many varied interests interplay and where a myriad of problems have to be dealt with, it is important that smaller developing countries are noticed for the good and innovative ideas and solutions they can provide to bridge the polarized positions that often paralyze the international trade agenda, instead of contributing to the bag of complex problems to be dealt with.

By increasing their positive visibility at a multilateral level, it will be easier for smaller developing countries to be taken into serious consideration in negotiations, as well as in all matters related to the administration of the WTO Agreements, including dispute resolution and conflict management. Finding ways to support a more active participation by developing countries at the WTO is an area of cooperation where international agencies have already undertaken significant efforts. Thus, rather than reinventing the wheel, better positioning for conflict management should be thought of as a by-product of active and constructive participation at the WTO.

A second critical step for developing countries to take on the international front, with a view to maximizing their chances for the early management of conflicts is to take full advantage of the implementation of PTAs. In this study we have explained the institutional avenues

these agreements provide to channel conflict management as well as the opportunities derived from the periodical political cycles in the implementation of PTAs.

Similar to the dynamics on the multilateral front, smaller developing countries should be aware of the importance of maintaining the attention of their bigger trade counterparts, while continuing to generate a positive working environment. From the perspective of larger economies, trade with a smaller developing partner represents only a fraction of their trade with the rest of the world. Governments of developing countries must therefore find creative ways to increase the political value those PTAs have for their counterparts. From the perspective of the bigger trade partner, it is very likely that the negotiation of these agreements was motivated by non-economic policy objectives in the first place. Smaller developing countries should understand those non-economic considerations and attempt to demonstrate that the implementation of the respective PTAs is in fact contributing to pursue those policy objectives.

By so doing, the PTA's implementation agenda may become an item of interest for the bigger country, and developing countries minimize the risk of larger traders' public agencies looking at PTA committee meetings and working groups as just a formality or bureaucratic hassle to

be dealt with as quickly as possible. Using the press to increase the visibility of the value of the implementation of the PTAs and taking the initiative to foster an engaging implementation agenda (involving the acceleration of tariff liberalization in some non-sensitive products or services, and/or the promotion of the convergence of PTAs for instance) are just some ways to create value for the parties and maintain the positive attention and working environment that can contribute to the early and successful management of trade conflicts.

Last, but not least, a third step that developing countries should consider undertaking is the active promotion of preventive ADR to manage trade conflicts. For ADR to live up to its potential dispute prevention function, it should have a compulsory element in obliging the responding party to react and provide a justified reaction in the case that an ADR petition is rejected. In this regard, ADR techniques envisaged in Article 5 of the DSU would not necessarily suffice.²² Developing countries should consider the inclusion of specific clauses in their PTAs requiring ADR slike mediation, early neutral evaluation, or fact finding, including as previously referred to, the compulsory element. The novel mediation mechanism for trade conflicts included in the European Union Central American Association Agreement is an example illustrating this approach.

6. CONCLUDING REMARKS

After almost two decades of practice, the consolidation of adjudication as an effective means to deal with international trade disputes under the DSU of the WTO has developed into a very visible and tangible dispute settlement system. In addition, it has enabled the gradual development of rules-oriented conflict management as an innovative approach for dealing with problems arising every day in international trade transactions.

Unveiling the notion of conflict management as a complement for dispute resolution in international trade is important for at least four fundamental reasons. First, conflict management can become an efficient way to foster swift and low-cost solutions for trade-related problems affecting small developing countries. Such an outcome may be particularly important for smaller, trade-dependent economies where export businesses often tend to be made up of micro and small businesses that may not be able to survive in the face of even temporary restrictions on their exports during a dispute resolution period.

Second, from a systemic perspective, conflict management maximizes the benefits of a rule-oriented dispute settlement system. Most early management of conflicts will likely entail the use of rules-based negotiation to reach a mutually acceptable solution to the matter. This way, conflict management can become an instrument to apply international trade law without incurring the costs of litigation.

Third, the promotion of conflict management techniques strengthens the domestic institutional structures necessary to administer international trade agreements. This is particularly true for developing countries. Such structures foster transparency and better regulatory coherence among the various agencies involved in the direct or indirect implementation of international rules and disciplines. From this perspective, promotion of conflict management not only

contributes to solving particular trade-related problems vis-à-vis external trade partners, but also promotes better trade-related governance at the domestic level.

Fourth, understanding the dynamics of conflict management in international trade helps to illuminate the little use that ADR has traditionally had as a conflict resolution technique in the field of international trade. In particular, this study helps to illustrate the limited use of ADR methods included in Article 5 of the DSU during its almost two decades of existence. Conflict management unveils the conditions under which the use of ADR could become a more effective means to prevent full-blown disputes.

Given the various advantages of conflict management techniques as a means for preventing trade-related disputes, institutions dealing with trade capacity building should incorporate the notion of conflict management in their working agendas. Most of the tasks to be undertaken to enable developing countries to benefit from this innovative approach are measures to be implemented at a domestic level and would not entail significant costs.

Finally, it is worth noting that international trade agreements are not ends in themselves, but rather are a means to pursue a series of broader policy objectives. One of those objectives is to provide entrepreneurs and firms involved in international economic activity the long-term certainty and predictability that is essential to international business. Dispute settlement is just an instrument that contributes to that end. This is done through two important effects of adjudication. First, dispute settlement clarifies the breadth and content of trade rules and disciplines. Second, it puts these rules into practice by generating effective compliance. From this vantage point, the basic rationale of litigation is then to resolve problems. Conflict management has the same purpose, but minimizes the time and costs associated with litigation.

ENDNOTES

- * Busch *et al* (ICTSD, 2008), “Does Legal Capacity Matter? Explaining Dispute Initiation and Antidumping Action in the WTO,” ICTSD Project on Dispute Settlement, Series Issue Paper No. 4.
- 1 Formal consultations under Article 4 of the DSU often represent the last step before a dispute is elevated to adjudication. Once panel proceedings are underway, direct informal negotiations have proven to be the most frequent method by which parties reach a settlement. As the WTO is inherently a negotiation forum, there is rarely the need for an intermediary to bridge the communication among the parties to the dispute. These points will be further developed in section 3.
- 2 This theoretical framework, developed over the last two decades, helps to understand the origins, dynamics and different approaches to resolve disputes arising in all levels of human interaction. Here it is adapted to the context of international trade. DSD finds its origins in the movement that evolved during the 1980s in the US that promoted the use of ADR techniques to solve domestic disputes. DSD is not a dispute resolution methodology itself. “Rather it is the intentional and systematic creation of an effective, efficient, and fair dispute resolution process based upon the unique needs of a particular system.”; see Franck S. (2007) “Integrating investment treaty conflict and dispute settlement design,” *Minnesota Law Review*, Vol. 92, 161-230
- 3 Costantino, C. and Sickles-Merchant, C. (1996) *Designing Conflict Management Systems*, San Francisco: Jossey-Bass, p. 5.
- 4 Smith, S. and Martinez, J. (2009) “An Analytic Framework for Dispute Systems Design,” *Harvard Negotiation Law Review*, Vol. 14, pp. 123-169.
- 5 For a detailed analysis on the political economy affecting the decision of developing countries whether to submit a claim under the WTO dispute settlement procedures, see Gregory, S. C. and Meléndez-Ortiz, R. (eds.) (2010) *Dispute Settlement at the WTO, International Centre for Trade and Sustainable Development ICTSD*, Cambridge University Press.
- 6 TUri, W, Brett, J. and Goldberg S. (1993) *Getting Disputes Resolved: Designing Systems to Cut the Costs of Conflict*, The Program on Negotiation at Harvard Law School, Cambridge, Massachusetts, p. 7.
- 7 Source: Interview of the author with various Central American negotiators participating in the DR-CAFTA negotiations.
- 8 In this regard, see “Managing the Challenges of WTO Participation: 45 Case Studies”, publication of the WTO available at: http://www.wto.org/english/res_e/booksp_e/casestudies_e/casestudies_e.htm (Last visited: 17/04/13).
- 9 Source: WTO. Data available at: http://www.wto.org/english/tratop_e/dispu_e/dispu_agreements_index_e.htm?id=A6#selected_agreement (Last visited: 17/04/13).
- 10 See *EC - Measures concerning meat and meat products*, WT/DS26 and WT/DS48, and Appellate Body Report AB-1997-4.
- 11 Paradoxically, as is further explained in subsection 3.2.2 below, the little relative weight of the exporting country may also make the conflict invisible or irrelevant for the authorities in the importing country, preventing engagement of the latter in the management of the conflict.

- 12 See “Tratado de Libre Comercio entre Costa Rica y México: Una evaluación a diez años de su vigencia (1995-2004),” Ministerio de Comercio Exterior de Costa Rica, *mimeo*, available at: www.comex.go.cr (Last visited: 17/04/13).
- 13 Mexico has submitted claims against Guatemala in *Guatemala - Antidumping Investigation Regarding Portland Cement from Mexico* (DS60), and *Guatemala - Definitive Antidumping Measure on Grey Portland Cement from Mexico* (DS 156). Guatemala has submitted claims against Mexico in *Mexico-Certain Pricing Measures for Customs Valuation and Other Purposes* (DS 298) and *Mexico-Antidumping Duties on Steel Pipes and Tubes from Guatemala* (DS 331).
- 14 It might be the case that the challenged measures are decades old and had been enacted in a very different historical context. In this situation, the interest groups that generated the promulgation of the measure no longer exist. Clearly, in such a scenario it would be much easier to convince the regulatory authorities to modify or dismantle a measure, since such action may not entail any political cost for the government.
- 15 Confidential interview of the author with a government official accredited before the WTO.
- 16 This might be the case where the country implementing the measure is not a member of the WTO and there is no other applicable international trade agreement. It might also be the case when the measure that is causing the conflict is clearly compatible with the applicable agreement, the matter under conflict is not well suited to be submitted as a complaint under the DSU, or when it is also clear that the matter would fall beyond the jurisdiction of any applicable dispute settlement procedures.
- 17 “WTO disputes reach 400 mark”: WTO Press Release, Press/578 6 November 2009, available at http://www.wto.org/english/news_e/pres09_e/pr578_e.htm (Last visited: 17/04/13).
- 18 Many disputes brought under the DSU illustrate this point. *European Communities - Regime for the Importation, Sale and Distribution of Bananas* (DS27) (*EC-Bananas III*) may be one of the cases that illustrate how the multiple, and not always convergent interests of many small developing countries can be amalgamated in the context of disputes under the multilateral trade system. This dispute involved 5 complainants, a multi-member respondent, and 25 third parties.
- 19 Costantino, C. and Sickles-Merchant, C. (1996) *Designing Conflict Management Systems*, San Francisco: Jossey-Bass, p. 38.
- 20 Both doctrine and Article 5 of the DSU make reference to mediation and conciliation as distinctive ADR techniques. They are, however, very similar. The main difference tends to be the level of flexibility of the process, leading some to call conciliation informal arbitration, while mediation leaves the mediator with a more flexible role to be determined by the parties.
- 21 Smith, S. and Martinez, J. (2009) “An Analytic Framework for Dispute Systems Design,” *Harvard Negotiation Law Review*, Vol. 14, pp. 123-169.
- 22 Article 5 of the DSU seems to presuppose that for ADR to apply a dispute must already exist. For the reasons explained in this study, the scenario under which ADR is likely to work is in its preventive function, that is, in the conflict management phase, rather than as a dispute resolution mechanism. It could be argued, however, that nothing in the DSU precludes the parties from voluntarily invoking Article 5, even before requesting consultations under Article 4. Nevertheless, another problem with ADR as provided by Article 5 of the DSU is that it is explicitly stated in its text that conciliation, mediation, and good offices are completely voluntary, and accordingly, there is no obligation by the responding party to even react to a solicitation by the complainant.

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