Building Legal Capacity for a More Inclusive Globalization

Barriers to and Best Practices for Integrating Developing Countries into Global Economic Regulation

Edited by Joost Pauwelyn and Mengyi Wang

A CTEI book

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Preface

International economic law in its broadest sense, from basic trade agreements to sophisticated regulatory regimes, develops gradually in the wake of deepening economic integration. Led at first by technological improvements in transport which reduced the costs of transporting goods, and later by improvements in communications which facilitated cross border investment, economic integration is likely to increase as digital technology evolves.

Developing countries are party to a multitude of international agreements in the field of trade, investment and economic cooperation. The negotiation, implementation and settlement of disputes under these treaties are increasingly complex. To actively engage in and benefit from these regimes and to have a voice, developing countries – as well as smaller stakeholders in developed countries – need to build legal capacity. Capacity building to benefit from these rules is essential to making globalization inclusive.

As economic integration deepens and global economic regulation continues to evolve, making a way through this maze becomes an art. How to build capacity with limited resources is the main question addressed by the contributors to this book. Capacity building in this area is not a project with an end in sight – the gap between those that are knowledgeable and those that need to catch up may even grow, so the wealth of insights gathered in this book will be useful for some time to come.

This book is a direct output of the QNRF-supported research project Legal Innovation to Empower Development; however, it had its genesis at an incubator workshop on Technical Cooperation and Capacity Building in International Economic Law, Negotiations and Dispute Settlement, supported by the Swiss Network for International Studies, held at the Graduate Institute in 2014.

In addition to the contributors to this book, a number of people have played a role in ensuring the success of the project. These include Fadi Makki, Sarah Mathew and Valbona Zenku at Georgetown Qatar; Talal Abdulla Al-Emadi, Francis Botchway, Rafael Brown and Jon Truby at Qatar University; Richard Baldwin, Ioana Motoc, Florencia Sarmiento and Angelica Zanninelli at the Graduate Institute; Pieter Gunst, President and Co-Founder of Legal.io; and seminar participants at the workshops on capacity building held in Doha and Geneva.

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Abbreviations

ACWL	Advisory Centre on WTO Law
AfCFTA	African Continental Free Trade Area
AGOA	African Growth and Opportunity Act
AMS	Aggregate Measurement of Support
AOA	Agreement on Agriculture
APJ-SLG Law Offices	AP & J Chambers and the Strategic Law Group
ARASFF	ASEAN Rapid Alert System for Food and Feed
ASEAN	Association of Southeast Asian Nations
ASTIP	Agricultural Science and Technology Innovation Program
BIT	Bilateral Investment Treaty
CARICOM	Caribbean Community
CDP	Committee for Development Policy
CETA	Canada-EU Comprehensive Economic and Trade Agreement
CFTA	Continental Free Trade Area
CIIPC	Centre for Innovation, Intellectual Property and Competition
COMESA	Common Market for Eastern and Southern Africa
Cotton-4 or C-4	Benin, Burkina Faso, Chad and Mali
CPTPP	Comprehensive and Progressive Agreement for Trans-Pacific Partnership
CSIEL	Chinese Society of International Economic Law
CSO	Civil Society Organisation
CTD	Committee on Trade and Development
CTIL	Centre for Trade and Investment Law
CUPL	China University of Politics and Law
CWS	Centre for WTO Studies
DDA	Doha Development Agenda
DFID	Department for International Development
DSB	Dispute Settlement Body
DSU	Dispute Settlement Understanding
DTL	Department of Treaty and Law

EAC	East African Community
EAS	East Africa Standards
EIF	Enhanced Integrated Framework
ELSA	European Law Students' Association
EU	European Union
FAO	Food and Agriculture Organization
FDI	Foreign Direct Investment
GAP	Good Agricultural Practices
GATS	General Agreement on Trade in Services
GATT	General Agreement on Tariffs and Trade
GCC	Gulf Cooperation Council
GNLU	Gujarat National Law University
GPA	Government Procurement Agreement
GSP	Generalized System of Preferences
ICAO	International Civil Aviation Organization
I-CID	International Advisory Centre for Investment Disputes (proposed)
IDEP	African Institute for Economic Development and Planning
IELPO	International Economic Law and Policy
IIA	International Investment Agreement
IIFT	Indian Institute of Foreign Trade
IPFSD	Investment Policy Framework for Sustainable Development
IPoA	Istanbul Program of Action
IPR	Intellectual Property Right
ISDS	Investor State Dispute Settlement
ITA	Information Technology Agreement
ITO	International Trade Organisation
JTN	Jincheng, Tongda & Neal
KWM	King & Wood Mallesons
LAS	League of Arab States
LATAM	Latin America
LDCs	Least-Developed Countries
LL.M.	Latin Legum Magister
MFN	Most-Favoured Nation
MOFCOM	Ministry of Foreign Commerce

MOFTEC	Ministry of Foreign Trade and Economic Cooperation
NAMA	Non-Agricultural Market Access
NGO	Non-governmental organisation
NLSIU	National Law School of India University
NLU	National Law University
NSBs	National Standards Bureaux
NTB	Non-Tariff Barrier
OECD	Organisation for Economic Co-operation and Development
PPM	Process and Production Method
PPP	Public-Private Partnership
PTA	Preferential Trade Agreement
R&D	Research and Development
RTA	Regional Trade Agreement
SADC	Southern African Development Community
SMEs	Small- and Medium- sized Enterprises
SPS	Sanitary and Phytosanitary Measures
STCs	Specific Trade Concerns
STDF	Standards and Trade Development Facility
SWUPL	Southwest University of Political Science and Law
TBT	Technical Barriers to Trade
TFA	Trade Facilitation Agreement
TFS	Trade Facilitation in Services
TMEA	TradeMark East Africa
TPP	Trans-Pacific Partnership Agreement
TradeLab	A global network of students, economists and legal practitioners seeking to empower countries and small stakeholders in effectively participating in and taking the full advantage of the global trading system.
trapca	Trade Policy Training Centre in Africa
TRIPS	Agreement on Trade-Related Aspects of Intellectual Property Rights Agreement
UAE	United Arab Emirates
UNCTAD	United Nations Conference on Trade and Development
UNDP	United Nations Development Programme
UNECA	United Nations Economic Commission for Africa
UNIDO	United Nations Industrial Development Organization

US	United States
USTR	United States Trade Representative
VSSLs	Voluntary Sustainability Standards and Labels
WCA	West and Central African countries
WCO	World Customs Organization
WEMA	Water Efficient Maize for Africa
WHO	World Health Organization
WTO	World Trade Organization
WTO Chairs	WTO Chairs Programme

Building Legal Capacity for a More Inclusive Globalization: Introduction and Summary of Findings

Joost Pauwelyn and Mengyi Wang

The global economy is currently at a critical moment. On the one hand, trade and investment rules have proliferated to continuously intensify international economic cooperation. World Trade Organization (WTO) rules and case law, evolving principles in preferential trade agreements (PTAs) as well as contracts, laws, and international agreements to stimulate or protect foreign direct investment (FDI) are increasingly complex. On the other hand, the benefits of international economic cooperation have not accrued evenly to all stakeholders: their participation in the system is visibly unbalanced, both among economies and among stakeholders within individual economies. These disparities are manifest at both the international and domestic levels. Internationally, as of 2016, 102 of the WTO's 131 members (counting the European Union as one) have never been involved as a main party in Appellate Body proceedings. Similarly, in investor-state arbitration, few complaints are filed by small or medium-sized enterprises (SMEs). Domestically, the uneven distribution of the dividends of globalization has heightened political tensions in many developed and developing countries, sometimes dramatically altering the course of domestic political economies.

Globalization per se is not the problem. What is needed is a more inclusive globalization. How could different economies and stakeholders more equitably benefit from globalization in a sustainable manner? They must first have the capacity to do so. This means, for instance, that stakeholders must be able to identify market opportunities, form and advance their positions in negotiations, and implement and enforce negotiated outcomes. The issue of capacity is thus the core of this book.

Launched at a strategic and timely moment for the global economy, this book examines key capacity constraints and efforts at building capacity in international economic law. We have assembled a collection of chapters that combines experiential data and academic research to articulate the obstacles to and opportunities for small stakeholders to participate fruitfully in the negotiation, implementation, and enforcement of trade and investment treaties. Many of the authors have been actively involved in capacity building, designed exemplary programs, and drawn on their findings and experiences from across the globe over decades of time. Throughout the book, we attempt to answer important questions such as where do capacity deficits lie, what has been done to mitigate them, and what are the possible future actions?

What is capacity? The chapters in this book perceive capacity in three different yet interrelated ways, each with implications for corresponding capacity building. The first definition relies on the distinction between broad and narrow capacity, as introduced by Bohanes and Vidal-Leon in Chapter 4. To these authors, in the context of the WTO, narrow capacity refers to technical expertise in a specific substantive domain, such as WTO law. By contrast, broad capacity refers to the "general ability of a government to be aware of, and to promote, its national economic interest in the WTO system by making use of WTO legal norms. Beyond legal capacity in the narrow sense, this capacity includes the ability to

organize the government bureaucracy in a manner that allows effective participation in the WTO framework."

The second definition rests on a bottom-up approach. Makong and Ngwira, in Chapter 10, maintain that "capacity development takes place at three levels, namely, at professional development of individuals, organizational level and lastly at institutional level. These levels are said to be interdependent, thus requiring a combination of individual development with organizational reforms and institutional changes so as to effectively employ newly acquired knowledge and skills."

Another definition sees capacity through its short-term and long-term pillars. Different needs, responses, and calculations should go into these pillars. For example, short-term needs such as litigation assistance could be provided by the Advisory Centre on WTO Law (ACWL) in the context of WTO issues, its investment litigation counterpart proposed by Joubin-Bret in the context of investment disputes, or the TradeLab clinics. However, efforts that primarily serve short-term purposes are generally inadequate, are not always absorbed or retained by recipients, and may even stand in the way of long-term capacity building. As Makong and Ngwira remark in Chapter 10, short-term interventions provided by actors such as international organizations may not be relevant for the broader, cross-sectoral needs of African Least Developed Countries (LDCs). To them, "[t]hese represent short lived interventions aimed at imparting basic knowledge on trade as opposed to advanced knowledge that may have the effect of providing the skills necessary for sustained and beneficial development and implementation of policies."

The chapters collectively make the case that, in order to ensure sustainable capacity building, a long-term approach is necessary. As Makong and Ngwira note in Chapter 10, long-term capacity building consists of professional development at the individual, organizational, and institutional levels. At the individual level, capacity building recipients could be students in TradeLab clinics, individuals working in the TradeLab beneficiary institution, or government officials receiving assistance through the ACWL. Further, individual capacity percolates through an organization, sometimes across divisions. For example, it is common for officials in the trade division to transfer to the investment division, as underlying legal and economic principles and skills can be applied in both realms. In addition, institutional capacity is probably the hardest to obtain. As Bohanes and Vidal-Leon aptly point out in Chapter 4, changes at the institutional level can be hampered by factors such as "bureaucratic turf battles and the sheer task of changing well-established patterns of functioning of the bureaucratic machinery." Strong institutions, where relevant ministries communicate and activate cross-sectoral initiatives, are an inescapable step. As the case studies in Chapter 7, Chapter 1, Chapter 9, and Chapter 10 of the book highlight eloquently, strong institutions in China and India, characterized by well-coordinated ministries and public-private partnerships, act as a force multiplier for the successful internalization of external capacity provision, while weak institutions in African LDCs hamper their ability to deliver economic growth.

Moreover, successful long-term capacity building initiatives tend to be sequenced and broad-based. They are sequenced in the sense that the first crucial step is an assessment of capacity constraints and needs, which would allow for optimal subsequent prioritization of resources. Makong and Ngwira in Chapter 10 note that self-assessment of capacity needs could strengthen the effectiveness of capacity interventions. Wang and Lin's 0 echoes this view in their examination of the agri-food sector. In particular, Wang and Lin underscore that private actors are ideally positioned to provide data that can help policy makers assess binding constraints in the economy and to prescribe the legal and regulatory frameworks that enable markets to grow.

Successful long-term capacity building initiatives are also broad-based. This means that a wide cross-section of stakeholders work in concert and generate positive feedback loops. As the case studies on China in Chapter 7 and India in Chapter 1 reveal, stakeholder governments, academia, law firms and business associations all proactively collaborated to generate and absorb capacity. The high level of synergy exhibited in both cases was orchestrated by the public sector, which is a potential model to emulate.

Further, efforts aimed at fostering long term capacity building should also bear in mind the dynamic and evolving nature of capacity constraints and building, which would allow for nimble response to new challenges. As Lamp in 0 and VanDuzer in 0 have pointed out, new leverages and challenges can sometimes occur due to a specific event or over time. New challenges can alleviate or accentuate traditional ones and merit close monitoring.

Finally, the case studies in this book also suggest that locally optimal packages for capacity building depend on a wide range of factors, such as local political structure, education system, market condition, and the strength of public-private relations. The chapters in this book do not seek to issue a universal prescription. As economies start from different places in their capacity quest, stakeholders will need to cooperate to identify their local needs and then draw the roadmap forward. This book, organized in three parts, hopes to assist with that process.

Part I: Capacity Needs and Constraints: Historical Evolution and State-of-Play

Part I reviews the evolving capacity needs and constraints in international economic law. More specifically, two of the chapters (Lamp; VanDuzer) primarily address the changing landscape and related capacity issues through the lens of treaty negotiation and implementation; another chapter (Wang and Lin) focuses on the agri-food sector (an essential sector for many developing countries) from an operational angle. Overall, these chapters illustrate that treaty negotiation and implementation are important first steps in economic development and inclusive globalization. Additional constraints along the supply chain in the form of legal and regulatory issues may present additional barriers; hence granular capacity building from an operational angle is key to making sure that inclusive globalization works in practice.

In 0, Lamp maps out the negotiation strategies that developing countries have with their growing leverage in the multilateral trading system. He does so via a carefully crafted strategic matrix: building on John Odell's conception of distributive and integrative bargaining strategies and adding another dimension of divided interests and common interests as an element of the negotiating setting. He concludes that integrative strategies can hold more promise for developing countries and that issues of common interests are likely to yield tangible dividends in the short to medium term. Additionally, he observes that, in the long term, reframing issues that are now considered divided interests could be a useful avenue for developing countries to pursue.

In 0, VanDuzer considers systematic capacity barriers that confront developing countries in the changing context of international investment agreements (IIAs). He first reviews the historical development of IIA negotiations and recent developments, including notable shifts in global investment flows and treaty making as well as the explosion of investor-state disputes. He then sketches the lasting systemic challenges for developing countries that stem from fragmentation and incoherence in IIA obligations. He then discusses available resources and innovations in IIA approaches and their impact on the systemic challenges, including examples from South Africa and Brazil. He concludes with insights into the integration of IIAs within a state's overall strategies of foreign investment and sustainable development.

In 0, Wang and Lin trace capacity constraints and capacity building efforts along the global agri-food supply chain from an operational angle. They organize their findings around market access and growth strategy. More specifically, under market access, they closely examine several sub-issues: rules and standards, trade preference programs, mechanisms for outbreak management and enforcement. As for growth strategy, they discuss Voluntary Sustainability Standards and Labels and biotechnology. For each of the sub-issues, they investigate the macro and micro capacity challenges and notable capacity building initiatives. They conclude with overarching observations and proposals of starting points for future capacity building endeavours.

Part II: Capacity Building Initiatives: Lessons Learned and Outstanding Challenges

Part II evaluates several notable existing or proposed options to mitigate capacity deficits in international economic law. The merits and limits of these options are highlighted. Significantly, multiple recipients of capacity building exist in the models, including government officials, civil society organizations (CSOs), trade associations, small law firms, and SMEs, each with implications for long-term capacity absorption.

In Chapter 4, Bohanes and Vidal-Leon analyse the model of the ACWL, an intergovernmental legal aid organization. The ACWL has three types of services that are mostly provided for free or at low charges: provision of legal opinions on questions of WTO law; assistance in litigation of WTO disputes; and training on WTO law. The authors begin by making a distinction between "narrow" and "broad" capacity. They then survey factors that constrain effective participation of developing countries and LDCs in the WTO legal system. Finally, they spell out the chief components, contributions and limits of the ACWL in its capacity building efforts.

In 0, Pauwelyn and Carpenter dissect TradeLab, a notable network of legal clinics operating in 13 universities and training centres across the globe. They start by addressing the urgency and utility of acquiring capacity, broadly defined. To them, TradeLab broadens and furthers the work of the ACWL in key aspects, such as the scope of substantive legal and economic issues and the range of capacity recipients. They then move on to introduce the pillars of TradeLab: students, experts, and beneficiaries. Finally, they assess the effectiveness and ongoing challenging of TradeLab – scoping and scaling – and lay out objectives for the future.

In Chapter 1, inspired by the experience of the ACWL in the context of WTO law, Joubin-Bret advocates for an International Advisory Centre for Investment Disputes (I-CID), which would be an advisory and defence centre for states involved in investor-state disputes. This is a particularly timely topic given the considerable increase of investor-state disputes, the global media attention surrounding high-profile investor-state disputes (especially in relation to public health), and the potential seismic structural change in the system with the establishment of a potential multilateral investment court mechanism. She reviews traditional and recent challenges facing defendant states in investor-state disputes, draws lessons from existing ISDS initiatives in Latin America and the ACWL in the WTO context, and identifies and answers some essential issues that would arise from the establishment of an I-CID.

Part III: Country Specific Experiences: In Search of Best Practices

Part III comprises four case studies that parse how capacity building has unfolded in different parts of the world. These empirically grounded case studies span four countries/regions at widely disparate development stages – China, India, Arab countries, and African LDCs – and

are a rich reservoir of comparative analysis. Together, these case studies reveal, in a granular fashion, how countries that are situated differently have boosted their capacities in the public and private sectors in the realms of negotiation, implementation, and enforcement. Part III begins with examinations of China and India, the two economies that have largely nurtured their legal capacities through internal efforts and risen to become prominent actors in the field of international economic law. The focus then shifts to Arab countries and African LDCs, most of which are yet to close significant gaps in capacities.

In Chapter 7, Gao and Shaffer provide a comprehensive study of China's legal capacity building experience in the WTO system, which has allowed China to transform itself from a WTO novice to a leading player in trade negotiations and dispute settlement in just over a decade. They start by contextualizing the severe challenges faced by China when it acceded to the WTO, including 1) a language barrier; 2) differences in legal systems; 3) differences in economy systems; and 4) a lack of qualified international trade lawyers. They then investigate China's multi-fronted and increasingly sophisticated capacity building strategy that broadly encompasses the government, law firms, academia, private companies, and trade associations. They also carefully point out the synergy among the diverse array of stakeholders, helpfully orchestrated by the government, and some of the evolving elements of China's strategy. Finally, these authors assess the possibility and limitations of replicating the Chinese strategy.

In Chapter 1, Nedumpara and Bahri offer a rich and practically informed account of India's capacity building strategy, deployed to strengthen its participation in dispute settlement within international trade law. They focus on the transformation of domestic institutions and proactive participation of various stakeholders. In particular, they explore how law schools, through initiatives such as entering various competitions, have played a pivotal role in cementing trade law capacity. Similar to the Chinese government, the Indian government has actively synergized the participation of a group of stakeholders including those in the private sector.

In Chapter 9, El Hachimi assesses legal capacity in Arab countries through their participation in the WTO dispute settlement mechanism. He notes that Arab countries' participation in the WTO dispute settlement mechanism is generally low, with a notable increase of third party participation by more resourceful countries in recent years. Importantly, the year of 2017 was one of "shock therapy" for several Arab countries, as they faced their first WTO disputes and were compelled to organize their resources to litigate, with divergent degrees of success in internalizing legal capacity at the domestic level. To explain the observed disparity in their levels of success, the author discerns structural and systematic challenges confronting Arab countries through practical experience of educators and government officials. Finally, he compares the capacity building experience of China with Arab countries, explores the underlying reasons for the outcomes, and offers recommendations for enhancing legal capacity in Arab countries.

In Chapter 10, Makong and Ngwira explore the effectiveness-efficiency dichotomy of capacity building in the context of African LDCs. Their analysis was triggered by the observation that while trade and trade-related capacity building has risen to prominence over the last two decades, many African LDCs have yet to fully capitalize on international trade and trade-related agreements. They reviewed the existing provisions for capacity building and argue that the effectiveness-efficiency dichotomy arises in two respects: 1) capacity building providers generally do not base their interventions on the self-assessed needs of LDCs and are short-term oriented, rending interventions efficient but not effective in the broader context of the cross-sectoral needs of LDCs; and 2) effective capacity building will require internally determined needs and priorities that many LDCs are currently unable to pinpoint.

Concluding Remarks

This capstone section identifies common threads in and extracts essential insights from the preceding sections. In Chapter 11, Puig imparts salient lessons of capacity building in international investment. Using his TradeLab experience as a starting point, he first notes that challenges remain, including limited effectiveness of external assistance and systematic capacity barriers that hinder the ability of developing countries to navigate the international investment regime. He further highlights that a centralized approach, inspired by the model of the ACWL in the field of WTO law, may be desirable.

In the context of international trade, Busch and Manak in Chapter 12 observe that balancing external assistance and internal capacity building is vital in order to maximise benefits from external sources. Moreover, in their view, the book offers two lessons. First, governments should lead the effort in capacity building. Secondly, capacity building should be based on a theory of learning and carefully crafted module that preferably begins with public-private partnerships and mechanisms to utilize external monitoring resources.

Part I

Capacity Needs and Constraints:

Historical Evolution and State-of-Play

Chapter 1. Strategies for Developing Countries in Multilateral Trade Negotiations at the World Trade Organization

Nicolas Lamp

1. Introduction

Developing countries have historically confronted multiple challenges in multilateral trade negotiations. For most of the history of the trade regime, developing countries were hampered by their limited human and financial resources, faced exclusionary negotiation practices, and grappled with strategic dilemmas stemming from their limited bargaining power. Many developing countries were not present during crucial phases of the Uruguay Round of trade negotiations, which culminated in the establishment of the World Trade Organization (WTO).[1] Those present often found themselves excluded from meetings in the "Green Room" where the most critical decisions were taken.[2] But even presence in a meeting did not guarantee effective participation: the relatively small trade volumes of most developing countries meant that their views often carried little weight.[3]

Since the launch of the Doha Round in 2001, the multilateral trade regime has made great strides in addressing the obstacles to the participation of developing countries in trade negotiations. Several civil society organizations (CSOs) and international institutions now monitor developments in the negotiations and provide resources and advice to developing country delegations. The WTO and other organizations offer a wide array of training opportunities to build the technical expertise of trade negotiators. In the wake of the debacle in Seattle in 1999, the WTO members have made serious efforts to make the negotiation process more transparent and accessible. Developing countries have also organized themselves into various groups to bundle their resources and have formed bargaining coalitions to increase their negotiating power.

As developing countries have become more adept at managing the logistical and technical challenges to participation in WTO negotiations, the strategic dilemmas which they face have also evolved. Since the establishment of the WTO in 1995, developing countries have enjoyed

[1] Hugo Paemen and Alexandra Bensch, *From the GATT to the WTO: The European Community in the Uruguay Round* (Leuven University Press 1995) 225 describe the negotiations in the final phases of round as follows:

> A bilateral Euro-American solution would be found to the problems … and endorsed by the two major partners, Japan and Canada. Thereafter, it could be "multilateralised" in Geneva.

[2] For an account of a "green room" meeting, see Fatoumata Jawara and Aileen Kwa, *Behind the Scenes at the WTO. The Real World of International Trade Negotiations* (Zed Books 2004) 104-108; for discussion, see Kent Jones, 'Green Room Politics and the WTO's Crisis of Representation' (2009) 9 Progress in Development Studies 349.

[3] This became glaringly obvious at the conclusion of both the Tokyo and the Uruguay Round rounds of trade negotiations: in the former, the developed countries adopted a series of "codes" on non-tariff barriers, largely among themselves, with little regard to the views of developing countries; and in the latter, the major developed countries decided to implement the results of the round by establishing a new organization, forcing developing countries to follow suit or remain outside the new organization; see Richard H Steinberg, 'In the Shadow of Law or Power? Consensus-Based Bargaining and Outcomes in the GATT/WTO' (2002) 56 International Organization 339; Nicolas Lamp, 'The Club Approach to Multilateral Trade Lawmaking' (2016) 16 Vanderbilt Journal of Transnational Law 107, 147-149, 177-181.

increased leverage in multilateral trade negotiations. This is not only true for the emerging economies, whose increasing weight in international trade has made them crucial partners in virtually all negotiation subjects. Rather, I argue that the WTO's institutional framework, the increasing centrality of regulatory and systemic issues in the negotiations, and the greater attention to trade policy in the media and among civil society groups have allowed developing countries across the board to assert themselves in a way that was not possible during the era of the General Agreement on Tariffs and Trade (GATT), the WTO's predecessor. This chapter develops a sketch of the resulting matrix of strategic options available to developing countries and attempts to derive lessons from the limited experience with these options to date.

The chapter proceeds as follows. The second section provides a brief review of developing country strategies throughout the GATT years (1947-1994). The third section introduces the strategic matrix that developing countries confront in trade negotiations. Specifically, I will build on John Odell's conception of distributive and integrative bargaining strategies and will complement it with a distinction between different negotiating settings in the WTO. The section then explores how the establishment of the WTO in 1995 increased the leverage of developing countries in multilateral trade negotiations and how this increased leverage affected the bargaining strategies at the disposal of developing countries. The fourth section introduces the concept of 'negotiating settings' as an analytical complement to bargaining strategies. Examples of the employment of different strategies in different negotiating settings during the Doha Round and in its aftermath are provided in this section. The fifth section evaluates the resulting strategic options, and the sixth section concludes.

It is worth emphasizing that my use of the term "developing countries" throughout the chapter should not detract attention from the fact that there are stark differences among the countries in that group. The challenges confronted by least-developed countries (LDCs) in effectively participating in multilateral trade negotiations are of greater magnitude than those facing the emerging economies. I highlight these differences throughout the chapter, especially in my evaluation of the strategic options that are available to developing countries in the final section.

2. Developing Country Strategies During the GATT Era

Some developing countries were active participants in the founding conferences of the multilateral trade regime, namely, the preparatory conferences in London in 1946 and in Geneva in 1947 as well as the United Nations Conference on Trade and Employment held in Havana in 1947-1948.[4] Though they were ultimately unable to change the fundamental features of the ITO Charter designed by the United States (US) and the United Kingdom, they did leave a mark on the provisions of the ITO Charter (and, to a lesser extent, the GATT).[5] In the following decades, developing countries remained actively involved in negotiations on institutional issues, including at the Review Session in 1954/1955- the negotiations that culminated in the addition of Part IV to the GATT in 1964 and the discussions about a new "framework" for trade relations in the 1970s. However, the area that made up the bulk of negotiating activity throughout the first two decades of the GATT - tariff negotiations - represented a difficult terrain for developing countries. This difficulty resulted from the negotiating rules, which were built around the notion of reciprocity. As Winham notes:

[4] See Rorden Wilkinson and James Scott, 'Developing Country Participation in the GATT: A Reassessment' (2008) 7 World Trade Review 473; Nicolas Lamp, 'The "Development" Discourse in Multilateral Trade Lawmaking' (2017) 16 World Trade Review 475.

[5] The fact that the ITO Charter contained a chapter on "Economic Development and Reconstruction" was in large part due to the efforts of developing countries at the preparatory conferences; see Lamp 'The "Development" Discourse in Multilateral Trade Lawmaking' (n 4) 488.

> The effect of the norm of reciprocity meant that only those nations that had significant trade flows were in a position to give, and therefore demand, concessions from trading partners. Influence in a tariff negotiation is a direct function of the size of a nation's trade. Nations with smaller trade flows simply are not in a position to offer many concessions to other countries and hence have little standing in a negotiation where the modus operandi is reciprocal exchange.[6]

As a result of their lack of leverage, developing countries confronted a choice between two competing strategies for tariff negotiations: they could either go along with the reciprocity-based bargaining protocol devised by developed countries and be content with the limited gains in market access that it offered them,[7] or they could invest their energies into (potentially futile) attempts to change the negotiating protocol to make it more responsive to their interests.[8] The principle of "special and differential treatment" that came to govern the participation of developing countries in trade negotiations in the 1960s represented an uneasy compromise between these two strategies: it reduced the demands made on developing countries under the traditional bargaining protocol, but further diminished the benefits that they could hope to derive from it.[9]

When trade negotiations in the GATT moved beyond tariffs to include non-tariff barriers, developing countries could have become more involved in the negotiations, as market power is (at least theoretically) less relevant when it comes to the negotiation of rules. To quote Winham again:

> Once non-tariff measures and other issues came onto the agenda of GATT negotiations – which occurred mainly at the Tokyo Round – developing countries were less inhibited by their trade profiles and were more able to make an impact on multilateral trade negotiations. In the negotiations over trade rules or codes of behaviour, large and small nations start on a footing of greater equality than they do in a tariff negotiation based wholly on the respective trading performances of the participants. Economic power and interest are still the principal variables in current GATT negotiations, but the correlation between bargaining position and trade performance has diminished and there is consequently greater scope for negotiating skill and perseverance on the part of individual national delegations.[10]

As it turned out, however, a mixture of disinterest by developing countries in submitting to additional discipline and exclusionary negotiating tactics used by developed countries meant that developing countries did not have much leverage to influence the "code" negotiations either[11] – they could either go along with developed countries' designs, or stay out of the codes, as most of them chose to do.

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[6] Gilbert R Winham, *International Trade and the Tokyo Round Negotiation* (Princeton University Press 1986) 256.

[7] See Joanne Gowa and Soo Yeon Kim, 'An Exclusive Country Club: The Effects of the GATT on Trade, 1950-94' (2005) 57 World Politics 453; Wilkinson and Scott (n 4) 485-486.

[8] During the late 1950s and early 1960s, developing countries saw an opening to change the way in which GATT contracting parties went about reducing their trade barriers. In the wake of the famous Haberler report, published in 1958, the GATT contracting parties launched a "Programme for the Expansion of International Trade", which explicitly sought to address obstacles to developing country exports. However, developed countries remained reluctant to reduce their barriers outside the context of reciprocal negotiations; for discussion, see Nicolas Lamp, 'How Some Countries Became "Special": Developing Countries and the Construction of Difference in Multilateral Trade Lawmaking' (2015) 18 Journal of International Economic Law 743, 752-759.

[9] Developing countries that offered reciprocal concessions made larger gains in market access for their products than developing countries that relied on the principle of special and differential treatment to avoid making concessions; see John S Odell, 'Introduction' in John S Odell (ed), *Negotiating Trade: Developing Countries in the WTO and NAFTA* (CUP 2006) 17.

[10] Gilbert R Winham, 'GATT and the International Trade Régime' (1990) 45 International Journal 796, 814.

[11] Lamp 'The Club Approach to Multilateral Trade Lawmaking' (n 3) 160-163.

3. New Sources of Leverage in the WTO and their Implications for Bargaining Strategies

The ability of the developing countries to influence the course of negotiations in the trade regime changed markedly with the establishment of the WTO. Developing countries gained more leverage from at least three sources. First, the more integrated structure of the WTO's "single undertaking", combined with the consensus tradition, turned developing countries into veto players on most issues. During the GATT years, developed countries had been able to proceed with new agreements (mostly among themselves) without much input from developing countries.[12] In the WTO, this is no longer possible. If developed countries want to add a new agreement to the WTO Agreement and thereby make it enforceable through the WTO's Dispute Settlement System, they now needed the consensus of the entire WTO membership. In the case of plurilateral agreements, the WTO Agreement explicitly requires the consensus of the members.[13] But even in the case of new multilateral agreements, which can be brought into force by two-thirds of the membership,[14] established practice requires the adoption of the agreement by consensus. Even critical mass agreements that are implemented via changes to schedules can effectively be vetoed by every member, since the WTO Secretariat does not certify schedules if a WTO member objects.[15] As a result of the integrated structure of the WTO, very little lawmaking can happen against the will of developing countries. Developing countries have gained a bargaining chip that they did not have before – they can effectively bring the lawmaking process to a halt.

A second source of potential influence developing country is a shift of focus in negotiations. While market access negotiations maintained a central place in the Doha Round, negotiations on regulatory and systemic issues have become more central to the WTO's agenda. There are several reasons for this development. The disagreements among the "Big Five" on market access meant that progress in most areas has stalled, and market access is now primarily addressed in other contexts, either through unilateral tariff reductions or in preferential trade agreements. As a result, negotiations on regulatory issues – trade facilitation and fisheries subsidies are the most prominent examples – have assumed centre stage in recent years. Whereas most developing countries had little to contribute to the Doha Round market access negotiations (as they were exempted from most reduction commitments), they have been more active in negotiations on regulatory and systemic issues, where they can play a larger role than on negotiations on market access.

Thirdly, developing countries have become increasingly adept at mobilizing public attention for their positions in WTO negotiations. The "access to medicines" campaign, which drew attention to certain obligations in the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) that were perceived to impede the poorest countries' access to essential medicines in a public health crisis, was probably the high point of public interest in the trade regime. The campaign resulted in the adoption of a waiver of the relevant obligations in 2003, which remained in force until an amendment to the TRIPS Agreement entered into force in 2017. There are other issues for which developing countries have been able to mobilize public attention, such as a developed countries' cotton subsidies (discussed

[12] As they had famously done at the conclusion of the Tokyo Round; ibid 147-149.

[13] Marrakesh Agreement Establishing the World Trade Organization (hereafter WTO Agreement) 15 April 1994, 1867 UNTS 14, 13 ILM 1144 (1994), Article X:9.

[14] WTO Agreement (n 13), Article X.

[15] WTO, 'Procedures for Modification and Rectification of Schedules of Tariff Concessions' Decision of 26 March 1980 L/4962 (28 March 1980); for discussion, see Bernhard Hoekman and Petros C Mavroidis, 'MFN Clubs and Scheduling Additional Commitments in the GATT: Learning from the GATS' (2017) 28 European Journal of International Law 387.

below) and food security, but have not (yet) resulted in tangible outcomes. However, such use of the media spotlight to put pressure on developed countries to adopt more enlightened positions on issues of interest to developing countries has become another arrow in developing countries' quiver.

To gain a better understanding of the strategic options that arise from the increased leverage of developing countries in trade negotiations, it is useful to revisit the distinction between distributive and integrative bargaining strategies that Odell developed in a study of trade negotiations, published in 2006. Odell identifies two "polar ideal types" of negotiating strategies: A "distributive" strategy is "a set of tactics that are functional only for claiming value from others" and are typically employed when the parties pursue objectives that are "partly in conflict" with the other parties' objectives. Odell associates the following tactics with a distributive strategy: "opening with high demands, refusing all concessions, exaggerating one's minimum needs and true priorities, manipulating information to others' disadvantage, taking others' issues hostage, worsening their alternative to agreement, making threats, and actually imposing penalties".[16] Odell contrasts distributive strategies with "integrative behaviour", which can be employed when the parties' objectives "are not in fundamental conflict and hence can be integrated for mutual gain to some degree".[17] For Odell, proposing "an exchange of concessions" or "reframing the issue space itself in a way that eases impasses" are examples of integrative behavior.[18]

In the following section, I will adopt a slightly modified form of Odell's conceptions of bargaining strategies. In my view, it is not possible to coherently distinguish between the conduct that Odell associates with distributive strategies and behaviour that is aimed (explicitly or implicitly) at "an exchange of concessions". Both involve an explicit *quid pro quo*. In the case of the distributive strategies described by Odell, the *quid* involves ending any behaviour that is actively making or threatens to make the negotiating partner worse off. This behaviour may also include using other tactics to tilt the balance of the *quid pro quo* to one's advantage. However, the negotiating outcome (if the use of the strategy is successful) is still an exchange of concessions. I will therefore treat bargaining strategies that aim at an exchange of concessions as distributive strategies, in contrast to integrative strategies that seek to achieve lawmaking outcomes by identifying a common interest in a solution.[19]

The three new sources of leverage that developing countries enjoy in WTO lawmaking as compared to the GATT – their veto power, the increased importance of systemic and regulatory issues, and the possibility of mobilizing public support – provide new opportunities for both distributive and integrative strategies. First, the power to block the consensus holds obvious potential for a distributive strategy. The ability to hold the progress of negotiations hostage is a bargaining chip that developing countries did not previously possess, at least not to the same degree, and that they can use to claim value from developed countries. Second, the increasing focus on systemic and regulatory issues provides new opportunities for integrative bargaining moves. On topics such as the reform of the Dispute Settlement System or trade facilitation, the participants are more likely to see their interests as shared and hence the willingness to arrive at compromises which are perceived as beneficial by all participants. Finally, the increased public awareness of the trading system holds the potential that negotiators (or their government) will reconsider and reformulate their interests once their initial articulation of these interests are subject to public scrutiny (this is more likely where

[16] Odell (n 9) 15.

[17] ibid.

[18] ibid 16.

[19] As I will show below, this way of differentiating between different bargaining strategies aligns with distinctions that WTO negotiators themselves draw. See n 75 and accompanying text.

the interests were originally formulated with little or no input from civil society). This creates further opportunities for the use of integrative bargaining strategies to reframe issues in a manner responsive to developing countries' concerns.

4. The Context for Bargaining Strategies: The Dimension of Negotiating Settings

Before we can adequately evaluate the strategic options that arise from developing countries' enhanced ability to pursue both distributive and integrative bargaining strategies in multilateral trade negotiations, it is useful to introduce a further dimension to the analysis, namely the distinction between different negotiating settings. While this distinction is not neat, it enables to roughly distinguish between issues on which WTO members have (or perceive themselves to have) divided interests and issues on which they have (or perceive themselves to have) common interests. In the mercantilist logic that has traditionally governed multilateral trade lawmaking, negotiations on market access and subsidy levels are perceived as characterized by divided interests: country A wants country B to lower its tariff on good X, whereas country B wants country A to lower its tariff on good Y. Negotiations on systemic or regulatory issues, however, often feature common interests: every WTO member has an interest in uniform customs valuation procedures,[20] efficient customs processes, and a well-functioning dispute settlement mechanism.

How do these negotiating settings relate to different bargaining strategies? There is an obvious affinity between distributive bargaining strategies and issues that are perceived as characterized by divided interests, on the one hand, and integrative bargaining strategies and issues that are characterized by common interests, on the other. Where interests are divided, the use of distributive strategies to gain as many concessions from one's negotiating partner while giving up as little as possible appears like a natural approach. On the other hand, common interests invite the pursuit of an integrative strategy. However, it is also possible to employ a distributive approach to an issue of common interest – i.e., to hold that issue hostage until unrelated demands are met – or to attempt to reframe an issue hitherto perceived as characterized by divided interests as an issue of common concern. Since the launch of the Doha Round in 2001, developing countries have employed both distributive and integrative strategies in both negotiating settings, with varying degrees of success. In the following, I will briefly review examples of each combination of strategies and negotiating settings (see Figure 1.1 for an overview).

[20] See Sherman's account of the negotiations on customs valuation in the Tokyo Round; Saul L Sherman, 'Reflections on the New Customs Valuation Code' (1980) 12 Law and Policy in International Business 119. Sherman notes that "genuine national differences of interest in the area of customs valuation are, at best, difficult to discern" ibid 127.

Negotiating Setting / Bargaining strategy	Divided Interests	Common Interests
Distributive Strategy	Blocking negotiations on the Singapore issues (2001-2004)	Blocking the adoption of the protocol for the adoption of the Trade Facilitation Agreement (2014)
Integrative Strategy	Sectoral Initiative in Favour of Cotton (2003 to date)	Proposals for a Trade Facilitation Agreement in Services and an Investment Facilitation Agreement (2016 to date)

Figure 1.1: Examples of Negotiating Strategies used by Developing Countries in the Doha Round and its Aftermath

4.1 Distributive Strategies on Issues of Divided Interests: The Singapore Issues

Since the establishment of the WTO, one of the most successful uses of a distributive strategy in multilateral trade negotiations by developing countries was their resistance to the inclusion of the Singapore issues on the agenda of the Doha Round. The Singapore issues, so named because they were first put on the WTO's agenda at the Singapore Ministerial in 1996, encompassed investment, competition, transparency in government procurement, and trade facilitation. The Singapore issues were perceived as an issue of divided interests *par excellence*: as the Chair of the General Council at the time, Stuart Harbinson, put it: "50 per cent [of WTO Members] were in favour of launching negotiations in Doha and 50 per cent were against it".[21] There is nothing inevitable about conceptualizing these issues as representing divided interests. Arguably, negotiations on investment, competition and transparency in government procurement had elements of potential interest to developing countries. Similarly, developing countries recognized the value of trade facilitation early on. Notwithstanding the merits of each issue, developing countries' scepticism of their inclusion in the Doha Round agenda was due to the opportunity costs of negotiations on these issues. Developing countries disliked that developed countries seemed more interested in expanding the agenda of the new round than in tackling developing countries' longstanding concerns regarding agricultural protectionism and other "implementation" issues arising from the Uruguay Round.

To developing countries, developed countries' approach had uncomfortable echoes of previous rounds, particularly the Uruguay Round, during which developed countries seemed more focused on extending the trade regime's ambit to intellectual property rights, services and trade-related investment measures than on addressing developing countries' grievances

[21] Stuart Harbinson, cited in Jawara and Kwa (n 2) 76. In fact, given the numerical superiority of developing countries, it is likely that the large majority of WTO Members was opposed to negotiations on these issues. According to Faizel Ismail, the head of the South African delegation to the WTO at the time, the "vast majority of developing countries were unwilling to launch negotiations"; Faizel Ismail, 'A Development Perspective on the WTO July 2004 General Council Decision' in Ernst-Ulrich Petersmann (ed), *Reforming the World Trading System. Legitimacy, Efficiency, and Democratic Governance* (OUP 2005) 53, 73.

regarding the protection of textiles and agriculture.[22] In the Uruguay Round, developing countries eventually acquiesced to negotiations on the new issues – partly because they grew more comfortable with the subject matter as the potential agreement took shape (as was the case with trade in services), and partly because they relied on assurances that they would have a veto on the implementation of these agreements at a later date (as was initially the case with services and later with intellectual property rights as well).[23] These assurances proved worthless when developed countries devised an institutional vehicle for the implementation of the results of the Uruguay Round – a "single undertaking" implemented through the establishment of a new organization, the WTO – that left developing countries no choice but to go along.[24] Developing countries were determined not to repeat this experience in the Doha Round. The Doha Ministerial Conference in 2001 was held under the cloud of the terror attack of 9/11 and featured some of the exclusive "green room" tactics of old.[25] All that the concerted resistance by developing countries achieved was that a decision on "modalities" for the negotiations on the Singapore issues was postponed to the next Ministerial Conference two years later and would have to be taken "by explicit consensus".[26] [27] While the language of the Doha Declaration made the start of the negotiations appear like a foregone conclusion, the requirement of an "explicit consensus", which effectively gave every WTO member a veto over the start of the negotiations, was an important safeguard. Nonetheless, the perception lingered that the Singapore issues had been "imposed" on developing countries at Doha.[28]

It was not surprising then that the Singapore issues became the proximate cause of the collapse of the next ministerial meeting in Cancún, at which a decision on "modalities" for the negotiations was to be taken. When developing countries stood fast in their opposition to initiating negotiations, the European Union (EU) made a last-minute concession and proposed to negotiate on only two of the issues. However, neither developing countries nor Japan and Korea (which were insisting on negotiations on all four issues) were prepared to accept the EU's proposal.[29] In the face of the gap between these positions, the chairman of the ministerial conference declared the meeting closed.

Many developing countries celebrated Cancún as a major achievement. In truth, it was not entirely unprecedented for concerted opposition from developing countries to prevent the successful conclusion of a ministerial conference. During the Uruguay Round, developing countries' resistance towards new rules on intellectual property rights and their disappointment with the lack of progress on agriculture had led to the failure of the mid-term review meeting in Montreal in 1988. What distinguished Cancún from these previous uses of distributive strategies by developing countries was the aftermath of the failed ministerial. In the Uruguay Round, the developing countries eventually went along with developed

[22] Jawara and Kwa note this parallel between the two rounds; Jawara and Kwa (n 2) 45. Ismail reports that one of the reasons why developing countries were opposed to negotiations on the Singapore Issues was that they were concerned about "overburdening an already complex negotiating agenda"; Ismail (n 21) 74.

[23] Lamp 'The Club Approach to Multilateral Trade Lawmaking' (n 3) 167-172.

[24] ibid 172-181.

[25] For an account of the "green room" that gave rise to the Doha Ministerial Declaration, see Jawara and Kwa (n 2) 104-108.

[26] WTO, 'Doha Ministerial Declaration' WT/MIN(01)/DEC/1 (20 November 2001), paras 20, 23, 26, and 27 <https://www.wto.org/english/thewto_e/minist_e/min01_e/mindecl_e.htm> accessed 3 January 2019.

[27] Reportedly, an earlier version of the Ministerial Declaration stipulated that a decision on starting negotiations had to be taken by explicit consensus; reportedly, the wording was changed to a decision on modalities at a "green room" meeting in the early hours of the last day of the Ministerial Conference, at the insistence of Japan; Jawara and Kwa (n 2) 106.

[28] Ismail (n 21) 74.

[29] For discussion, see Stephen Woolcock, 'The Singapore Issues in Cancún: A Failed Negotiation Ploy or a Litmus Test for Global Governance' (2003) Intereconomics 249.

countries' agenda after they received assurances that they would have a say in the institutional aspects of the implementation of results. In reality, however, all they received in return for giving up their position were promises from developed countries, which were ultimately not kept.

In the Doha negotiations, by contrast, developing countries largely prevailed. In the months following Cancún, both the US and the EU agreed to drop three of the four Singapore issues from the agenda.[30] The only issue that remained, trade facilitation, held significant attractions for developing countries, as long as their concerns regarding the implementation burden could be addressed. The negotiations leading up to the so-called Framework Agreement concluded in July 2004 featured none of the exclusionary tactics that had marred the negotiations in Doha and Cancún. Instead, as one ambassador from a developing country put it, developed countries appeared to have learned their lessons from Cancún and allowed full participation of developing countries in the negotiations of the modalities.[31]

In sum, the outcome on the Singapore issues in the Doha Round can be seen as a successful example of the use of distributive strategy by developing countries on an issue on which the interests of developed and developing countries were divided (at least in the perception of the participants). Developing countries effectively held the progress of the round hostage to their demand that the Singapore issues be dropped, and they very nearly achieved their goal. The only issue that remained on the agenda – trade facilitation – was subsequently addressed in a manner that took full account of the interests of developing countries.

4.2 Integrative Strategies on Issues of Divided Interests: The Sectoral Initiative on Cotton

At about the same time that developing countries were fighting off developed countries' attempt to launch negotiations on the Singapore issues, a group of four least-developed countries – Benin, Burkina Faso, Chad and Mali – jointly submitted a proposal to the Committee on Agriculture that called for the establishment of a "mechanism for phasing out support for cotton production with a view to its total elimination".[32]

The reduction of subsidies has traditionally been conceptualized as an issue of divided interests by WTO Members. The country maintaining the subsidy has an interest in keeping it in place to support its producers, while other countries want to reduce the subsidy to create enhanced opportunities for their exports. The Agreement on Agriculture provides a methodology to quantify support provided to domestic producers with the help of an Aggregate Measurement of Support (AMS) and has thereby allowed WTO Members to negotiate reductions in agricultural support according to the same mercantilist logic traditionally applied to tariff reductions.

However, employing a distributive strategy to achieve a reduction in cotton subsidies was not a realistic option for the co-sponsors of the sectoral initiative on cotton, who soon came to be called the "Cotton-4" (or "C-4"). Given their small markets and lack of subsidies of their own, they had no means of pressuring the major subsidisers – the US, the EU, and China – to

[30] Ismail (n 21) 74.

[31] ibid 75.

[32] WTO, 'WTO Negotiations on Agriculture. Poverty Reduction: Sectoral Initiative in Favour of Cotton. Joint Proposal by Benin, Burkina Faso, Chad and Mali' TN/AG/GEN/4 (16 May 2003) (hereafter WTO, 'Sectorial Initiative in Favour of Cotton') 2. There is by now a large literature on the sectoral initiative on cotton; see only Kym Anderson and Ernesto Valenzuela, 'The World Trade Organisation's Doha Cotton Initiative: A Tale of Two Issues' (2007) 30 The World Economy 1281; Matthew Eagleton-Pierce, 'The Competing Kings of Cotton: (Re)framing the WTO African Cotton Initiative' (2012) 17 New Political Economy 313.

make concessions by either worsening their alternatives to agreement or by offering commercially equivalent concessions in return. The only avenue available to the C-4 was to reframe the issue so that it would be seen as a common concern for all. And this is what they set out to do.

Their proposal started out by outlining the importance of cotton for the economic and social development prospects of West and Central African (WCA) countries. It then referred to the "strenuous efforts" of the C-4 to become competitive and "adapt their economies to the WTO's objectives", only to point out that the impact of these efforts had been "virtually nullified" because certain other members had refused to "make their own necessary adjustments" and continued to subsidise to "distort global market prices. This was contrary to the basic objectives of the WTO".[33] As a basis for their arguments, the co-sponsors appealed to fundamental notions of fairness – everybody should be required to adjust, and nobody should be denied the rewards for their efforts – and to goals that they had in common with the subsidizers, namely, the objectives of the WTO. They further cited empirical evidence that subsidies were in fact responsible for low global market prices and the resulting economic hardship of their cotton producers. They invoked a more specific set of common goals – the objectives of the Doha Development Agenda – to lend additional force to their arguments:

> The elimination of subsidies for cotton production and export is the only specific interest of WCA cotton-producing countries in the Doha Round. Any outcome of the negotiations that does not help to ensure respect for the principles of free trade and competition in global trade in cotton will be seen by the WCA countries as unbalanced, unfair and contrary to the objectives approved by all the Member countries at Doha.[34]

The C-4's arguments were amplified by a CSO campaign. In 2002, Oxfam published a briefing paper called "Cultivating Poverty: The Impact of US Cotton Subsidies on Africa", which it followed up in 2004 by another report entitled "Finding the Moral Fiber: Why Reform is Urgently Needed for a Fair Cotton Trade", bringing the issue to the attention of the mainstream media and the public.[35]

During the first WTO meeting at which the initiative was discussed, there was widespread support for the C-4's proposal;[36] and no country challenged any of the C-4's arguments.[37] At the behest of the co-sponsors, the proposal was put on the agenda of the Cancún Ministerial Conference, and a negotiating group on the issue was created on the first day of the

[33] WTO, 'Sectoral Initiative in Favour of Cotton' (n 32) 1.

[34] ibid 2.

[35] See only Elizabeth Day, 'The Desperate Plight of Africa's Cotton Farmers' *The Observer* (14 November 2010) <https://www.theguardian.com/world/2010/nov/14/mali-cotton-farmer-fair-trade> accessed 13 January 2019; Claire Delpeuch, Antoine Leblois and Ben Shepherd, 'Cashing in on Cotton: Can West Africa Ever Compete with US Subsidies?' *The Guardian* (19 June 2014) <https://www.theguardian.com/global-development-professionals-network/2014/jun/19/farming-us-subsidies-west-africa-cotton> accessed 8 January 2019; Marie Clarke, 'US Corporate Cotton vs. African Cotton Farmers at the WTO' *Huffington Post* (17 December 2015) <https://www.huffingtonpost.com/marie-clarke-brill/us-corporate-cotton-vs-af_b_8818258.html> accessed 13 January 2019; Wideangle, 'The Dying Fields: Global Cotton Industry: Cotton Subsidies and the World Trade Organization' *PBS* (24 August 2007) <https://www.pbs.org/wnet/wideangle/uncategorized/global-cotton-industry-cotton-subsidies-and-the-world-trade-organization/1945/> accessed 8 January 2019.

[36] WTO, 'Summary Report on the Nineteenth Meeting of the Committee on Agriculture. Special Session Held on 01 July 2003' TN/AG/R/9 (25 August 2003); Senegal noted that "the co-sponsors of the initiative were simply demanding the application of a fundamental WTO principle, that of fair trade" ibid 9; the Philippines stated that "the issue of cotton was a perfect example of the unfairness which still existed in the Agreement on Agriculture" ibid 10; New Zealand "encouraged countries currently subsidizing cotton to consider carefully the sobering facts set out in the paper" ibid 10; the Chairman noted that "there certainly appeared to be significant sympathy and concern for the situation" ibid 12.

[37] The only intervention that could be construed as a challenge was the EC statement that "the European Communities did not generally favour sectoral approaches" ibid 11.

Conference.[38] Suddenly, however, "wide differences in the positions" of the members of the negotiating group emerged; the US took the lead in arguing that the issue should be tackled using an "integrated approach covering all measures affecting cotton and man-made fiber".[39] The Draft Ministerial Declaration circulated half-way through the Conference deflected the focus away from the reduction of cotton subsidies by calling for consultations under the auspices of a wide range of WTO bodies.[40] The draft even suggested that the West and Central African countries should diversify their economies to decrease their reliance on cotton.[41] As the *Economist* observed at the time, this outcome "had American fingerprints all over it".[42] The co-sponsors of the Sectoral Initiative were hugely disappointed by the Draft,[43] and the failure to reach a consensus on cotton added to the sense of crisis at the Cancún Conference, in particular since "the African and Caribbean countries walked out of the Cancún talks as a measure of solidarity".[44]

In response to the deadlock, the WTO Secretariat organised a workshop on cotton in March 2004, which was seen as "an important confidence-building measure" between the co-sponsors, the other African participants, and the US, EU, and other developed countries.[45] The US also invited ministers from the four co-sponsors to come to Washington and meet with the US Trade Representative in the run-up to the conclusion of the Framework Agreement in July 2004. As a result of these exchanges, the sectoral initiative on cotton was integrated into the Framework Agreement, which stipulated that the issue would be "addressed ambitiously, expeditiously, and specifically" and that the negotiations would "encompass all trade distorting policies affecting the sector in all three pillars of market access, domestic support, and export competition".[46] While the initiative remained tied to the agriculture negotiations instead of being addressed as a separate matter, it was prioritised within these negotiations. The Hong Kong Ministerial Declaration of December 2005 stipulated – on an *ad referendum* basis – that all export subsidies on cotton would be eliminated by 2006, instead of 2013 as for other agricultural products.[47] The last draft of the Doha Round Modalities for Agriculture,

[38] South Centre Analytical Note, 'Chronology of Events in the Cancun WTO Ministerial Conference. 10-14 September 2003' SC/TADP/AN/IG/5 (September 2003) 2.

[39] ibid 4.

[40] WTO, 'Draft Cancún Ministerial Text. Second Revision' JOB(03)/150/Rev.2 (13 September 2003) para 27: "(…) *we instruct* the Chairman of the Trade Negotiations Committee *to consult* with the Chairpersons of the Negotiating Groups on Agriculture, Non-Agricultural Market Access and Rules *to address the impact of the distortions* that exist in the trade of cotton, man-made fibres, textiles and clothing *to ensure comprehensive consideration* of the entirety of the sector" (emphasis added).

[41] ibid para 27: "The Director-General is instructed to consult with the relevant international organizations (…) to effectively direct existing programmes and resources toward diversification of the economies where cotton accounts for the major share of their GDP".

[42] 'The WTO under Fire' *The Economist* (Cancún, 18 September 2003); as the Economist reported at the time, "political realities in Congress (the chairman of the Senate agriculture committee is a close ally of the cotton farmers)" had made American negotiators "fiercely defensive" of the cotton subsidies.

[43] According to one delegate, it caused "anger and bitterness" ibid; see also WTO, 'Poverty Reduction: Sectoral Initiative on Cotton. Wording of Paragraph 27 of the Revised Draft Cancún Ministerial Text. Communication from Benin' WT/GC/W/516 (7 October 2003): "the proposed formulation does not offer any basis for finding appropriate solutions to the problems facing the West and Central African least-developed countries (LDCs) affected by the subsidies granted to the production and export of cotton".

[44] Jagdish Bhagwati, 'Don't Cry for Cancún' (2004) 83 Foreign Affairs 52, 61.

[45] WTO, 'WTO African Regional Workshop on Cotton. Cotonou, Republic of Benin. 23-24 March 2004' WT/L/564 (31 March 2004) para 72; the workshop inter alia concluded that West African cotton producers are very competitive, and that West African cotton was of very high quality; see ibid para 22.

[46] WTO, 'Second draft of post-Cancún decision for the General Council' JOB(04)/96/Rev.1 (30 July 2004) para 4.

[47] WTO, 'Hong Kong Ministerial Declaration' WT/MIN(05)/DEC (22 December 2005) <https://www.wto.org/english/thewto_e/minist_e/min05_e/final_text_e.htm> accessed 8 January para 11; see ibid para 6 for the elimination of other export subsidies; the Declaration also envisages more rapid reductions in trade-distorting domestic support for cotton in relation to general reduction commitments; see ibid para 11.

published in December 2008, contained a more ambitious reduction formula for domestic support on cotton than for other agricultural products.[48]

The deadline set out in the Hong Kong Ministerial Declaration was missed – WTO Members only agreed to eliminate all export agricultural export subsidies at the 2015 Ministerial Conference in Nairobi. In the Nairobi Decision on Export Competition, the special status of cotton is reflected in an earlier deadline for the elimination of export subsidies on cotton by developing countries, namely the beginning of 2017 instead of the end of 2018 (developed countries agreed to eliminate all export subsidies as of the date of the decision).[49]

Apart from this earlier deadline and numerous meetings, ministerial decisions, reports and workshops, the Sectoral Initiative in Favour of Cotton has had few tangible results, as WTO Members most recently acknowledged at the Nairobi Ministerial Conference.[50] The decision by the major developed countries in 2015 to effectively shelve the Doha Round – and with it the Draft Modalities on Agriculture, including their ambitious formula for the reduction of domestic support on cotton – means that a broader success of the initiative is out of reach for the foreseeable future. Despite this meagre outcome, the impact that the initiative had on the Doha Round and its aftermath is remarkable. With support from civil society, the C-4 managed to make the treatment of cotton "a litmus test of the commitment to make the WTO Doha Round of global trade negotiations a truly development round", as the then-Director General Pascal Lamy put it in 2008.[51] While the Draft Modalities for Agriculture fell victim to the failure of the Doha Round, the commitment by the major subsidisers contained in those modalities was a major concession, especially in light of the initial attempts by the US to dilute the initiative's focus on domestic support. There was no direct *quid pro quo* for this concession from the C-4. Instead, the concession was motivated in large part by the perception that addressing cotton subsidies as a matter of priority had become crucial to the legitimacy of the Doha Round and the WTO more broadly, and was thus in the interest of the major powers as well (even though it sparked considerable opposition from domestic interests in those countries). While the window of opportunity to capitalize on this perception may have closed with the failure of the Doha Round,[52] the sectoral initiative nonetheless holds important lessons regarding the capacity of even least-developed countries to shape the law making process in the WTO.

[48] WTO, 'Committee on Agriculture, Special Session, Revised Draft Modalities for Agriculture' TN/AG/W/4/Rev.4 (6 December 2008) para 54.

[49] WTO, 'Nairobi Ministerial Decision on Export Competition' WT/MIN(15)/45 — WT/L/980 (19 December 2015) para 12.

[50] See WTO, 'Cotton – Ministerial Decision of 19 December 2015' WT/MIN(15)/46 – WT/L/981 (21 December 2015) where WTO Members "express[ed] their concern at the lack of progress in the cotton negotiations and the absence of clearly-stated political determination in the trade component of this vital issue since 2003, when the Sectoral Initiative in Favour of Cotton was submitted to the WTO".

[51] Director-General Pascal Lamy, 'Cotton is "litmus test" for development commitment in Doha Round' (United Nations Conference on Trade and Development High Level Multi Stakeholder Meeting on Cotton, Geneva, 2 December 2008).

[52] Given the current US administration's lack of commitment to the WTO as an institution, there appears to be no basis for progress on the issue at this point; see WTO, 'Committee on Agriculture, Special Session, Sub-Committee on Cotton, Eighth Dedicated Discussion of the Relevant Trade-Related Developments for Cotton, Report by the Chairman, H E Dr Stephen Ndũn'gũ Karau' TN/AG/38 – TN/AG/SCC/9 (17 November 2017) para 6, where the Chairman reports that "at least one delegation had expressed its strong scepticism about any possible substantive outcome on Cotton Domestic Support taking into account the overall negotiating environment, and had invited participants to acknowledge that stalemate and turn their attention to a possible post-MC11 work programme in which cotton could be included".

4.3 Distributive Strategies on Issues of Common Interest: Blocking the Adoption of the Trade Facilitation Agreement

The previous section on Singapore issues narrates how trade facilitation became the only one of the four original Singapore issues to remain on the Doha negotiating agenda. No longer grouped with the more divisive issues of investment, competition and transparency in government procurement, trade facilitation came to be recognized as an issue of common interest *par excellence*. It largely escapes the mercantilist logic of the trade barriers that have traditionally been the focus of multilateral trade lawmaking: nobody (except perhaps a few corrupt officials) gains when imports and exports are delayed by inefficient customs procedures. Once the modalities were designed to ensure that developing countries would not be left alone with the costs of implementation, trade facilitation became a "win-win" proposition. The conclusion of the Trade Facilitation Agreement (TFA) at the Bali Ministerial Conference in December 2013 remains virtually the sole success story to emerge from the shambles of the Doha Round.

The decision adopting the TFA in Bali set up a Preparatory Committee on Trade Facilitation, which was tasked with drafting the final legal text of the agreement and drawing up a protocol of amendment, with adoption foreseen for July 31. In line with WTO practice, the adoption of the protocol should take place by consensus. Given the strong interest among the WTO membership in seeing the first ever multilateral trade agreement concluded under the auspices of the WTO adopted and opened for ratification, the July 31 deadline presented an opportunity unlike many others for developing countries to withhold their consensus in the pursuit of a distributive strategy. Some African countries considered making their consent to the protocol conditional on a commitment by the WTO Membership to conclude the Doha Round. And, on July 2, India began to link its support for the TFA to progress in the negotiations for a permanent exemption of stockholding programs for food security purposes from the disciplines of the Agreement on Agriculture.[53]

From a strategic perspective, blocking the consensus on the TFA was something quite different from blocking the consensus on the Singapore issues. Whereas the Singapore issues had been a divisive matter for years, the TFA was the product of many years of collaborative work and was widely seen as an agreement that would benefit all WTO Members, particularly developing countries.[54] Using a distributive strategy to prevent negotiations on the Singapore issues was a logical thing to do: apart from the uncertain benefits of a sprawling negotiating round, developing countries had little to lose. The TFA was different. By vetoing the TFA as part of a distributive strategy, India and the African countries were endangering the success of a project from which they themselves stood to benefit. Moreover, as the European Union pointed out, India's opposition did not concern "ongoing negotiations whose outcome is not yet clear"; instead, India was "target[ing] agreements already reached and commitments already made".[55]

The tension between developing countries' interest in seeing the TFA adopted, on the one hand, and the temptation to use the adoption of the TFA as a bargaining chip, on the other hand, became clearly apparent in the negotiating position of the African countries which considered making their support "conditional" on a commitment to conclude the Doha Round as a whole. Reportedly, there was a divide between capital-based officials who were "focused on making their Category A commitments and preparing for implementation", on the one

[53] 'TF Agreement under Threat as July 31 Deadline Looms for WTO Amendment' *Inside US Trade* (11 July 2014).

[54] In explaining its concern about India's position towards the TFA, the EU representative noted: "I haven't heard anyone saying that he or she has changed his or her mind on the benefits the TF agreement would provide". EU Statement, 15 September 2014.

[55] EU Statement, 15 September 2014.

hand, and "Geneva-based officials" who were "interested in using TF implementation as a negotiating chip in the debate over how to proceed on the Doha Round".[56] The incongruousness of the African countries' attempt to use their consent to the TFA as part of a distributive strategy also became apparent when the US responded to the veto threat with a distributive strategy of its own: several US legislators threatened to delay the renewal of the African Growth and Opportunity Act (AGOA) unless the Africans relented. According to a World Bank expert, using AGOA renewal as leverage was a "mistake" since "the countries that care about AGOA … under[stood] that TF implementation can help them benefit more from AGOA, and … therefore also support TF implementation".[57] In these circumstances, the US threat "served only to cause resentment against the U.S.", in the expert's view. Apart from South Africa, all African countries had abandoned their resistance by July 25, and even South Africa never "publicly threatened" to make its consensus conditional on a formal link between the TFA's entry into force and the conclusion of the Doha Round.[58]

India was more resolute in holding the TFA hostage to its demands on public stockholding for food security purposes. On July 16, it confirmed that, until it received "an assurance and visible outcomes" on the other elements of the Bali package, "India will find it difficult to join the consensus on the Protocol of Amendment".[59] At a meeting of the General Council on July 24-25, India made its demand more specific, asking that "the public stockholding issue as well as the other decisions of Bali be taken forward in the same timeframe as Trade Facilitation".[60] This demand was clearly inconsistent with the timeframes agreed at Bali, which foresaw a resolution of the public stockholding issue by December 2017.[61] Unsurprisingly, other WTO Members complained that India was asking to "receive new tradeoffs" for its consent to the TFA, "additional to the ones they negotiated in Bali".[62] Canada described India's demand as an "indefensible position to take at this stage".[63]

Despite the African Group's flirtation with the idea of holding the TFA hostage to broader progress in the Doha Round and India's persistent attempts to win allies for its position,[64]

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[56] ibid. The then-US Trade Representative Michael Froman also noted this tension in the attitude of trade negotiators from Africa even before the adoption of the TFA, commenting in October 2013:

> I am sometimes struck by the dichotomy I sense between capitals and Geneva when it comes to trade facilitation. Every time I go to Africa, … it is clear that trade facilitation is a central goal of every government with which I have met, the focal point of domestic, bilateral and regional work. In Geneva, trade facilitation is too often a bargaining chip in the great game of multilateral trade negotiations, a pivot point for tactical maneuvering.

Michael Froman, 'USTR Froman Warns Poor Countries Would be the Biggest Losers if Bali Fails' (WTO Public Forum, 1 October 2013) <https://www.wto.org/english/news_e/news13_e/pfor_01oct13_e.htm> accessed 4 January 2019.

[57] 'TF Agreement under Threat' as July 31 Deadline Looms for WTO Amendment'(n 53).

[58] 'Trade Facilitation Deal Hangs in Balance as WTO Members Wait on India' *Inside US Trade* (25 July 2014).

[59] 'Commerce Secretary Reiterates India's Stand on Trade Facilitation' *Tax Management India* (16 July 2014).

[60] Statement by India at the Meeting of the General Council (Geneva, 24-25 July 2014).

[61] The WTO Director General noted that a "strict parallelism" between the TFA and food security was "not possible", since the negotiation on the TFA "was concluded in the Bali package", whereas the negotiation on food security "was launched by the Bali package". Statement by Director General Roberto Azevêdo at the Informal Heads of Delegations Meeting (15 September 2014) <https://www.wto.org/english/news_e/spra_e/spra30_e.htm> accessed 4 January 2019.

[62] 'India Sticks to TFA Objection, Proposes Link to Permanent Solution on Food Security' *World Trade Online Daily News* (26 July 2014).

[63] 'TF Work Faces New Hurdle from India; African Group Demands Remain Unclear' *World Trade Online Daily News* (7 July 2014).

[64] See 'India seeks cooperation from African countries at the WTO: Rajeev Kher' *Confederation of Indian Industry Blog* (21 August 2014) <http://www.cii.in/PressreleasesDetail.aspx?enc=XmZ52waZcfwpUu8p/0FWdLUCpYeEgDm2BipucctXToM=> accessed 8 January 2019. India's Commerce Secretary somewhat desperately asserted that India "was not the sole

India found itself increasingly isolated when WTO Members reconvened after the summer break in September 2014. At an Informal Heads of Delegation Meeting on September 15, the US and the EU put India on the spot, asking it to declare whether it merely wanted to clarify the Bali package or to reopen it. Both the US and the EU made it clear that while they were willing to do the former, they would not accept the latter. The US made a step towards India when it gave up its opposition, which it had expressed in July, towards adopting a General Council Decision to clarify that the "peace clause" on public stockholding adopted at Bali would remain in place until a "permanent solution" to the issue had been found. This provided a basis for a breakthrough in early November 2014: India gave up its blockage of the protocol for adoption of the TFA in return for a General Council Decision reaffirming the duration of the "peace clause" on public stockholding.[65]

Arguably, India gained nothing of substance by delaying the adoption of the protocol for the TFA by five months. Indeed, it is hard to know whether India's new government ever seriously expected to achieve its declared negotiating objective of synchronizing work on the TFA and public stockholding, or whether it merely put up a fight to score points with rural voters at home.[66]

4.4 Integrative Strategies on Issues of Common Interest: The Initiatives on Trade Facilitation in Services and Investment Facilitation

Observers of the trade regime have long noted that negotiations on issues of common interest in the WTO are complicated by the tendency of WTO Members to conceptualize these issues in terms of divided interest in an attempt to extract bargaining leverage. In a comparative study of the Organisation for Economic Co-operation and Development (OECD) and the WTO, Kenneth Abbott and Duncan Snidal have explored why the OECD was much more successful than the WTO in addressing the issue of corruption in the late 1990s. Abbott and Snidal note that, to officials at the United States Trade Representative (USTR),

> Corruption was simply another issue – another nontariff barrier – in the quid pro quo world of international trade policy. In that world, as a USTR official told us, "you get what you pay for." Trade officials therefore framed the corruption issue as a bargaining problem with divided interests rather than as an issue of common concern. No one in the agency or its business constituencies was willing to trade off concrete market access for the possible future benefits of controls on international bribery and corruption, eviscerating the potential for US leadership in the WTO.[67]

As a result of this dynamic, exercising leadership on issues on common interest is potentially costly for a WTO Member: it may be asked for "payment" even by Members who would benefit from the implementation of the proposal.[68] As noted above, this was a concern for the US when it tried to ensure the adoption of the TFA at the Bali Ministerial conference.[69] Another example of this dynamic is the run-up to the 2015 Ministerial conference in Nairobi:

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country in the fray", given that the G-33 and 46 countries had "endorsed … India's stand". However, while these countries might have endorsed India's substantive proposals on food security, they appeared to disagree with India that blocking the adoption of the TFA was the proper strategy to advance those proposals.

[65] 'US-India Breakthrough Includes Council Decision on Peace Clause' *Inside US Trade* (14 November 2014).

[66] See 'US, India Rekindle Talks to Break WTO Deadlock on TFA-Food Security' *Inside US Trade* (7 November 2014).

[67] Kenneth W Abbott and Duncan Snidal, 'International Action on Bribery and Corruption: Why the Dog Didn't Bark in the WTO' in Daniel LM Kennedy and James D Southwick (eds) *The Political Economy of International Trade Law: Essays in Honor of Robert E Hudec* (CUP 2002) 177, 193.

[68] ibid 199.

[69] See Michael Froman, 'USTR Froman Warns Poor Countries Would be the Biggest Losers if Bali Fails' (n 56).

discussions reportedly moved slowly because WTO members were "floating only ideas, not specific proposals, partially for fear that they could be asked to pay for their demands".[70]

Despite the misgivings of the US about the demands for payment that it faced in response to its advocacy of the TFA, the TFA was widely recognized to be in the common interest of all WTO members. The negotiation and adoption of the TFA were dominated by the use of integrative bargaining strategies. In the wake of the TFA's adoption, developing countries have seized on this model and have tried to replicate its success in other areas. Ironically, it was India that first took an initiative along these lines by proposing an analogue to the TFA for services trade in September 2016.[71] In April 2017, Argentina and Brazil followed suit with a proposal for a "WTO instrument on investment facilitation".[72]

At the first meeting at which India's proposal was discussed, the US made explicit its understanding of what conditions the Indian proposal would have to satisfy in order to successfully emulate the TFA. In the US view, "the success of the TFA was built on a firm foundation, by which Members had been able to reach consensus on a discrete problem the resolution of which benefitted all Members, i.e. the need to modernise customs processes".[73] From this experience, the US derived three conditions that a lawmaking initiative had to meet in order to replicate the success of the TFA: First, the proposal should be focused on a clearly defined problem; second, the proposal should provide obvious benefits to all Members; and third, the proposal should avoid known sensitivities.[74]

Arguably, these conditions describe the features that an issue must have for its resolution to be in the common interest of all WTO members. The US further explained that, in its view, the only way in which such an issue could be addressed is through integrative bargaining strategies, stating that "[s]tructuring work around a proposal which required an exchange of concessions was unlikely to lead to success".[75] Given that negotiations structured around exchanges of concessions have been the dominant form of lawmaking for most of the trade regime's history, this statement is a remarkable indication that – at least in the eyes of one of the regime's most influential members – the WTO's traditional *modus operandi* is at a dead end.

In the opinion of the US and some other developed countries, the Indian proposal on investment facilitation did not meet the requirement for a "win-win" proposition that could be adopted without an exchange of concessions in all respects, since it "touched on a number of highly sensitive issues".[76] However, WTO Members have shown enough interest in continuing discussions of the proposal ever since. In November 2016, India followed up on its

[70] 'WTO Efforts on Doha Work Program Face Obstacles, may Miss July Deadline' *Inside US Trade* (26 February 2015).

[71] WTO, Working Party on Domestic Regulation, Communication from India, 'Concept Note for an Initiative on Trade Facilitation in Services' S/WPDR/W/55 (27 September 2016).

[72] WTO, General Council, Communication from Argentina and Brazil, 'Possible Elements of a WTO Instrument on Investment Facilitation' JOB/GC/124 (26 April 2017) (hereafter WTO Communication from Argentina and Brazil).

[73] WTO, Working Party on Domestic Regulation, Note by the Secretariat, 'Report of the Meeting Held on 6 October 2016' S/WPDR/M/68 (11 November 2016) (hereafter WTO, 'Report of the Meeting Held on 6 October 2016') para 1.49.

[74] ibid. The US reiterated these criteria in later discussions; see WTO, Council for Trade in Services – Special Session, Note by the Secretariat, 'Report of the Meeting Held on 3 May 2017' TN/S/M/46 (24 May 2017) (hereafter WTO, 'Report of the Meeting Held on 3 May 2017') para 1.52.

[75] WTO, 'Report of the Meeting Held on 6 October 2016' (n 73).

[76] ibid para 1.50. These issues included "immigration procedures …, social security and health insurance portability"; see WTO, Working Party on Domestic Regulation, Note by the Secretariat, 'Report of the Meeting Held on 25 November 2016' S/WPDR/M/69 (22 December 2016) para 2.53.

Concept Note with an "Elements Paper"[77] setting out potential components of an agreement on trade facilitation in services, and in February 2017 it tabled a "draft legal text".[78] The reaction to its draft text was mixed – while many delegations found the idea of trade facilitation in service useful, there was also some scepticism about how the proposal related to existing negotiating processes on services, about the lack of a negotiating mandate, and about the realism of the proposal in the current political context. However, there was sufficient engagement, including proposals on concrete textual changes, for India to circulate a revised draft in July 2017.[79] At the time of writing, the WTO members had not discussed the revised draft, but such discussions were expected to resume in 2018.[80]

While the prospects for an agreement on trade facilitation in services remain uncertain, the initiative and leadership that India demonstrated in proposing the agreement, engaging with other WTO Members, and incorporating their feedback was widely noted and commended.[81] Other WTO Members were aware that India's initiative was not a selfless exercise, but that India was attempting to address some concrete grievances, especially regarding restrictions on the movement of natural persons under Mode 4. However, the fact that India decided to address those grievances by proposing a comprehensive set of rules that potentially held attractions for all WTO Members – in other words, that India decided to pursue an integrative strategy – arguably had the effect that WTO Members engaged with India's proposal much more deeply than they otherwise might have.

In April 2017, Argentina and Brazil decided to follow India's lead by proposing "possible elements of a WTO instrument on investment facilitation".[82] Their proposal, which explicitly built on India's initiative but broadened the scope to investment generally, was careful to heed the parameters spelled out by the US for successful initiative in the TFA's mould, namely, it "avoid[ed] well known contentious issues", including investment protections and investor-state dispute settlement.[83] Argentina and Brazil clearly saw that "if any multilateral effort in this area is to succeed, it must be strictly circumscribed to facilitation".[84]

Ironically, it was India that initially stood in the way of discussions on investment facilitation: it took the extraordinary step of blocking the adoption of the agenda of the General Council meeting at which the possibility of discussions on investment facilitation was supposed to be discussed, arguing that the topic was outside the WTO's mandate.[85] India's opposition (it eventually gave up its veto of the General Council's agenda after the agenda item was renamed) did not prevent the discussions from moving forward. At the 11th Ministerial

[77] WTO, Working Party on Domestic Regulation, Communication from India, 'Possible Elements of a Trade Facilitation in Services Agreement' S/WPDR/W/57 (14 November 2016).

[78] WTO, Council for Trade in Services – Special Session, Working Party on Domestic Regulation, 'Communication from India – Trade Facilitation Agreement for Services' S/C/W/372 – TN/S/W/63 – S/WPDR/W/58 (23 February 2017).

[79] WTO, Council for Trade in Services – Special Session, Communication from India, 'Trade Facilitation Agreement for Services – Revision' TN/S/W/63/Rev 1 (27 July 2017).

[80] WTO, Council for Trade in Services – Special Session, Report by the Chairman HE Ambassador Hector Marcelo Cima to the Trade Negotiations Committee, 'Negotiations on Trade in Services' TN/S/41 (27 November 2017) paras 1.3 and 1.6.

[81] For example, Australia "welcomed the leadership role that India was playing to push forward the services negotiation agenda"; WTO, Council for Trade in Services, Note by the Secretariat 'Report of the Meeting Held on 16 and 17 March 2017' S/C/M/130 (6 June 2017) para 3.64.

[82] WTO Communication from Argentina and Brazil (n 72).

[83] ibid para 1.3.

[84] ibid.

[85] Brett Fortnam, 'India Blocks WTO General Council Meeting over Investment Agenda Item' *World Trade Online Daily News* (10 May 2017).

Conference in Buenos Aires in December 2017, a group of 70 WTO Members signed a "Joint Ministerial Statement on Investment Facilitation for Development"[86] and in February 2018, Brazil circulated a draft "Investment Facilitation Agreement".[87] At the time of writing, it is impossible to tell where these discussions would lead, but the ministerial statement certainly would appear to lend them considerable momentum.

5. Evaluating the Strategic Options

The case studies discussed in the previous section represent only a small subset of interactions between developing countries and their counterparts during the Doha Round and in its aftermath. Hence they cannot be a basis for definite conclusions about the strategic options that developing countries have at their disposal. However, they allow me to make some tentative observations.

5.1 Distributive Strategies on Issues of Divided Interests

It is hard to dispute that the ability of developing countries to employ distributive strategies to assert their interests is much greater now than it was in previous rounds of multilateral trade negotiations, especially when developing countries decide to act jointly. This strategy is particularly effective when developing countries try to prevent negotiating outcomes that are not in their interest. Their successful employment of this strategy to block negotiations on the Singapore issues is the most well-known example, but there are others. Thus, the emerging economies have successfully resisted developed countries' attempts to gain their participation in several zero-for-zero tariff elimination deals on industrial products, the so-called non-agricultural market access (NAMA) negotiations, throughout the Doha Round.[88]

However, developing countries' ability to block negotiations on issues that they are not interested in, or to resist negotiating proposals that they regard as unfavourable, only takes them so far. If developing countries use this strategy too liberally, they will paralyse the WTO as a negotiating forum and cause negotiations to move to other fora in which they will typically have less leverage to influence the outcome than they have in the WTO. This has already happened to a large degree, as developed countries have been focusing most of their energy on the negotiation of preferential trade agreements. The use of distributive strategies should therefore be carefully calibrated to consider the cost of blocking action in the WTO not only as compared to the alternative of action in the WTO, but also as compared to action (by one's negotiating partners) in another forum.

While distributive strategies may allow developing countries to block the progress of negotiations, it is less clear that they have allowed developing countries to force the adoption of measures which they advocate (although this assessment is complicated by the paucity of negotiated outcomes in the past two decades). The "peace clause" on public stockholding for food security purposes that India achieved at Bali could be seen as an example where a distributive strategy delivered a modest success.[89]

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[86] WTO, Ministerial Conference, 'Joint Ministerial Statement on Investment Facilitation for Development' WT/MIN(17)/59 (13 December 2017).

[87] WTO, General Council, Communication from Brazil, 'Structured Discussions on Investment Facilitation' JOB/GC/169 (1 February 2018).

[88] See WTO, Trade Negotiations Committee, 'Report by the Director-General on His Consultations on NAMA Sectoral Negotiations' TN/C/14 (21 April 2011).

[89] There is an important difference between India's linkage of food security and the TFA before and after Bali. While the linkage was an example of a distributive strategy on an issue of common interest, with all the attendant risks, in the run-up to Bali as well, its use after Bali was seen as particularly destructive because India was perceived as walking back on commitments that it had made in Bali.

There are other contexts in which distributive strategies have their place. In this way, some negotiations based on the traditional mercantilist model have yielded success in recent years. The expansion of the product scope of the Information Technology Agreement (ITA) and the renegotiation of the Government Procurement Agreement are cases in point. At the core of both these agreements are exchanges of market access concessions, in the form of tariff reductions and access to procurement markets, respectively. In these contexts, the use of distributive strategies by developing countries is entirely appropriate. However, there is every indication that the scope for such deals has narrowed considerably. The ease of negotiating market access in preferential agreements has made such agreements the preferred method for lowering barriers. Moreover, the failure to conclude the Environmental Goods Agreement appears to have sapped the appetite for critical mass deals on market access in the WTO for the near future.

5.2 Distributive Strategies on Issues of Common Interest

While a strict distributive strategy may still be the best option where interests are (perceived as) clearly divided, as was the case with the Singapore issues, the use of a distributive strategy on issues of common interest, such as India's veto of the TFA protocol unless its demands on food security were addressed, poses additional risks. First, since India had just as much of an interest in the adoption of the TFA as most other WTO Members,[90] its attempt to take the TFA hostage in order to achieve unrelated demands further diluted the appeal of the WTO as a negotiating forum. Trust among the delegations was eroded.[91] Second, India's actions also legitimized the pursuit of distributive strategies on issues of common interest, further reducing the scope for lawmaking on such issues in the WTO. This works to the disadvantage of developing countries, which have fewer resources for collateral or concessional payments as part of distributive strategies than developed countries.

India's blockage of the TFA is not the only example of the use of a distributive strategy by developing countries on issues that other WTO Members perceive as being in the common interest of all WTO Members. The negotiations on the review of the Dispute Settlement Understanding (DSU), a systemic issue *par excellence*, are reportedly held up at least in part because developing countries are demanding to be "paid" for their consent with concessions in unrelated areas.[92] Perhaps because they are alive to the risks of this strategy, other developing countries have been more cautious in its use than India. There were concerns that China would link its agreement to an outcome on fisheries subsidies to its demands in negotiations on the WTO agreements governing the use of trade remedy laws[93]. These concerns were put to rest in July 2017 when China announced that it would not link the two issues.[94]

The shortcomings of distributive strategies – their suitability to block rather than advance negotiations, the risks attending their use, and the increasingly limited scope for deals

[90] Since the FTA entered into force, India has lauded the agreement as a significant achievement. On the importance of trade facilitation for India, see Pravakar Sahoo, Niloptal Goswami, and Rahul Mazumdar, 'Trade Facilitation: Must for India's Competitiveness' (2017) 51 Journal of World Trade 285.

[91] Observers noted "a breakdown of trust following the missed TFA deadline" that "could prevent other countries from working to please India"; 'Uncertainty over India's Red Lines Clouds Future of Trade Facilitation Deal' *Inside US Trade* (22 August 2014). And the US Ambassador stated that "trust has been devastated by the failure of a few to keep their obligations regarding the first critical Bali milestone"; WTO, Statement by Ambassador Michael Punke at the Informal Heads of Delegation Meeting at the WTO (Geneva, 15 September 2014).

[92] Interviews with trade negotiators from a developed country.

[93] 'WTO Members Fear China Could Link AD and Fisheries Proposals, Sink Ministerial Outcome' *World Trade Online Daily News* (4 May 2017).

[94] 'China Says It Will Not Link Trade Remedy Talks with Fisheries Negotiations at WTO' *World Trade Online Daily News* (14 July 2017).

structured around exchanges of concessions – provide grounds to argue that pursuing integrative strategies, both on issues hitherto perceived as of divided interest and on issues of common interest, is the more promising route for developing countries in the foreseeable future.

5.3 Integrative Strategies on Issues of Divided Interests

As the example of the sectoral initiative on cotton demonstrates, successfully using an integrative strategy to make headway on an issue that has traditionally been characterized by divided interests (and hence was seen as requiring a reciprocal exchange of concessions) is a tall order. In order to reframe these issues, developing countries must bring their negotiating partners to fundamentally reassess and reconceive their interests with respect to the subject matter in question, to align them with the interests of developing countries. It is not enough to simply demand that an issue should not be "linked" to other issues, as the G-33 did in the run-up to the 2017 Ministerial Meeting in Buenos Aires when they asked that a negotiated outcome on a special safeguard mechanism and public stockholding "should not be linked to other issues".[95] If developed countries perceive their interests as opposed to those of developing countries, such a demand will simply be perceived as a request to receive concessions "for free".[96] Despite these challenges, the use of integrative strategies to reframe issues that were traditionally regarded as characterized by divided interests (and therefore requiring reciprocal concessions) has arguably led to success in two instances. One example is the success of the campaign to waive and ultimately amend certain obligations under the TRIPS Agreement in order to ease access to medicines in public health emergencies for developing countries without pharmaceutical manufacturing capacity.[97] The second example is the decision adopted by WTO Members at the Nairobi Ministerial Conference in 2015 to eliminate agricultural export subsidies. In both instances, developing countries achieved significant gains without compensating concessions, at least in part, because they were able to reframe the issues in a manner where developed countries came to see their interest aligning with developing countries' interests. There is thus some promise for developing countries in pursuing integrative strategies even on issues on which their interests have traditionally been opposed to those of developed countries.

5.4 Integrative Strategies on Issues of Common Interest

In the current negotiating climate, lawmaking initiatives that stick closely to the three conditions articulated by the US delegate – identify a clearly circumscribed issue, develop a solution that benefits all members and avoid any sensitivities – hold the greatest chance of success. It is thus not surprising that both India's Trade Facilitation in Services Agreement and Brazil's Agreement on Investment Facilitation attempt to adhere to this model. However, this lawmaking model also has significant drawbacks as a strategy for developing countries.

First, it is a resource-intensive strategy. Identifying a potential issue for a lawmaking initiative, developing a textual proposal in coordination with domestic stakeholders, defending the proposal in meetings of the relevant WTO bodies, and incorporating feedback from other WTO members – with uncertain chances of success – requires both human and

[95] Jack Caporal, 'Group of Developing Countries Says Public Stockholding, SSM Should Not Be Linked to Other Issues' *World Trade Online Daily News* (10 December 2017).

[96] The EU and the United States promptly rejected the G-33's request and reaffirmed that for them the issue of public stockholding remained part of a larger bargain on domestic agricultural subsidies; see 'EU Members Say Domestic Support Linked to Public Stockholding' *Inside US Trade* (10 December 2017).

[97] See John S Odell and Susan K Sell, 'Reframing the Issue: the WTO Coalition on Intellectual Property and Public Health, 2001' in John S Odell (ed) *Negotiating Trade: Developing Countries in the WTO and NAFTA* (CUP 2006) 85; and Jean-Frédéric Morin and E Richard Gold, 'Consensus-Seeking, Distrust and Rhetorical Entrapment: The WTO Decision on Access to Medicines' (2010) 16 European Journal of International Relations 563.

financial resources that most developing countries do not possess. It is hence not surprising that it was India, Brazil, and Argentina – large developing countries with decades of experience in multilateral trade negotiations – who authored the proposals that are currently being discussed. For most other developing WTO Members, the opportunity costs of proposing initiatives along these lines are prohibitive.

Second, many issues that are of most pressing interest to developing countries, such as further liberalization of developed countries' agricultural markets or the movement of natural persons for the delivery of services, simply do not fit within the TFA-inspired mould articulated by the US delegate. Reforms on these issues necessarily produce winners and losers and are hence highly sensitive for developed countries. The perception that the proposal on a TFA for services advanced by India does not squarely address the core issues of interest of most developing countries may explain why India's initiative has received a rather lukewarm response, especially from poorer developing countries. For example, Rwanda, speaking on behalf of the African Group, at one point stated that "[i]n the absence of any discernable progress on priorities of the African Group, notably domestic support in agriculture and public stockholding for food security purposes, realistic prospects for taking up the TFS seemed minimal."[98] In discussions on India's proposal in WTO committees, several developing countries have emphasized that they were not "demandeurs" on services and have signaled limited interest in the proposal.

Finally, taking the lead on a lawmaking initiative that targets an issue in the common interest of all WTO Members comes with a loss of bargaining leverage. As John Odell has argued:

> Taking the initiative is costly in negotiation terms since a proposal for a compromise undermines the credibility of the speaker's commitment to his or her preferred position and hence the ability to claim the largest possible share of the gain. Only the very largest traders conceivably stand to gain enough individually to pay, individually, this cost of taking the initiative toward compromise in the WTO.[99]

The dynamic described by Odell is readily apparent in India's current bargaining position. Because it is the principal proponent of an agreement on trade facilitation in services, India now has a stake in a successful outcome on this issue and will be tempted to agree to a package that includes a TFA on services even if that package does not address any other of India's longstanding priorities stemming from the Doha Round (a special safeguard mechanism for agricultural products, public stockholding for food security purposes, etc.). It has thus lost leverage to achieve a satisfactory outcome on these other issues, which is yet another element of the opportunity cost of pursuing lawmaking initiative on issues of common interest in the WTO.

6. Conclusion

With the demise of the Doha Round single undertaking, a more flexible negotiating architecture is emerging in the WTO. The present chapter has sought to map the strategic options that developing countries confront as they navigate the increasingly complex landscape of negotiating groups, informal work programs, and exploratory discussions.

In the aftermath of the Uruguay Round and in the early years of the Doha Round, developing countries were focused on resisting what they perceived as the imposition of onerous obligations by developed countries. Aided by new sources of leverage stemming principally

[98] WTO, 'Report of the Meeting Held on 3 May 2017' (n 74) para 1.19.

[99] See John S Odell, 'Chairing a WTO Negotiation' in Ernst-Ulrich Petersmann (ed), *Reforming the World Trading System. Legitimacy, Efficiency, and Democratic Governance* (OUP 2005) 469, 472.

from the institutional structure of the WTO, developing countries built their capacity to implement distributive strategies and successfully employed them to derail negotiations on subjects that they did not perceive to be in their interest. In more recent years, as negotiations in the WTO have increasingly focused on issues with potential benefits for all WTO members, such as trade facilitation, the use of distributive strategies by developing countries – such as India's decision to block the adoption of the protocol of amendment for the TFA – has come to appear increasingly counterproductive.

Instead, the chapter suggests that the pursuit of integrative strategies holds more promise for developing countries. While far from costless in terms of resources and negotiating leverage, lawmaking initiatives that seek to identify and address issues of common concern are more likely to lead to tangible outcomes in the short- and medium-term. India and Brazil are already pursuing this route. However, the scope for such initiatives is limited. In an increasingly fractured and discordant international community, issues on which the interests of a large number of WTO Members are aligned are not easy to find. And in any event only a minority of developing WTO Members have the capacity to devote resources to such initiatives. In the longer term, a more promising route for developing countries may be to attempt to reframe issues on which interests are currently perceived as divided. The Sectoral Initiative in Favour of Cotton represents an audacious attempt to do just that, and its limited success to date demonstrates the difficulty of achieving this objective. Fortunately, a wide range of institutions stand ready to assist developing countries in taking the next step in the development of their strategy in multilateral trade negotiations – from the ability to ward off unwanted obligations to shaping the next generation of international trade rules.

Chapter 2. Can International Investment Agreements be Instruments of Sustainable Development? Systemic Capacity Challenges for Developing Countries

J. Anthony VanDuzer

1. Introduction

The world is girdled by an increasingly dense network of international investment agreements (IIAs) that includes almost 3000 bilateral investment treaties (BITs) and more than 300 other agreements with investment provisions.[1] Almost every country in the world is party to at least one IIA, and many are parties to dozens.[2] While the rate of proliferation of IIAs peaked in the mid 1990's when more than four treaties were signed every week, countries, both developed and developing, continue to sign new ones.[3]

The negotiation and implementation of IIAs present an array of interrelated capacity challenges. Traditionally, the models used for IIAs have been drafted by developed countries. These models had a singular focus on investment protection without much regard for the need to preserve host country policy space to take action to ensure that foreign investment contributed to sustainable development.[4] The consequences of this unbalanced approach became very clear beginning in the 1990's, as investors increasingly challenged state actions, including those adopted to achieve environmental protection and other public policy goals, through investor-state arbitration. This mechanism is unique to investment treaties. It allows private parties to seek compensation from states on the basis that the state's action is inconsistent with its treaty obligations. State exposure to investor-state claims makes it critical for IIA negotiators to have the expertise necessary to ensure that IIA obligations strike the right balance between investor protection and preserving domestic policy space. In practice, however, developing countries negotiators have often lacked the capacity or power to negotiate changes to treaty texts with their developed country counterparts.[5]

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[1] United Nations Conference on Trade and Development (hereafter UNCTAD), *World Investment Report 2017: Investment and the Digital Economy* (United Nations 2017) <https://unctad.org/en/PublicationsLibrary/wir2017_en.pdf> accessed 2 January 2019.

[2] Two hundred and nineteen countries are parties to at least one IIA. See UNCTAD's Investment Policy Hub: <http://investmentpolicyhub.unctad.org/IIA> accessed 2 January 2019.

[3] UNCTAD, *World Investment Report 2017* (n 1) xii.

[4] J Anthony VanDuzer, Penelope Simons and Graham Mayeda, *Integrating Sustainable Development into International Investment Agreements: A Guide for Developing Countries* (Commonwealth Secretariat 2013). Acknowledging that the meaning of sustainable development is contested and context specific, for the purposes of this paper sustainable development is considered to require reconciling economic considerations with environmental sustainability and social protection. See Giorgio Sacerdoti, 'Investment Protection and Sustainable Development: Key Issues' in Steffen Hindelang and Markus Krajewski (eds), *Shifting Paradigms in International Investment Law: More Balanced, Less Isolated, Increasingly Diversified* (OUP 2016) 19.

[5] Lauge Poulsen, 'The Politics of South-South Bilateral Investment Treaties' in Tomer Broude, Marc Busch and Amy Porges (eds), *The Politics of International Economic Law* (CUP 2011) 199.

Ensuring compliance with IIAs also demands considerable expertise. Because developed countries have been unwilling to move away from their treaty models, many developing countries have ended up with a haphazard patchwork of investment obligations creating complex compliance challenges.[6] Inconsistent and sometimes surprising interpretations by investor-state tribunals of broad and open-ended IIA provisions like "fair and equitable treatment" have complicated compliance efforts.[7] As well, the 109 states that have been the subject of investor-state claims have had to develop the capacity to defend themselves or hire expert counsel to do so.[8]

The context in which IIAs are negotiated has changed over time in ways that affect the significance of these capacity challenges for developing countries. For example, increasingly developed countries are the target of investor-state claims as a consequence of their conclusion of IIAs with developing countries, like China, that are significant sources of inward investment. As a result, developing countries negotiators are beginning to face developed country counterparts who are more concerned to ensure that investment treaties preserve host country policy space. Some developed countries, like Canada, have developed distinctive new approaches to IIAs that seek to ensure that they are compatible with sustainable development.[9]

At the same time, international organizations, most prominently United Nations Conference on Trade and Development (UNCTAD), and some CSOs, like the International Institute for Sustainable Development, have produced analysis, policy frameworks, and model agreements, and sponsored training activities, with the goal of ensuring that states have the capacity to negotiate treaties compatible with their sustainable development.[10]

Despite the changing context and the availability of more resources to support efforts by developing countries in their negotiation of IIAs and their compliance with them, systemic barriers continue to impede developing country capacity to take up new and better approaches to IIAs.

As well, IIAs are only one part of state strategies to achieve sustainable development supported by foreign investment. Each country needs to consider how IIAs can best contribute to a state's overall investment and development strategy, in light of their unique circumstances. Many countries are just beginning to think about IIAs in this way.

The paper begins with an overview of the historical development of the IIA regime and some of the factors that are driving changes to the context for the negotiation of investment treaties in ways that affect the capacity challenges for developing countries. Then some of the

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[6] Wolfgang Alschner and Demitriy Skougarevskiy, 'Rule-takers or rule-makers? A new look at African bilateral investment treaty practice' (2016) 4 TDM <www.transnational-dispute-management.com/article.asp?key=2357> accessed 2 January 2019.

[7] Susan Franck, 'The Legitimacy Crisis in International Treaty Arbitration: Privatizing Public International Law Through Inconsistent Decisions' (2005) 73 Fordham Law Review 1521.

[8] UNCTAD, *World Investment Report 2017* (n 1) 114.

[9] Lise Johnson and Lisa Sachs, 'International Investment Agreements, 2013: A Review of Trends and New Approaches' in Andrea Bjorklund (ed), *Yearbook of Investment Law & Policy 2013-2014* (OUP 2015).

[10] Howard Mann and others, 'IISD Model International Investment Agreement for Sustainable Development' (2005) 20 ICSID Review – Foreign Investment Law Journal 91. Note that the IISD has held an Annual Forum for Developing Country Negotiators since 2006. See IISD, Annual Forum of Developing Country Investment Negotiators <http://www.iisd.org/project/annual-forum-developing-country-investment-negotiators> accessed 3 January 2018; UNCTAD, *Investment Policy Framework for Sustainable Development* (United Nations 2015) <https://unctad.org/en/PublicationsLibrary/diaepcb2015d5_en.pdf> accessed 3 January 2019. Note also that since 2008, UNCTAD's biennial World Investment Forum has brought together experts and stakeholders from government, private sector and civil society from around the world.

continuing systemic challenges for developing countries regarding the negotiation of and compliance with investment treaty obligations resulting from fragmentation and incoherence in IIA obligations are sketched out. The next section identifies available resources and recent innovative IIA approaches and their impact on these challenges. The final section discusses the broader issue of how to integrate IIAs within a state's overall strategies regarding foreign investment and sustainable development.

2. The Historical Context for IIA Negotiations and How it is Changing

2.1 The "Grand Bargain" of BITs Between Developed and Developing Countries

Beginning in 1959, developed countries started to negotiate treaties with developing countries with the aim of protecting their investors' operations there.[11] These BITs established broad substantive standards that had to be observed by treaty parties in relation to investors from the other party state. Most BITs backed up these commitments by providing that investors from one party state could seek compensation from the other party state through investor-state arbitration. Developed countries were not concerned that the vague investor protection standards in their models might encroach on host state policy even though they assumed the same legal obligations because usually there were no developing country investors who could claim treaty protections. In practice, investment flowed only in one direction: from the developed country party to the developing country party.

Developing countries entered into these treaties in the hope that they would attract investment by committing to provide the promised protection and be subject to investor-state arbitration claims if they did not. Typically, BITs did not expressly address investment promotion, except, in some cases, in their preambles.[12] Protection of investors from developed countries in return for inward investment into developing countries has been called the "grand bargain" of BITs.[13]

Led initially by European countries, thousands of BITs were negotiated at an accelerating pace through the 60's, 70's, and 80's with a significant uptick in the 1990's and early 2000's.[14] Though the annual number of new treaties has declined in recent years, states continue to conclude them. Thirty-seven were signed in 2016.[15]

Developed countries were successful in imposing their models on developing countries as a result of the confluence of several factors, including substantial disparities in economic and political power and developed countries' greater expertise and negotiating experience.[16] As well, the negotiating context for BITs was not conducive to deviation from model agreements. Unlike trade agreement negotiations, states tended not invest much time or resources in BIT negotiations. Parties to trade agreement negotiations are engaged in building a comprehensive

[11] The first BIT was the Treaty between the Federal Republic of Germany and Pakistan for the Promotion and Protection of Investments (signed 25 November 1959, entered into force 28 April 1962).

[12] VanDuzer, Simons and Mayeda (n 4) 43.

[13] Jeswald W Salacuse and Nicholas P Sullivan, 'Do BITs Really Work? An Evaluation of Bilateral Investment Treaties and Their Grand Bargain' (2005) 46 Harvard International Law Journal 67. Various other motives for signing investment treaties have been suggested. See Jennifer Tobin and Marc Busch, 'A BIT is Better Than a Lot: Bilateral Investment Treaties and Preferential Trade Agreements' (2010) 62 World Politics 1, finding that signing a BIT increases the likelihood that the parties will sign an FTA.

[14] UNCTAD, *World Investment Report 2012: Towards a New Generation of Investment Treaties* (United Nations 2012) <https://unctad.org/en/PublicationsLibrary/wir2012_embargoed_en.pdf> accessed 3 January 2019.

[15] UNCTAD, *World Investment Report 2017* (n 1).

[16] Poulsen, 'The Politics of South-South Bilateral Investment Treaties' (n 5) 199.

framework for their entire trade and investment relationship tailored to their respective interests. By contrast, the goal in most BIT negotiations, at least for developed countries, was simply to get developing countries to agree to their model. Negotiations to customize BIT terms to meet the needs of the developing country party were rare.[17] Finally, competition for investment between similarly situated developing countries discouraged them from seeking changes to BITs that would lessen investor protection.

2.2 The New Context (i): Shifts in Global Investment Flows and Treaty-Making

While IIAs are still entered into between developed and developing countries, many treaties are now being negotiated in contexts that are different, changing how developed states view investment obligations. FDI from developing countries and transition economies accounted for almost 41% of global FDI outflows in 2016.[18] Countries like China, India, and Malaysia, have become significant capital exporters. Countries like Canada that had negotiated most treaties from a capital exporter's point of view are now signing treaties with developing countries that are substantial sources of inward investment, forcing them to be more concerned about ensuring that their treaties accommodate their ability to regulate to achieve sustainable development.[19] As well, negotiations between countries that are both capital importers and capital exporters are occurring in an increasing number of South-South[20] and North-North contexts,[21] where all parties have an interest in ensuring the right balance between investor protection and their freedom to take action to achieve sustainable development. Developed countries with a new-found appreciation of the need to ensure that their investment obligations allow them sufficient space to regulate in the public interest have typically been willing to grant this same space to developing country partners in their negotiations.[22]

2.3 The New Context (ii): Investor-State Arbitration

The explosion of investor-state cases has also shifted the context for negotiating IIAs and complying with them. There were only a handful of investor-state cases prior to the mid-1990s, but, by the end of 2016, over 750 had been brought under BITs or investment chapters in free trade agreements.[23] As IIAs are increasingly entered into by developed states with

[17] Poulsen, 'The Politics of South-South Bilateral Investment Treaties' (n 5) 199; Engela Schlemmer, 'An Overview of South Africa's Bilateral Investment Treaties and Investment Policy' (2016) 31 ICSID Review – Foreign Investment Law Journal 167, 185, 188; J Anthony VanDuzer, 'Canadian Investment Treaties with African Countries: What Do They Tell Us About Investment Treaty Making in Africa?' (2017) 18 The Journal of World Investment and Trade 556, 569-576.

[18] UNCTAD, *World Investment Report 2017* (n 1) ix, 236-237.

[19] For example, the Agreement between the Government of Canada and the Government of the People's Republic of China for the Promotion and Protection of Investments (signed 9 September 2012, entered into force 1 October 2014), Canada Treaty Series 2014/26 <https://investmentpolicyhub.unctad.org/Download/TreatyFile/3476> accessed 3 January 2019. There is about three times as much Chinese investment in Canada as Canadian investment in China.

[20] For example, the Common Market for Eastern and Southern Africa (hereafter COMESA), Investment Agreement for the COMESA Common Investment Area (adopted 23 May 2007, not yet in force) <https://investmentpolicyhub.unctad.org/Download/TreatyFile/3092> accessed 3 January 2019.

[21] For example, the North American Agreement Free Trade Agreement (signed 14 September 1993, entered into force 1 January 1994) Canada Treaty Series 1994/2; the Comprehensive Economic and Trade Agreement between Canada and the European Union (signed 5 August 2014, in force on a provisional basis 21 September 2017) (hereafter CETA) <http://www.international.gc.ca/trade-agreements-accords-commerciaux/agr-acc/ceta-aecg/text-texte/toc-tdm.aspx?lang=eng> accessed 3 January2019; the EU-US Trans-Atlantic Trade and Investment Partnership still under negotiation.

[22] It is also the case that more and more preferential trade agreements with investment chapters, often involving multiple parties, are being negotiated where there is more engagement in negotiations and a greater prospect for the inclusion of provisions that support sustainable development; UNCTAD, *World Investment Report 2012* (n 14) 84.

[23] UNCTAD, *World Investment Report 2017* (n 1) xii.

countries that are significant sources of inward investment, inevitably claims have begun to be made against developed country parties. Western European capital exporting states, including, Austria, Belgium, France, Germany, Greece, Italy and Spain as well as Australia have all been the target of investor-state claims in recent years.[24] Exposure to investor-state claims has provided additional incentives for developed countries to negotiate IIAs that more clearly guarantee the policy space for regulating to achieve sustainable development. Developed countries that have faced the most investor-state cases, like Canada and the US, have been the leaders in adopting IIA provisions protecting their right to regulate.[25]

Investor-state cases have raised awareness of the strong bite of investment treaty commitments across all countries and led to widespread dissatisfaction with the IIA regime. In part, this is because investor-state arbitration tribunals have made some awards that limited host state regulatory flexibility in surprising ways.[26] Tribunal awards have been criticized for a lack of consistency, undermining certainty regarding the content of the investor protection standards.[27] States, as well as civil society organizations and academics, have expressed serious concerns about investor-state arbitration itself. The quality and independence of the arbitrators has been challenged.[28] States have also complained about the high cost of defending investor claims.[29]

These concerns have encouraged many countries to reconsider the costs and benefits of investment treaty protection and investor-state arbitration. Many countries have reformed or are currently reforming their approach to IIAs.[30] New approaches to investment treaty obligations designed to enhance their contribution to sustainable development have been proposed by states, CSOs, and academics. A few countries, including Indonesia, Ecuador, Venezuela, India, and South Africa, have even sought to opt out of the system, in whole or in part, by terminating investment treaties.[31]

2.4 Conclusion

In short, the changing context for negotiating IIAs and experience with investor-state arbitration is driving innovation and new approaches to IIAs. Some of these approaches are starting to appear in IIA practice.[32] A key feature of these new approaches is the preservation

[24] UNCTAD, *IIA Issues Note: Investor-State Dispute Settlement: Review of Developments in 2015* (United Nations 2016) <https://unctad.org/en/PublicationsLibrary/webdiaepcb2016d4_en.pdf> accessed 3 January 2019.

[25] Collins has suggested that developed countries may seek treaty commitments that permit host states to maintain and improve regulatory standards on the basis that their businesses already meet those standards while developing country businesses may not. In this context, higher standards would protect developed country businesses against developing country competitors. See David Collins, 'Sustainable International Investment Law after the *Pax Americana*: The BOOT on the Other Foot' (2011) 13 The Journal of World Investment and Trade 325.

[26] VanDuzer, Simons and Mayeda (n 4) 102.

[27] The degree and seriousness of this problem is contested: see Cristoph Schreuer and Matthew Weiniger, 'A Doctrine of Precedent?' in Peter Muchlinksi, Federico Ortino and Cristoph Schreuer (eds), *The Oxford Handbook of International Investment Law* (OUP 2008) 1198.

[28] Jan Wouters and Nicholas Hachez, 'Institutionalization of Investment Arbitration and Sustainable Development' in Marie-Claire Cordonier Segger, Markus Gehring and Andrew Newcombe (eds), *Sustainable Development in World Investment Law* (Kluwer Law International 2011).

[29] Susan Franck, 'Rationalizing Costs in Investment Treaty Arbitration' (2011) 88 Washington University Law Review 769.

[30] UNCTAD, *World Investment Report 2017* (n 1).

[31] Nineteen treaties were terminated between 1 January 2016 and 1 April 2017, including 11 by Indonesia and 7 by India. See UNCTAD, *World Investment Report 2017* (n 1) 112.

[32] UNCTAD, *World Investment Report 2017* (n 1) 112. UNCTAD concluded that most new IIAs incorporate at least some reforms identified in its "Investment Policy Framework for Sustainable Development" and have provisions to protect host state policy space. See UNCTAD, *Investment Policy Framework for Sustainable Development* (n 10) xii, 119-124.

of policy space for host states. As a result, there are many more options for IIA provisions available to developing country negotiators. Nevertheless, significant challenges remain for developing countries seeking to ensure that their IIA commitments contribute to their sustainable development.

3. Systemic Factors Contributing to Continuing Capacity Challenges for Developing Countries

3.1 Introduction

There is no comprehensive up-to-date survey of the capacity of developing countries to negotiate, implement and comply with IIAs. Of course, capacity varies significantly across countries. But there is substantial evidence that, in general, developing countries often have limited capacity to understand and assess the content of the IIA obligations they negotiate and so ensure both coherence between their IIA commitments and their domestic policy and compliance with their commitments.[33] Poulsen found that limited expertise and experience was sometimes exacerbated by high turnover of negotiators, a tendency for the negotiation of IIAs to be relegated to lower level regional desk officers and a general lack of awareness of investment obligations on the part of government officials, especially below the national level.[34] Weak developing country capacity to engage in dispute settlement has also been shown.[35]

There is no doubt that capacity challenges can be overcome, at least in some circumstances. The large number of claims face by Argentina flowing from its response to its economic crisis in the early 2000's resulted in that country enhancing its capacity dramatically from almost none at the time of its first investment arbitration.[36] Nevertheless, a number of systemic challenges continue to render it difficult for developing countries to negotiate IIAs that meet their needs.

As discussed above, traditionally BIT negotiations began and ended with model agreements drafted by developed countries interested in obtaining the broadest possible protection for their investors' investments in developing countries. While the negotiating context has changed, developed countries still seek agreement to their models, which, despite improvements, may not adequately reflect developing country concerns about attracting investment and ensuring that IIA obligations will contribute to sustainable development. The continuing ability of developed countries to impose their models makes it hard for developing countries to ensure that the IIAs they sign reflect their priorities. As discussed in the next section, UNCTAD and others have proposed options for negotiators but these are only helpful if negotiators are aware of them, understand their benefits and can negotiate treaties incorporating them.

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[33] UNCTAD, *International Investment Rule-making: Stocktaking, Challenges and the Way Forward* (United Nations 2008) (hereafter UNCTAD, *Stocktaking Challenges*) 50 <https://unctad.org/en/Docs/iteiit20073_en.pdf> accessed 3 January 2019; Lauge Poulsen, 'Bounded Rationality and the Diffusion of Modern Investment Treaties' (2014) 58 International Studies Quarterly 1. Poulsen demonstrates this point with case studies of South Africa and South Korea.

[34] Poulsen, 'Bounded Rationality' (n 33).

[35] See Eric Gottwald, 'Levelling the Playing Field: Is It Time for a Legal Assistance Center for Developing Countries in Investment Treaty Arbitration?' (2007) 22 American University International Law Review 237, 252-255. Gottwald calls for a center like the Advisory Centre on WTO Law to be established to address weak developing country capacity to engage in dispute settlement stemming from a lack of experience and expertise, and access to legal databases and sources of relevant legal doctrine.

[36] ibid 255.

In any case, improvements in new treaty models do not affect existing IIA commitments based on old models. Differences across these legacy treaties and the interaction between treaty obligations raises complex compliance challenges. The fragmentation and incoherence of many states' IIA obligations undermine their ability to keep track of and comply with them. The negotiation of treaties based on new models that strike a better balance between investment protection and host state policy space, while desirable, contributes to the fragmentation and incoherence of a state's international commitments.

These systemic challenges are addressed below.

3.2 The Continuing Dominance of Developed Country IIA Models

Research has shown that developed countries continue to be successful in imposing their model treaty terms on developing country counterparts.[37] This suggests the continuing significance of political and economic power in IIA negotiations and that developing countries may still lack sufficient expertise to negotiate treaties that better reflect their national interests.[38]

The impact of developed country dominance is mitigated where the developed country has revised its model to ensure better protection for host state regulatory freedom. The Canadian model treaty, for example, incorporates a significant number of provisions that seek to ensure that investor protections are compatible with host state regulatory freedom and to improve investor-state arbitration procedures, largely for the benefit of respondent states. Investor protection obligations are more fully specified and limited by extensive exceptions and reservations.[39] Developed country innovations in treaty-making like these may be consistent with some developing country priorities in relation to investment and investment treaties. This does not mean, however, that IIAs based on these models will fully and specifically reflect the economic circumstances and development objectives of developing countries. As well, developed country models, like Canada's, may also include provisions that are inimical to developing country interests, such as creating pre-establishment obligations and prohibiting states from imposing certain performance requirements on investors.[40] In its *World Investment Report 2017*, UNCTAD remarks on the progress made in incorporating sustainable development provisions in treaties but identifies these kinds of increased obligations on states as an offsetting concern.[41] Finally, in new developed country models, the changes are incremental. They do not transform IIAs into instruments designed to promote sustainable development. As well, they have yet to be tested in investor-state arbitration. As a result, it remains unclear to what extent new model provisions will be interpreted to safeguard host state regulatory freedom in practice.

[37] Alschner and Skougarevskiy (n 6). Alschner and Skougarevskiy found that in South-South negotiations African countries 'enjoy greater agency' meaning influence on the form of the ultimate treaty, though relatively few used it; see also VanDuzer (n 17).

[38] Schlemmer (n 17) 185, 188; Poulsen, 'The Politics of South-South Bilateral Investment Treaties' (n 5) 199.

[39] VanDuzer (n 17).

[40] Pre-establishment obligations protect investors before they have made an investment and typically represent a qualified obligation to allow investor entry. See Canada's Model Foreign Investment Promotion and Protection Agreement (hereafter Canadian Model BIT) Articles 1, 3-4 <http://italaw.com/documents/Canadian2004-FIPA-model-en.pdf> accessed 3 January 2019. Prohibitions on performance requirements include prohibitions on state requirements for investors to engage in identified activities, often as a condition of permitting the investment or receiving some benefit, such as tax relief. Prohibited performance requirements might relate to requirements to hire local workers, for example see Canadian Model BIT, Article 7).

[41] UNCTAD, *World Investment Report 2017* (n 1) 127.

In any case, regardless of how much better new model treaties might be, countries are bound by the treaties that they have signed in the past that include vague and unqualified investor protection standards. These legacy treaties raise a number of issues, as discussed below.[42]

3.3 Fragmentation and Incoherence in IIA Obligations

(a) Introduction

State compliance with IIAs is made more difficult by the fragmented and incoherent nature of their obligations. Most treaties share common categories of obligations (typically including a prohibition on expropriation without compensation, as well as requirements for fair and equitable treatment, national treatment and most favoured nation treatment), but they vary in how they are expressed. Variation across IIAs is increasing with the adoption in some treaties of the kinds of pro-sustainable development provisions described above.[43] Inconsistency across a state's existing IIA obligations is aggravated by two kinds of interactions between treaty obligations complicating treaty compliance efforts.[44] First, most favoured nation (MFN) clauses have been interpreted to allow investors to claim the best protection in any treaty to which a state is a party making it harder for states to understand their obligations. Second, increasingly countries are negotiating multiple treaties involving some or all of the same parties but with different standards of investor protection and investor-state procedures.

(b) Inconsistency in Legacy Treaties

Some developing countries have signed many treaties with developed countries, each following a different model. This has created inconsistency in the standards that they have to meet. This incoherence in treaty obligations impairs host state efforts at treaty compliance.[45] For example, Egypt has signed 116 IIAs. In their study of the treaties of 133 countries, Alschner and Skougarevskiy concluded that Egypt's treaties exhibited significant variation. Egypt ranked 104th in treaty coherence.[46] Alschner and Skougarevskiy found that developed countries tended to have much more coherent treaty networks reflecting their success in imposing their treaty models. Canada, for example, ranked 10th in their study.

(c) IIA interaction through MFN provisions

Incoherence arising from a state being party to multiple IIAs is aggravated by the MFN provisions that appear in most BITs.[47] MFN provisions in BITs have been interpreted to permit the importation of more favourable standards from other treaties: investors protected under an IIA with a state that has an MFN clause become entitled to the highest level agreed to in any IIA to which that state is a party.[48] Some commentators have suggested that MFN clauses improve treaty coherence by bringing all treaty obligations of a state up to the highest

[42] UNCTAD has identified the reform of these legacy treaties as the essential next stage of IIA reform. See UNCTAD, *World Investment Report 2017* (n 1)126 ff.

[43] UNCTAD, *Stocktaking Challenges* (n 33) 57-58.

[44] UNCTAD, *World Investment Report 2017* (n 1) 120.

[45] Inconsistent arbitral awards interpreting investment treaty provisions also make compliance more difficult. See UNCTAD, *Stocktaking Challenges* (n 33) 60-61.

[46] Alschner and Skougarevskiy (n 6). Nigeria has 29 treaties and ranks 109th in treaty coherence.

[47] UNCTAD, *Most Favoured Nation: A Sequel* (United Nations 2010) <https://unctad.org/en/Docs/diaeia20101_en.pdf> accessed 3 January 2019; Poulsen, 'The Politics of South-South Bilateral Investment Treaties' (n 5) 200-201.

[48] UNCTAD, *Most Favoured Nation: A Sequel* (n 47).

level of protection granted to an investor under any treaty it has agreed to.[49] There are, however, several reasons to be sceptical about the coherence achieved by MFN provisions.

MFN provisions do not resolve problems of incoherence in any straightforward way. Most MFN clauses do not expressly address their application to other treaty standards. The language used in each clause must be interpreted to determine the extent to which another treaty's provision can be incorporated. Investor-state tribunals have not adopted a uniform approach to the interpretation of the scope of MFN clauses to incorporate other treaty standards.[50] Determining whether an MFN clause in a treaty incorporates a standard in another treaty also requires a comparison of the relative strength of investor protection standards. Doing so has proven to be difficult for tribunals.[51] As a consequence, significant residual uncertainty regarding the scope for MFN clauses to import standards from other treaties aggravates rather than mitigates the uncertainty regarding the standards states must meet. In any case, harmonizing all treaty provisions up to the highest level of treatment that a state has agreed to might not be desirable. The more balanced investor protection standards under more recent treaties would be displaced by the more investor-friendly standards in older treaties.[52]

(d) Overlapping regional and bilateral treaties

A second factor affecting coherence of IIA obligations is the burgeoning proliferation of new treaties addressing investment that are often layered on top of existing bilateral treaties. So-called mega-regional treaties like the Canada-EU Comprehensive Economic and Trade Agreement (CETA)[53] and the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP) overlap with bilateral investment treaties and other IIAs between participating states. Free trade agreements with investment chapters often overlap with prior BITs between the same parties.[54] In a study of 167 treaties with investment provisions, UNCTAD found overlaps with 119 earlier IIAs involving some or all of the same parties.[55] In some cases, the parties have clearly mapped out how the agreements are to interact. In the CETA, for example, the eight BITS between Canada and EU member states are to be terminated.[56] In the CPTPP, however, pre-existing agreements will continue and the precise manner in which those agreements will operate in conjunction with the investment provisions in the CPTPP is not fully specified.[57] In the absence of a clear hierarchy of obligations, the effective standard is harder to identify.

[49] Stephan Schill, 'Multilateralizing Investment Treaties through Most-Favored Nation Clauses' (2009) 27 Berkeley Journal of International Law 496; Poulsen, 'The Politics of South-South Bilateral Investment Treaties' (n 5).

[50] UNCTAD, *Most Favoured Nation: A Sequel* (n 47).

[51] See *ADF Group Inc v United States of America*, ICSID Case No ARB (AF)/00/1, Award (9 January 2003).

[52] Some treaties impose significant limitations on the application of MFN clauses, even excluding all prior treaties, which has the benefit of clarity but ensure that no harmonization occurs, such as the Canadian Model BIT (n 40), Annex III. The CETA (n 21) provides that treaty standards do not themselves constitute treatment for the purposes of the MFN clause in that treaty (Article 8.7(4)). Regarding the cases on MFN see UNCTAD, *Most Favoured Nation: A Sequel* (n 47).

[53] CETA (n 21).

[54] Tobin and Busch (n 13).

[55] UNCTAD, *World Investment Report 2017* (n 1) 129.

[56] CETA (n 21) Article 30.8(1), Annex 30-A.

[57] Comprehensive and Progressive Agreement for Trans-Pacific Partnership (signed 8 March 2018, entered into force 30 December 2018) (hereafter CPTPP) <www.mfat.govt.nz/assets/Trans-Pacific-Partnership/Text/1.-Initial-Provisions-and-General-Definitions-Chapter.pdf > accessed 3 January 2019, Article 1.2. Note that the CPTPP incorporates, by reference, the provisions from the Trans-Pacific Partnership, with the exception of some provisions to be suspended upon entry into force.

Ongoing IIA reform efforts, while laudable, similarly threaten coherence, especially where they proceed simultaneously and in an uncoordinated fashion. In Africa, for example, negotiations that will address investment obligations are ongoing in multiple overlapping fora involving many of the same countries: the Common Market for Eastern and Southern Africa (COMESA), Southern African Development Community (SADC), the Tripartite Free Trade Agreement between COMESA, SADC, and the East African Community and the Continental Free Trade Area.[58]

(e) Conclusion

The patchwork of different, even inconsistent, treaty obligations and the interaction between them can create significant compliance challenges for host states. The challenges associated with IIAs, however, are not limited to treaty negotiation or treaty compliance. For most countries, the goal of IIA negotiation is to use IIAs as a tool to leverage foreign investment for sustainable development. Doing so requires states to coordinate their IIA commitments with their overall investment strategies. Few IIAs are well adapted for this purpose as discussed below.

3.4 Integrating IIAs within a Strategy to Attract Investment and Achieve Sustainable Development

(a) Introduction

As previously discussed, IIAs are not designed to promote sustainable development. Historically their main goal has been investor protection. States hoped that by providing that protection they would attract investment. This hope was sometimes expressed in the preamble of some treaties but rarely reflected in substantive IIA obligations until very recently. In light of the scant attention to investment promotion, it is perhaps not surprising that the many empirical studies conducted in the last 20 years have not produced consistent evidence of a strong positive correlation between signing an IIA and attracting investment.[59] Even if IIAs were effective strategies to attract investment, there is no guarantee that investment will lead to development, much less development that is sustainable.[60]

This part of the paper examines new approaches that have been developed, innovations in actual treaty practice and the complex challenges associated with integrating IIAs into broader state strategies to harness foreign investment for sustainable development. These new approaches will only be helpful to developing countries if they are aware of the options, and have the expertise necessary to determine what approach to pursue and how to successfully negotiate to include it in their treaties.

[58] UNCTAD, *World Investment Report 2017* (n 1) 112-113, 130.

[59] Karl Sauvant and Lisa Sachs (eds), *The Effect of Treaties on Foreign Direct Investment: Bilateral Investment Treaties, Double Taxation Treaties and Investment Flows* (OUP 2009); VanDuzer, Simons and Mayeda (n 4) 514-523.

[60] See Kevin Gallagher and Lyuba Zarsky, 'No Miracle Drug: Foreign Direct Investment and Sustainable Development' in Lyuba Zarsky (ed) *International Investment for Sustainable Development: Balancing Rights and Obligations* (Earthscan Press 2005).

(b) New approaches to making IIAs more compatible with sustainable development

States and regional organizations as well as academics and CSOs have done considerable work to reimagine IIAs as instruments more consistent with sustainable development.[61] The following are two notable examples.

SADC developed a model BIT in 2012 to provide a resource for developing country treaty negotiators. The SADC model BIT varies substantially from traditional BITs in seeking to promote sustainable development.[62] It recommends that states not include an MFN obligation to ensure more certainty and predictability.[63] Investor protection obligations are specified in detail with a view to ensuring that investor protection is balanced appropriately against state sovereignty.[64] The SADC model BIT also includes provisions designed to ensure that investment contributes to sustainable development directly. For example, obligations are imposed on investors to conduct environmental and social impact assessments of their investments, comply with human rights and labour rights standards and avoid involvement in corruption.[65] Where investor-state arbitration is included in a treaty, the SADC model provides that an investor's failure to comply with these obligations could result, among other things, in a counterclaim by the host state and may be taken into account in adjudicating the investor's claim on the merits and/or any damages awarded in arbitration.[66]

UNCTAD's *Investment Policy Framework for Sustainable Development*[67] (IPFSD), first published in 2012 and updated most recently in 2015, suggests various ways that IIAs could be reformed to make a more direct and effective contribution to sustainable development. Like the SADC model, UNCTAD provides examples of new, more specific standards of protection that better preserve state's regulatory policy space as well as limitations on investor-state arbitration for the benefit of host states. UNCTAD also suggests obligations on investors like the SADC model. But the IPFSD goes on to identify more far reaching options for promoting sustainable development, including reduced obligations for states in line with their level of development and requirements for investment promotion activities in recognition of both the essential role of investment in sustainable development and the weak evidence that existing treaties encourage investment.

UNCTAD recently provided more guidance on how to facilitate investment in its *Global Action Menu for Investment Facilitation*, identifying investment facilitation as a significant gap in national and international investment policies.[68] The *Action Menu* provides detailed

[61] We will not discuss the voluminous writing on IIA reform by CSOs and academics. Some examples are Mann and others (n 10); VanDuzer, Simons and Mayeda (n 4). Because some of the proposals curtail investor protection and impose obligations on investors, it is possible that any investment inducing effect of IIAs will be impaired, though this has not been demonstrated.

[62] Southern African Development Community (hereafter SADC), SADC Model Bilateral Investment Agreement Template and Commentary (2012) <www.iisd.org/itn/wp-content/uploads/2012/10/sadc-model-bit-template-final.pdf> accessed 3 January 2019.

[63] ibid Article 29.

[64] ibid, the national treatment obligation (Article 4) and the expropriation obligation (Article 6).

[65] ibid investor obligations (Articles 32-40).

[66] ibid Article 19. Seatzu and Vargiu describe the SADC Model BIT as 'the first African instrument that puts forward, in a strong fashion, Southern African perceptions of the international law on foreign investment.' Francesco Seatzu and Paolo Vargiu, 'Africanizing Bilateral Investment Treaties (BITs): State Practice and future prospects of a Pro-active African Approach to International Investment Law' (2015) 2 State Practice & International Law Journal <www.brunel.ac.uk/law/documents/SPILJ-Vol2-Issue1-000287F-2-1.pdf> accessed 3 January 2019.

[67] UNCTAD, *World Investment Report 2017* (n 1).

[68] UNCTAD, *Global Action Menu for Investment Facilitation* (United Nations 2016) <https://investmentpolicyhub.unctad.org/Upload/Action%20Menu%2023-05-2017_7pm_print.pdf> accessed 3 January 2019.

recommendations regarding how to encourage investment through transparent, predictable, and consistent investment policies, efficient administration of procedures affecting investors, including investment approvals and procedures for the entry of investors' personnel, as well as institutionalized international cooperation in IIAs.

The overlapping but not identical approaches described above are only examples of the burgeoning options for developing countries seeking to negotiate IIAs that are more likely to contribute to their sustainable development. The challenge for developing countries is not a paucity of ideas, but rather sorting out what approach to pursue and how to negotiate its adoption successfully.

(c) Advances in Treaty Practice

(i) Introduction

Progress in adopting new approaches like those described above in actual treaties has been slow. In its *World Investment Report 2017*, UNCTAD reported that most treaties concluded in 2016 included some sustainable development reform elements.[69] Many of these, however, represent modest tweaks to existing treaty practice including references to sustainable development in the preamble to the treaty as well as substantive provisions designed to preserve host state policy space like clarifications to existing investor protection standards, such as fair and equitable treatment, and exceptions for particular policy areas.[70] Versions of most of these kinds of provisions have been incorporated in more sophisticated treaty models and many actual treaties for more than a decade.[71] Several countries, however, have embarked on much more radical strategies in relation to IIAs. Three different approaches adopted in the past two years are described below.

(ii) New Domestic Law

South Africa has adopted an approach to investor protection largely based on domestic law. In 2010, the government decided that it would not sign new BITs unless there were compelling economic and political reasons to do so and would terminate its existing BITs.[72] So far South Africa has terminated many, but not all, of its existing treaties. Effective 13 December 2015, South Africa implemented a new domestic investment regime.[73] The new law establishes investor protection standards applicable to all investors, domestic and foreign, that are much more limited than those in traditional IIAs and a mediation process to deal with any dispute

[69] UNCTAD, *World Investment Report 2017* (n 1) 119-125. See also Katharine Gordon, Joachim Pohl and Marie Bouchard, *Investment Treaty Law, Sustainable Development and Responsible Business Conduct: A Fact Finding Survey*, OECD Working Papers on International Investment 2014/01 (OECD 2014) <www.oecd.org/investment/investment-policy/WP-2014_01.pdf> accessed 3 January 2019.

[70] UNCTAD, *World Investment Report 2017* (n 1) 119-125.

[71] For example, SADC Protocol on Investment and Finance, Annex 1 (signed 18 August 2006, entered into force 16 April 2010) <www.sadc.int/files/4213/5332/6872/Protocol_on_Finance__Investment2006.pdf> accessed 3 January 2019. See also the Canadian Model BIT (n 40) which dates from 2004; the US Model BIT 2012 <www.italaw.com/sites/default/files/archive/ita1028.pdf> accessed 3 January 2019 dates from 2012 but earlier versions contained many of the features that are now becoming more commonplace. See Chester Brown (ed), *Commentaries on Selected Model Investment Treaties* (OUP 2013).

[72] Schlemmer (n 17) 188-92.

[73] South African Government, Protection of Investment Act 22 of 2015. The development of the current position is discussed in more detail in Schlemmer (n 17). See also Xavier Carim, 'Investment Policy Brief: International Investment Agreements and Africa's Structural Transformation: A Perspective from South Africa' (2015) 4 South Centre Investment Policy Brief <www.southcentre.int/wp-content/uploads/2015/08/IPB4_IIAs-and-Africa%E2%80%99s-Structural-Transformation-Perspective-from-South-Africa_EN.pdf> accessed 3 January 2019.

involving the state's treatment of an investor.[74] The act also provides that South Africa may consent to arbitration in relation to investments covered by the act.[75]

A domestic law approach like South Africa's provides a commitment to investor protection on terms unilaterally determined by the state free from any treaty constraints. In this way, the state is can to determine how it will regulate from time to time subject only to its own rules for changing its regime. How investors will view a commitment that can be revoked by appropriate state action, and whether this is a model that is feasible for other developing countries, especially smaller ones, remains to be seen.

(iii) Brazil's Cooperation and Investment Facilitation treaties

Recently, Brazil introduced its own innovative approach to investment treaties. Brazil has been a significant outlier in the global expansion of investment treaty protection, despite being both a major destination for foreign investment and a significant source of outward investment, especially in Latin America and Africa. Though it signed 14 investment treaties in the 1990's, none were ratified. In 2015, however, Brazil began signing Cooperation and Investment Facilitation treaties based on a new model.[76] The model contains a prohibition on expropriation without compensation, but few other investor protections found in most BITs. The Brazilian model focuses on other ways to mitigate risk for foreign investors as well as facilitating investment in a manner that promotes sustainable development. A key element of the model is the establishment of two institutions: a Joint Committee of representatives of the state parties and local focal points set up by each party to support investments from the other party. The Joint Committee is responsible for facilitating the exchange of information regarding business opportunities, procedures for investment approvals and other prerequisites for investment, relevant laws and incentives, and statistical information.[77] The Joint Committee is also charged with developing "thematic agendas" for cooperation on investment facilitation on an ongoing basis.[78] The focal points are to work to prevent disputes between investors and states and, where they arise, to facilitate their resolution.[79] The procedures specified for dispute resolution also contemplate a role for the Joint Committee in supporting dispute settlement. Investor-state arbitration is not provided for. None of Brazil's treaties based on this model are in force.

(iv) Conclusion

While most investment treaty-making is slowly moving beyond traditional IIA models, South Africa, and Brazil's Cooperation and Investment Facilitation treaties provide real world examples of new approaches that go much farther. They demonstrate distinctive strategies to ensure that foreign investment better contributes to sustainable development. As with the SADC and UNCTAD approaches described in the preceding section, these strategies offer new possibilities for developing country negotiators. Choosing the right approach, however,

[74] Protection of Investment Act (n 73). The only protections in addition to those already available under the constitution are 'fair administrative treatment', national treatment, physical security of property, and rights to repatriate funds (Articles 6, 8, 9 and 10). Mediation is provided for in Article 13.

[75] ibid Article 13(5).

[76] Treaties were signed with Mozambique, Angola, Mexico, Malawi, Colombia, and Chile available at UNCTAD, Investment Policy Hub <http://investmentpolicyhub.unctad.org/IIA/CountryBits/27> accessed 3 January 2019. An English translation of the Angola and Mozambique treaties was prepared by Martin Brauch, 'Side-by-side Comparison of the Brazil-Mozambique and Brazil-Angola Cooperation and Investment Treaties' (2015) International Institute for Sustainable Development <www.iisd.org/sites/default/files/publications/comparison-cooperation-investment-facilitation-agreements.pdf> accessed 3 January 2019.

[77] Brauch (n 76) Articles 4 and 6.

[78] ibid Article 8.

[79] ibid Articles 5 and 15.

requires understanding how IIAs can be used as part of a state's broader strategy regarding foreign investment as discussed in the next section.

3.5 Integrating IIAs into State Strategies Regarding Foreign Investment

Brazil's Cooperation and Investment Facilitation treaties provide an example of one way that IIAs can be responsive to party states' distinct strategies on foreign investment. As discussed, they contemplate the creation of institutions with a mandate to (i) promote investment through information sharing and the development of investment promotion programs and (ii) assist in managing relations with investors, including facilitating the resolution of disputes. This approach conceives of investment treaties as a dynamic framework for an ongoing relationship that requires continuing engagement of both states to promote investment and deal with conflicts that inevitably arise between investors and host states over time. To be effective, the institutions that form part of this framework must take into account to the different needs and policy priorities of each party.[80]

But, while an important development, creating institutional mechanisms responsive to the distinctive and changing circumstances in each party state is not enough to ensure that IIAs align fully with their domestic needs and priorities. Coherence between national policy and IIAs remains a key challenge for developing countries. In 2016, the G20 Trade ministers adopted the G20 Guiding Principles for Global Investment Policymaking which emphasize the need for policies that impact on investment to be "coherent at both the national and international levels."[81] Policy coherence and the critical role of domestic policy have also been prioritized by UNCTAD and the World Bank.[82]

It is far beyond the scope of this paper to map out the complex issues associated with developing an effective investment policy that deals coherently with international obligations, including IIAs, and domestic policy, much less the relevant country specific variables in that regard.[83] In general terms, however, a state must begin by deciding what kinds of investors it wants to attract and then develop an understanding of what will attract them. A particular foreign investor will choose to invest in a country based on the investor's investment strategy and how it corresponds to a range of geographic, economic, political, and social factors in that country as well as the features of domestic law and regulation.[84] Policy makers can affect only some of these factors. In order to get the policy environment right, states must understand

[80] Examples of these kinds of institutional arrangements are discussed in J Anthony VanDuzer, 'Sustainable Development Provisions in International Trade Treaties: What lessons for International Investment Agreements?' in Steffen Hindelang and Markus Krajewski (eds), *Shifting Paradigms in International Investment Law: More Balanced, Less Isolated, Increasingly Diversified* (OUP 2016) 142, 169-170.

[81] G20 Trade Ministers' Meeting Statement, July 2016, Shanghai, Annex III: G20 Guiding Principles for Global Investment Policymaking <www.oecd.org/daf/inv/investment-policy/G20-Guiding-Principles-for-Global-Investment-Policymaking.pdf> accessed 3 January 2019. Guideline 5 and the ministers' statement itself emphasized the importance of coherence; see ibid para 19.

[82] UNCTAD, *Investment Policy Framework for Sustainable Development* (n 10); Zhenwei Christine Qiang, Roberto Echandi and Peter Kusek, *Maximizing Potential Benefits of FDI for Competitiveness and Sustainable Development: World Bank Group Report on Investment Policy & Promotion Diagnostics and Tools* (World Bank 2017) <http://documents.worldbank.org/curated/en/736501494499554704/Maximizing-potential-benefits-of-FDI-for-competitiveness-and-sustainable-development-World-Bank-Group-report-on-investment-policy-and-promotion-diagnostics-and-tools> accessed 3 January 2019; UNCTAD, *World Investment Report 2017* (n 1) 126; UNCTAD, *Global Action Menu for Investment Facilitation* (n 68).

[83] This is done effectively in Qiang, Echandi and Kusek (n 82).

[84] Most analysis of firm decision making begins with the taxonomy of firm motivations for foreign investment developed by Dunning: firms invest in a country to sell their products in the country, to acquire natural resources or strategic assets like intellectual property, or to locate a stage in the production process in the country because it is efficient to do so; see John Dunning and Sarianna Lundan, *Multinational Enterprises and the Global Economy* (Edward Elgar Publishing 2008).

what policy measures are needed in light of how the kinds of investment they seek to attract are affected by these factors, as well as how to ensure that the foreign investment sought can be made to support sustainable development, recognizing that investments are not one time transactions but rather long term relationships that must be nurtured, maintained and managed.[85] Local budgetary and other capacity constraints must also be factored into a strategy based on this kind of thorough-going assessment. Choices about whether to enter into IIAs and, if so, what they should contain need to be made by each country as part of such a broad-based comprehensive strategy regarding foreign investment and sustainable development. This would require rejecting the one-size fits all approach followed since the beginning of modern investment treaty making in 1959.

4. Conclusion

There is no doubt that investment is essential for sustainable development.[86] Traditionally, however, IIAs have not been well-designed to promote investment, much less to contribute to sustainable development. Existing IIAs contain mainly broadly-worded investor protection provisions enforceable through investor-state arbitration. Despite these strong investor protections, however, investment inducing effects have not been clearly demonstrated. As well, investor protections have been interpreted in some investor-state cases to constrain the ability of states to regulate to achieve sustainable development. Experience with investor-state arbitration and the changing context in which IIAs are being negotiated has created an awareness of the strong bite of IIAs and encouraged increasing innovation in treaty models and some actual treaties that enhance the prospect that they will contribute to investment-led sustainable development. But many challenges impair the ability of countries, especially developing countries, to ensure that the treaties they sign support their sustainable development in light of their distinctive circumstances.

At the negotiating table, developed countries continue to be successful in resisting changes to their treaty models, rejecting more far reaching reforms to traditional models that have been suggested by academics, international organizations and a few developing countries intended to transform IIAs into instruments to promote sustainable development. The evolving and increasingly wide range of options for IIA provisions that negotiators now have to choose from has not yet translated into widespread changes in treaty texts. In part, this may be because of a lack of the technical capacity in some countries to assess the desirability of particular kinds of provisions, despite capacity building efforts of UNCTAD, the World Bank, and CSOs. Power imbalances continue to define the outcome of treaty negotiations between developed and developing countries. For many developing countries, competition for investment with similarly situated countries may also discourage an aggressive approach to IIA negotiations.

Broadly-worded treaty standards, sometimes interpreted in surprising and inconsistent ways by investor-state tribunals, impair countries' efforts at IIA compliance. Compliance is also complicated by the fragmented and incoherent nature of international investment law. Many countries have a large number of legacy treaties with differing obligations. In particular, older IIAs do not contain the modest improvements evident in some developed country models. The complex interaction between treaties through MFN clauses, and overlapping bilateral and

[85] Qiang, Echandi and Kusek (n 82) discuss the relationship between these factors and particular kinds of policies.

[86] UNCTAD has identified increased investment as essential to achieve the United Nations Sustainable Development Goals: see UNCTAD, *World Investment Report 2017* (n 1) 124. In 2014, UNCTAD concluded that developing countries faced an annual shortfall of US$2.5 trillion dollars compared to what would be needed to achieve the SDGs: see UNCTAD, *World Investment Report 2014: Investing in the SDGs: An Action Plan* (United Nations 2014) xi <https://unctad.org/en/PublicationsLibrary/wir2014_en.pdf> accessed 3 January 2019.

regional agreements which may not address how the new provisions they contain are to operate in relation to older treaties further complicates compliance efforts.

Finally, each country's approach to IIAs must be integrated into the design and implementation of an investment policy that operates consistently and effectively across a country's domestic law and its international obligations, including, but not limited to, its IIA obligations. Investment policy-making coherence has only recently begun to be considered in relation to IIAs. The creation of treaty-based institutions charged with promoting investment between states though programs adapted to their unique conditions and managing conflicts between investors and host states, such as in Brazil's Cooperation and Investment Facilitation treaties, is one first step in moving away from a one-size fits all approach to IIAs. Developing a coherent investment policy that incorporates a consistent approach to IIAs, however, is a great challenge. It requires a prior assessment of what investors a state wants to attract and the development of a comprehensive strategy regarding how to attract them in light of factors that will affect their investment choices, taking into account the characteristics of the state. Only with the benefit of such a strategy can states make better decisions about whether to sign IIAs and, if they do sign them, what they need to contain.

Chapter 3 Ploughing Away Capacity Constraints in Global Agri-food Trade

Mengyi Wang and Ching-Fu Lin

1. Introduction

This chapter investigates the principal capacity constraints and building efforts in the global agri-food supply chain. It does so by analysing the key challenges, underlying capacity constraints and existing capacity building efforts in relation to market access and growth strategy. The analysis is primarily anchored in legal and institutional frameworks and simultaneously mindful of the economic, social, and political landscape that shapes agri-food trade.

The chapter is both descriptive and prescriptive. Descriptively, the chapter probes developing countries' underperformance in agri-food trade. For example, many developing countries have not been able to move up the value chain by obtaining a larger share in trade in processed and transformed agricultural products.[1] Prescriptively, the chapter seeks to sharpen the focus on avenues for capacity building and means of stimulating productivity and trade. This is particularly urgent given the paramount importance of the agri-food sector in economic growth, poverty reduction, employment, food security and environmental sustainability in developing countries.[2] For example, 40 to 65 percent of Africa's working-age population depends on farming for primary employment.[3]

This chapter undertakes this descriptive and prescriptive endeavour mainly from the public sector perspective while highlighting public-private partnerships (PPP) wherever applicable.

[1] Alex F McCalla and John Nash, *Reforming Agricultural Trade for Developing Countries. Quantifying the Impact of Multilateral Trade Reform. Agriculture and Rural Development* (World Bank 2007) vol 2, 165–166 <https://openknowledge.worldbank.org/handle/10986/13520> accessed 4 January 2019.

[2] See M Ataman Aksoy and John C Beghin (eds), *Global Agricultural Trade and Developing Countries* (World Bank 2005) 17 <https://openknowledge.worldbank.org/bitstream/handle/10986/7464/344290PAPER0Gl101official0use0only1.pdf?sequence=1&isAllowed=y> accessed 4 January 2019; Ousman Gajigo and Alan Lukoma, 'Infrastructure and Agricultural Productivity in Africa' (2011) Market Brief African Development Bank <www.afdb.org/fileadmin/uploads/afdb/Documents/Publications/Infrastructure%20and%20Agricultural%20Productivity%20in%20Africa%20FINAL.pdf> accessed 4 January 2019; Andrei Parvan, 'Agricultural Technology Adoption: Issues for Consideration When Scaling-Up' (2011) 1 The Cornell Policy Review <https://blogs.cornell.edu/policyreview/2011/07/01/agricultural-technology-adoption-issues-for-consideration-when-scaling-up/> accessed 4 January 2019; Marie-Agnes Jouanjean, 'Targeting infrastructure development to foster agricultural trade and market integration in developing countries: an analytical review' (2013) Overseas Development Institute <www.odi.org/sites/odi.org.uk/files/odi-assets/publications-opinion-files/8557.pdf> accessed 4 January 2019; Wolfgang Bokelmann and Muluken E Adamseged, 'Contributing to a better understanding of the value chain framework in developing countries' (Fifth International Conference, Addis Ababa, 2016) 1 <http://ageconsearch.umn.edu/bitstream/249334/2/279.%20Value%20chains%20in%20developing%20countries.pdf> accessed 4 January 2019; Africa Agriculture Status Report 2016 (2016) 19 <https://agra.org/aasr2016/public/assr.pdf> accessed 5 January 2019.

[3] Africa Agriculture Status Report 2016 (n 2).

While smallholders are the primary agents operating in the agricultural sector, governmental policies and actions tangibly enable or hamper private actions. As the ensuing sections will demonstrate, as far as the public sector is concerned, technical and institutional capacity constraints pervade the lifecycle of agricultural production and trade. In particular, market access and growth strategy exhibit recurring patterns of constraints.

Before pivoting to a more detailed examination, several qualifications and clarifications must be noted. First, this chapter acknowledges, but does not dwell upon, the role of political economy of trade at the international and domestic levels.[4] It recognizes that technical and institutional capacities cannot exist independently of the broader political, social and economic contexts that production and trade inhabit. Secondly, the country groupings – "developing countries" and "developed countries" – do not take account of the heterogeneity within each of the groups.[5] The binary designation merely serves as a crude proxy for countries' ability and sophistication to set, take advantage of and enforce rules and standards, and to guide private actors through policy instruments.[6] As the issue of nomenclature has been discussed in previous literature,[7] this chapter sidesteps such debate. Thirdly, the capacity building package for any given economy should be predicated on a more granular and empirically informed appraisal. The cross-cutting developmental bottlenecks identified in the chapter, notwithstanding the diversity and distinctiveness across individual economies, are intended to be a point of departure for internal reform, partner capacity building, and donor interventions.

The ensuing sections of the chapter are organized as follows. Section 2 assesses the primary legal and institutional constraints in two key areas: market access and growth strategy. Market access is the linchpin of agri-food trade and covers several sub-issues along the supply chain, namely: rules and standards, trade preference programs, mechanisms for outbreak management and enforcement. Taking a long-term view, the remainder of section II further discusses growth strategy through Voluntary Sustainability Standards and Labels (VSSLs) and biotechnology. Each of the aforementioned sub-issues is examined through a three-step analytical framework: 1) why is this particular sub-issue important?; 2) what are the macro and micro challenges and underlying capacity constraints?; and 3) what are the notable capacity building initiatives, and are they effective? Section 3 weaves together the common threads observed in the sub-issues and proposes starting points for future endeavours. Section

[4] The domestic political structure creates powerful interest groups in developed countries to have restricted reforms that could be promised in trade talks, in particular regarding subsidies provided by developed countries. See Farai Chigavazira, *The Regulation of Agricultural Subsidies in the World Trade Organization Framework. A Developing Country Perspective* (Anchor Academic Publishing 2016) 7.

[5] Eugenio Diaz-Bonilla and others, 'WTO, Agriculture and Developing Countries: A Survey of Issues' (2001) International Food Policy Research Institute 18 <http://ageconsearch.umn.edu/bitstream/16278/1/tm010081.pdf > accessed 5 January 2019.

[6] As an example, Morocco, a developing country, has made considerable inroads in productivity and international trading through its Green Morocco Plan. See Lahcen Oulhaj, 'Evaluation of the Agricultural Strategy of Morocco (Green Morocco Plan) with Dynamic General Equilibrium Model' (2013) Forum Euroméditerranéen des Instituts de Sciences Économiques <www.femise.org/en/studies-and-research/evaluation-of-the-agricultural-strategy-of-morocco-green-morocco-plan-with-a-dynamic-general-equilibrium-model/> accessed 5 January 2019; Mohammad Badrawi, 'Green Morocco Plan focuses on sustainable agriculture' *AL-Monitor* (12 October 2014) <www.al-monitor.com/pulse/business/2014/10/httpalhayatcomarticles4906517----.html> accessed 5 January 2019; Oxford Business Group, *The Report: Morocco 2016* <www.oxfordbusinessgroup.com/morocco-2016/agriculture-fisheries> accessed 5 January 2019.

[7] See Joost Pauwelyn, 'The End of Differential Treatment for Developing Countries? Lessons from the Trade and Climate Change Regimes' (2013) 22 Review of European Community & International Environmental Law 29. This is despite the existence of groupings more pertinent to agricultural trade such as net exporting or importing countries, Low Income Food Deficit Countries ("LIFDC"), Landlocked countries, and Not Food Importing Developing Countries ("NFIDC"). See, Organization for Economic Co-operation and Development (hereafter OECD), *Agricultural Trade and Poverty: Making Policy Analysis Count* (OECD 2003) 74.

3 finds that economies should, ideally, first identify their binding constraints and market opportunities, which could entail exercises such as extensive data collection through private actors. Subsequently, some level of prioritization and strategization linked to local context is needed, leading to a package of internal reform, external support, international cooperation and PPP.

2. Capacity Constraints

This section articulates prominent areas of legal and institutional constraints that handicap market access and growth strategy. As will be discussed in more depth below, these constraints percolate through the operation and governance of agri-food supply chains. From the operational angle, capacity constraints manifest themselves throughout the supply chain, including agricultural input, production, processing, distribution, border measures, marketing and risk management. From the governance angle, capacity constraints centre around legal, regulatory and institutional frameworks (for example, tariffs, customs procedures, and food safety regulations). Furthermore, the dynamic nature of agri-food development in the global value chain also poses a challenge to developing countries and hence demands a smarter planning for export competitiveness.

The analysis of market access and growth strategies further includes a number of intersecting sub-threads. Market access essentially rests on developing countries' legal and institutional capacities in four principal areas, *i.e.* compliance of applicable rules and standards of importing countries; abilities to maximally leverage preferential trade agreements; outbreak management systems and their effectiveness; and the efficient use of implementation and enforcement mechanisms. Growth strategy, on the other hand, touches upon active policy planning and financial and technical investment in crucial aspects of agri-food trade. The cases of VSSLs and biotechnology below well demonstrate the strategic and long-term nature of promoting growth in production capacities, export opportunities, and market leadership.

2.1 Market Access

(a) Rules and Standards

Market access is closely tied to rules and standards, as non-tariff measures as such can restrict market access. As demonstrated by trade disputes litigated at the World Trade Organization (WTO) such as *EC-Sardines*,[8] *Korea-Beef*,[9] and *EC-Hormones*,[10] products that fail to meet mandatory rules and standards are by definition excluded from the market (assuming there are effective border measures).[11] In the real world of agri-food trade, many producers and exporters from developing countries struggle to comply with the myriad agri-food rules and standards at multilateral, regional, and bilateral levels (both public and private).[12] The

[8] Appellate Body Report, *European Communities – Trade Description of Sardines*, WT/DS231/AB/R (adopted 23 October 2002).

[9] Appellate Body Report, *Korea – Measures Affecting Imports of Fresh, Chilled and Frozen Beef*, WT/DS161/AB/R and WT/DS169/AB/R (adopted 10 January 2001).

[10] Appellate Body Report, *European Communities – Measures Concerning Meat and Meat Products (Hormones)*, WT/DS26/AB/R and WT/DS48/AB/R (adopted 13 February 1998).

[11] See Spencer Henson, 'Food Safety Issues in International Trade' in Laurian J Unnevehr (ed), *Food Safety in Food Security and Food Trade* (2003) International Food Policy Research Institute <http://ageconsearch.umn.edu/bitstream/16573/1/fo031005.pdf> accessed 5 January 2019; Jean C Buzby (ed), *International Trade and Food Safety: Economic Theory and Case Studies* (2003) USDA Agricultural Economic Report No 828 <https://www.ers.usda.gov/publications/pub-details/?pubid=41618> accessed 8 January 2019.

[12] Steven Jaffee and Spencer Henson, 'Standards and Agro-Food Exports from Developing Countries: Rebalancing the Debate' (2004) World Bank Policy Research Working Paper 3348 <http://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.544.143&rep=rep1&type=pdf> accessed 5 January 2019.

negative impact of non-compliance with standards is four-fold: the immediate economic loss of import rejects/bans; a reputational loss to the country as a competitive exporter of a specific product or commodity; the foregone opportunity of not reaching certain markets; and the loss flowing from multiple sets of uncoordinated standards.

Consider the immediate economic loss of import rejects. As pointed out by the United Nations Industrial Development Organization (UNIDO), a small number of economies – namely, Bangladesh, China, the Dominican Republic, Egypt, India, Nigeria and Pakistan – account for the majority of import rejections on the basis of non-compliance of agri-food rules and standards;[13] and export revenue losses due to non-compliance with rules and standards in major agri-food sub-sectors were significant.[14] For instance, the United States rejected products in four sub-sectors (including fisheries, fruit and vegetables, herbs, spices, and nuts) that amounted to a loss of US$715 million.[15] On a yearly basis, the United States, the European Union, Australia, and Japan reject imported fruit and vegetable products that account for about US$35 million.[16]

Of equal importance is the growing relevance and impact of private standards, however defined, in affecting and shaping international agri-food trade.[17] There has been a rich literature discussing how demanding private safety and sustainability standards have emerged from developed countries and have considerably affected developing countries' exports, posing challenges to export opportunities open to and the economic development of some developing countries.[18] Considering the usually de facto mandatory effect of private agri-food standards, products that fail to satisfy standards are effectively excluded from the market, which is dominated by a small number of importers or retailers.[19]

Disaggregating the evidence on standard noncompliance of developing countries paints a nuanced picture of capacity constraints.[20] Some countries have high rejection rates in most

[13] See United Nations Industrial Development Organization (hereafter UNIDO), *Meeting Standards, Winning Markets: Trade Standards Compliance 2015* (UNIDO 2015) 5 <www.unido.org/fileadmin/user_media_upgrade/Resources/Publications/TCB_Resource_Guide/TSCR_2015_final.pdf> accessed 5 January 2019.

[14] ibid.

[15] ibid.

[16] ibid.

[17] See Ching-Fu Lin, 'Public-Private Interactions in Global Food Safety Governance' (2014) 69 Food and Drug Law Journal 143; see also Gretchen H Stanton, 'Food Safety-related Private Standards*:* The WTO Perspective' in Axel Marx and others (eds), *Private Standards and Global Governance: Economic, Legal and Political Perspectives* (Edward Elgar Publishing 2012) 235.

[18] See Yesim Yilmaz, 'Private Regulation: A Real Alternative for Regulatory Reform' (1998) Cato Policy Analysis 303 <www.cato.org/publications/policy-analysis/private-regulation-real-alternative-regulatory-reform> accessed 5 January 2019; Doris Fuchs, Agni Kalfagianni and Tetty Havinga, 'Actors in Private Food Governance: The Legitimacy of Retail Standards and Multistakeholder Initiatives with Civil Society Participation' (2009) 1 Agriculture and Human Values 10-12; Doris Fuchs and Agni Kalfagianni, 'The Democratic Legitimacy of Private Authority in the Food Chain' in Tony Porter and Karsten Ronit (eds), *The Challenges of Global Business Authority: Democratic Renewal, Stalemate, or Decay*? (SUNY Press 2010) 65; Miet Maertens and Johan Swinnen, 'Private Standards, Global Food Supply Chains and the Implications for Developing Countries' in Axel Marx and others (eds), *Private Standards and Global Governance: Economic, Legal and Political Perspectives* (Edward Elgar Publishing 2012) 153-154.

[19] See Denise Prévost, 'Private Sector Food-Safety Standards and the SPS Agreement: Challenges and Possibilities' (2008) 33 South African Yearbook of International Law 1; Jennifer Clapp and Doris Fuchs (eds), *Corporate Power in Global Agrifood Governance* (MIT Press 2009); Ching-Fu Lin (n 17) 144-146, 150.

[20] Sometimes challenges to compliance of agri-food rules and standards (and therefore market access problems) may not necessarily be caused by institutional constraints of the government, but in some cases by other commodity- or export market-specific factors. "This potential has not been fully exploited as regards fisheries and processed agri-food products, mainly due to the difficulty of Indonesian exporters to conform to public and private standards applied in foreign markets, in particular EU markets": see OECD, 'Estimating the Constraints to Agricultural Trade of

markets for most of their exported products,[21] hence a stronger safety/quality infrastructure needs to be in place to tackle systematic deficiencies and facilitate compliance. This may include laboratory infrastructure, administrative reform, a compliance service, supply chain upgrade, regulatory cooperation, and legislative reform. Other countries encounter challenges in particular markets, plausibly indicating that a better understanding of applicable rules and standards in specific export markets would be desirable.[22] Still other countries face substantial rejections for specific products, suggesting that "a critical examination of specific value chains and/or the introduction of specific food safety controls are needed to avoid future rejections."[23]

At a more international level, most developing countries also face export challenges due to the inefficiency of inconsistent standards and the lack of harmonization. As urged by the Food and Agriculture Organization of the United Nations (FAO) and the WTO, developing countries should invest so as to engage effectively in institutions and multilateral bodies such as the WTO Sanitary and Phytosanitary Measures (SPS) and Technical Barriers to Trade (TBT) Committees and multilateral standard-setting organizations.[24] The most relevant and influential body for food standards is the Codex Alimentarius Commission (Codex), which represents 99 percent of the world's population as well as a vast amount of food standards, guidelines, and codes of practice.[25] It is thus concerning that some developing countries remain outside the decision-making process of Codex,[26] particularly when the organization is backed by the WTO.[27]

Developing Countries' (2012) OECD Policy Dialogue on Aid for Trade 32 <https://www.oecd.org/dac/aft/estimatingconstraintstoagriculturaltrade.pdf> accessed 6 January 2019.

[21] Examples include Bangladesh, China, the Dominican Republic, Egypt, Ghana, India, Lebanon, Nigeria, Pakistan and Sri Lanka. See UNIDO, *Trade Standards Compliance 2015* (n 13) 13-38.

[22] For instance, for El Salvador and Senegal in the US market, for Thailand and Turkey in the EU market, for the Fijis in the Australian market, and for Peru in the Japanese market. Another example is Colombia which, in general, is a good performer, but its nuts and seed exports suffer from relatively high rejection rates in the US market. See UNIDO, *Trade Standards Compliance 2015* (n 13) 13-38.

[23] Examples include fishery exports from Indonesia and the Philippines, fruit and vegetable exports from Hong Kong (China), nuts and seed exports from Iran (particularly to the EU), and fruit and vegetable as well as fishery exports from Viet Nam. See UNIDO, *Trade Standards Compliance 2015* (n 13) 13-38.

[24] Food and Agriculture Organization of the United Nations (hereafter FAO) and World Trade Organization (hereafter WTO), 'Trade and Food Standards' (2017) 27-40, available at <www.fao.org/3/a-i7407e.pdf> accessed 6 January 2019. Indeed, remaining informed of the development of relevant international standards and guidelines adopted by the Codex Alimentarius Commission (hereafter Codex), World Organization for Animal Health (hereafter OIE), and International Plant Protection Convention (hereafter IPPC) is indispensable for securing export opportunities and promoting growth and development.

[25] Codex is an international standard-setting body jointly run by the FAO and the World Health Organization (hereafter WHO), and it has 188 Members and a collection of agri-food standards, guidelines, and recommendations covering around 200 food commodities, 300 food additives, and 5,000 maximum residue limits for pesticides. See Codex Alimentarius, List of Observers available at <www.fao.org/fao-who-codexalimentarius/about-codex/observers/en/> accessed 6 January 2019.

[26] See generally Michael Livermore, 'Authority and Legitimacy in Global Governance: Deliberation, Institutional Differentiation, and the Codex Alimentarius*'* (2006) 81 New York University Law Review 766; Elizabeth Smythe, 'In Whose Interests? Transparency and Accountability in the Global Governance of Food: Agribusiness, the Codex Alimentarius, and the World Trade Organization' in Jennifer Clapp and Doris Fuchs (eds), *Corporate Power in Global Agrifood Governance* (MIT Press 2009) 93; Ching-Fu Lin, 'Scientification of Politics and Politicization of Science: Reassessing the Limits of International Food Safety Lawmaking' (2013) 15 Columbia Science & Technology Law Review 1.

[27] The Codex has become a powerful anchor in most, if not all, SPS disputes. Therefore, the Codex is commonly regarded as a quasi-legislator and its standards *de facto* mandatory for WTO Members concerning agri-food market access. See Bruce Silverglade, 'The WTO Agreement on Sanitary and Phytosanitary Measures: Weakening Food Safety Regulations to Facilitate Trade?' (2000) 55 Food and Drug Law Journal 517, 518–52; Steve Charnovitz, 'Triangulating the World Trade Organization' (2002) 96 American Journal of International Law 28, 51; Joel P Trachtman, 'The World Trading System, the International Legal System and Multilevel Choice' (2006) 12 European

While some emerging economies have gradually increased their participation in some Codex and WTO committee meetings, the participation by many remains stubbornly low.[28] Insufficient participation in relevant international standard-setting activities and inadequate harmonization not only prevent developing countries from being first movers and giving their producers advantages, but also perpetuate the infancy of their food control, inspection and certification system. To assist developing countries to harmonize with international standards, the WTO, FAO, and other organizations have created http://www.standardsfacility.org/ (STDF) to share best practices and help secure market access by complying with international agri-food standards.[29]

Certain developing countries have sought better engagement in the international standard-setting and harmonization process in different ways. For instance, Kenya has established the National Consultative Committees on TBT and SPS to help promote PPPs among various stakeholders on TBT and SPS matters and examine regularly developments in rules, standards, and conformity assessment procedures that may pose trade barriers.[30] Kenya's National Consultative Committees also serve to prepare the relevant ministries and agencies through internal consultation and coordination for the TBT and SPS Committee meetings.[31] In addition, given the recent debate among WTO Members regarding the issue of private agri-food standards,[32] China has served as one of the co-stewards (with New Zealand) in the working group established by the WTO SPS Committee to investigate the issues of GlobalGAP and similar private standard schemes as well as propose working definition for future discussions.[33] As WTO members have very different views on this issue, China has made sure that it has a voice and premium access to the most updated information and progress. Last but not least, under the Codex framework, notably, China is the only developing country serving as the host country of a General Subject Committee,[34] while India, Mexico, Malaysia, and Colombia also serve as host countries for specific Commodity Committees.[35]

Faced with the challenges posed by private standards along the global supply chain, certain developing countries have shifted to actively cooperate with private ordering schemes based on an understanding of market reality.[36] For example, to assist their small farmers, Kenya, Chile, India, Malaysia and Mexico have established government-backed Good Agricultural

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Law Journal 469, 480; Alberto Alemanno, *Trade in Food: Regulatory and Judicial Approaches in the EC and the WTO* (Cameron May 2007) 262-267.

[28] FAO and WTO, 'Trade and Food Standards' (n 24).

[29] See Standards and Trade Development Facility <www.standardsfacility.org/> accessed 6 January 2019.

[30] FAO and WTO, 'Trade and Food Standards' (n 24).

[31] ibid.

[32] Ching-Fu Lin (n 17) 155-56.

[33] WTO, Report of the Co-Stewards of the Private Standards E-Working Group to the March 2015 Meeting of the SPS Committee on Action 1, Submission by the Co-stewards of the E-Working Group G/SPS/W/283 (17 March 2015) <https://docs.wto.org/dol2fe/Pages/FE_Search/FE_S_S009-DP.aspx?language=E&CatalogueIdList=130970&CurrentCatalogueIdIndex=0&FullTextHash=1&HasEnglishRecord=True&HasFrenchRecord=True&HasSpanishRecord=True> accessed 6 January 2019 . China and New Zealand proposed the following working definition: "An SPS-related private standard is a written requirement or condition, or a set of written requirements or conditions, related to food safety, or animal or plant life or health that may be used in commercial transactions and that is applied by a non-governmental entity that is not exercising governmental authority."

[34] China hosts Codex 'Pesticide Residues - CCPR,' 'Food Additives – CCFA' (General Subjects Committees). No other developing countries do so. See FAO and WTO, 'Trade and Food Standards' (n 24) 32.

[35] Commodity Committees: India hosts 'Spices and Culinary Herbs - CCSCH,' Mexico hosts 'Fresh Fruits and Vegetables - CCFFV,' Malaysia hosts 'Fats and Oils - CCFO,' and Colombia hosts 'Sugars – CCS'. See FAO and WTO 'Trade and Food Standards' (n 24) 33.

[36] Ching-Fu Lin (n 17) 155.

Practices (GAP) with certification services at no or very low cost, and they have further sought to be benchmarked and recognized as equivalent by private ordering schemes such as GlobalGAP.[37]

Last but not least, civil society has also been active in facilitating standards harmonization. For example, at the regional level, TradeMark East Africa (TMEA) invested US$ 11.6 million between 2011 and 2014 in the Standards Harmonization and Conformity Testing Programme. The Programme aimed to assist the harmonization of regional standard by National Standards Bureaux (NSBs).[38] As a result, 79 East Africa Standards (EAS) were harmonized, and clearance time shrank considerably thanks to the mutual recognition of the certification marks by the NSBs in the region.[39]

(b) Trade Preference Programs

Trade preference programs are a pillar of market access for developing countries. Prominent examples include the European Union's Everything but Arms program, the United States' African Growth and Opportunity Act (AGOA), and the Generalized System of Preferences (GSP) by the European Union, United States and Japan. Two levels of challenges hamstring the ability of beneficiary countries to harness the benefits of the programs.

The first level concerns the programs *per se* and mirrors capacity constraints under most favoured enations (MFN) trading. For individual programs, inadequate capacity to resolve the supply constraints and standard non-compliance stand in the way of market penetration into the preference-granting countries.[40] For instance, in 2014, Tanzania only had one product entering the United States market through AGOA.[41] Moreover, the aforementioned difficulty to navigate and harmonize the network of rules is present in this context. For instance, the rules of origin of processed products vary widely across preference-granting countries and products.[42] Preferences, conditionalities, exceptions, and rules of origin are sometimes inconsistent and conflictory,[43] which operate as another form of market access barrier engendered by inconsistent standards and lack of harmonization mentioned.

The second level is the interaction between trade preference programs and domestic reforms.[44] This is a challenge unique to trade preference programs. Potential adverse effects are numerous: products with large preference margins in the trade preference programs create a false comparative advantage that could spawn inefficient allocation of resources or a level of dependence that stifles agricultural diversification and in turn perpetuation of a trade

[37] Ching-Fu Lin (n 17) 155; see also Olga van der Valk and Joop van der Roest, 'National Benchmarking Against Global GAP: Case Studies of Good Agricultural Practices in Kenya, Malaysia, Mexico and Chile' (2009) Report of the Agricultural Economics Research Institute, The Hague <http://library.wur.nl/WebQuery/wurpubs/fulltext/11453> accessed 6 January 2019.

[38] See TradeMark East Africa, <https://www.trademarkea.com/news/standards-harmonization-contributes-to-increased-intra-eac-trade/> accessed 6 January 2019.

[39] ibid.

[40] Amini Kajunju 'Capacity Building Is Critical for African Countries to Take Advantage of AGOA's Potential' *The Huffington Post* (6 December 2017) available at <http://www.huffingtonpost.com/amini-kajunju/capacity-building-is-crit_b_5553287.html> accessed 6 January 2019.

[41] ibid.

[42] Aksoy and Beghin (n 2) 70.

[43] Peter Gibbon and Stefano Ponte, *Trading Down: Africa, Value Chains, and the Global Economy* (Temple University Press 2005) 100.

[44] Aksoy and Beghin (n 2) 7.

profile composed primarily of low value-added products.[45] The perpetuation of the small share of export of processed goods, due to tariff escalation, has already been observed.[46]

The difficulty of harmonizing rules under different schemes and embedding trade preference programs in the broader growth strategy plausibly speaks to entrenched structural constraints of treaty negotiation. This is an area where the role of capacity building is limited, given the unilateral nature of trade preference programs and lack of effective coalition among beneficiary countries who sometimes compete to shield themselves from preference erosion.

An important way to enhance the utility of trade preference programs is to formulate more favourable rules that induce sustainable growth. Favourable rules include provisions that include a broader range of products, as agricultural products are frequently excluded in trade preference programs (in addition to corresponding complicated SPS rules).[47] Additionally, trade preference programs should preferably guarantee long-term commitments on the part of the preference-granting economy. After all, unpredictability about the duration of trade preference programs can have a negative impact on investment decisions. The perennial uncertainty surrounding the periodical renewal of AGOA, for example, undercuts investment decisions based on AGOA.

(c) Management of Outbreak and Shock Events

By its very nature, agricultural production is prone to diseases, pests, climate change, contamination, and other hazards.[48] Therefore, a robust legal and institutional framework in place to expeditiously contain and manage any outbreaks of disease, major food safety incidents, or shocks is vital to contain the damage and to sustain trade in the long term. Failure to institutionalize a mechanism to prevent, respond to, and manage outbreaks and shock events may translate into import bans, border restrictions, or heightened inspections.[49] Indeed, a few incidents over the past decade demonstrate the long term economic and reputational damage that can happen in the absence of the installation of a credible and robust system that could be immediately switched on.[50]

For instance, China's mismanagement over the melamine contamination case (which caused severe health problems in over 46 countries) resulted in the bans and restrictive measures adopted by other WTO members, including those implementing regulation out of public fear

[45] Aksoy and Beghin (n 2) 57, 72. McCalla and Nash (n 1) 166.

[46] Thom Achterbosch, Frank van Tongeren and Sander de Bruin, 'Trade preferences for developing countries' (2003) Report of the Agricultural Economics Institute, The Hague 55 <http://ageconsearch.umn.edu/bitstream/29102/1/rr030611.pdf> accessed 6 January 2019; McCalla and Nash (n 1) 166.

[47] Katrin Kuhlmann, 'Reframing Trade and Development: Building Markets through Legal and Regulatory Reform' (2015) E15Initiative Geneva, International Centre for Trade and Sustainable Development (ICTSD) and World Economic Forum 3 <www.e15initiative.org/> accessed 6 January 2019.

[48]See Steven Jaffee, Paul Siegel, and Colin Andrews, *Rapid Agricultural SupplyChain Risk Assessment:A Conceptual Framework* (World Bank 2010) vol 1 <http://siteresources.worldbank.org/INTARD/Resources/RapApRisk_combined_web.pdf> Accessed 20 January 2019.

[49] See WTO, 'Brazil Reassures WTO Members about Its Meat Safety Measures' (22-23 March 2017) <https://www.wto.org/english/news_e/news17_e/sps_22mar17_e.htm> accessed 6 January 2019; 'Brazil Tries to Rescue Meat Industry from Scandal' *Jamaica Observer* (22 March 2017) <http://www.jamaicaobserver.com/news/Brazil-tries-to-rescue-meat-industry-from-scandal> accessed 6 January 2019; European External Action Service, 'WTO Confirms Russian Pork Ban Is Illegal' EEAS Press Release (23 February 2017) <https://eeas.europa.eu/headquarters/headquarters-homepage/21308/wto-confirms-russian-pork-ban-illegal-23-february-2017_en> accessed 6 January 2019.

[50] The WTO Hormones dispute between the EU and the US is a classic example. See, *European Communities — Measures Concerning Meat and Meat Products (Hormones)* WT/DS26 <https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds26_e.htm> accessed 6 January 2019.

and criticisms.[51] Another example is the notorious Bovine Spongiform Encephalopathy (BSE) outbreak originating in the United Kingdom,[52] where public outcry resulted in comprehensive bans in numerous countries and even a regulatory conflict between the British and European authorities.[53] It remains clear that BSE continues to present a significant threat to global health and food safety and has enormous regulatory implications around the world. Most importantly, even after the outbreak has been under control for many years, reputational and thus economic damages have lasted.

The lack of capacity to address agri-food-related outbreaks and shock events may be rooted in a myriad of causes, such as institutional fragmentation (multiple agencies involved in the regulatory process) the absence of an overarching risk assessment body with appropriate scientific expertise and infrastructure, inadequate risk management capacity, underdeveloped rapid alert and response systems, weak law enforcement, personnel training, surveillance, and coordination along the entire supply chain, insufficient labeling requirements, and even corruption.[54] Ineffectiveness, insufficiency, or non-existence of domestic institution, legislation, or regulation are crucial capacity constraints that prevent governments from controlling outbreaks and other shocks. Notably, even developed countries such as the United States and European countries face various problems with regulatory institutions;[55] problems of underdeveloped legal frameworks (as noted above) are shared by most other developing countries.[56]

Recent examples of institutional capacity building and regulatory reforms include the European Union's General Food Law, in particular the establishment of the European Food Safety Authority in charge of risk assessment and communication and the Rapid Alert System for Food and Feed;[57] China's 2009 Food Safety Law and 2015 Amendment, in particular the export inspection and certification services; and the United States' Food Safety Modernization Act, in particular the prevention-based approach and third-party audit and certification system. Moreover, the Association of Southeast Asian Nations (ASEAN) has

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[51] Francis Snyder, *Food Safety Law in China: Making Transnational Law* (Brill Nijhoff 2015) 9-107. More specifically, sixty-eight countries banned or recalled foods suspected of containing melamine, while some other countries increased testing requirements or even imposed a ban on all imports of milk and milk products from China. See also Vivek Bhalla and others, 'Melamine Nephrotoxicity: An Emerging Epidemic in an Era of Globalization' (2009) 75 Kidney International 774.

[52] Belinda Cleeland, 'The Bovine Spongiform Encephalopathy (BSE) Epidemic in the United Kingdom' International Risk Governance Council <http://irgc.org/wp-content/uploads/2012/04/BSE_full_case_study_web1.pdf> accessed 20 January 2019.

[53] Bernd van der Meulen, *European Food Law Handbook* (Wageningen Academic Publishers 2008) 240–42.

[54] Ching-Fu Lin, 'Global Food Safety: Exploring Key Elements for an International Regulatory Strategy' (2011) 51 Virginia Journal of International Law 637, 649-661; Bernd van der Meulen, 'Development of Food Legislation Around the World: Concluding Observations' in Christine E Boisrobert and others (eds), *Ensuring Global Food Safety: Exploring Global Harmonization* (Academic Press 2009) 63, 65–66.

[55] In the United States, overlapping competencies among FDA, the USDA, and other federal agencies have undermined the efficiency of the government in handling routine food safety surveillance tasks and in responding to crises of foodborne hazards. Insufficient and ineffective border inspection of imported food remains a node of weakness for both the United States and the EU. In the EU, many inadequately outfitted new Member States, although developing their scientific and regulatory capacities, undermine the effectiveness of the high-standard European General Food Law; Ching-Fu Lin (n 54) 649-61.

[56] See Ahmidou Ouaoich, 'A Review of the Capacity Building Efforts in Developing Countries – Case Study: Africa' in David James (ed), *Sixth World Congress on Seafood Safety, Quality and Trade* (Sydney, 14–16 September 2005) 101, 107; Larry Keener, 'Capacity Building: Harmonization and Achieving Food Safety' in Christine E Boisrobert and others (eds), *Ensuring Global Food Safety: Exploring Global Harmonization* (Academic Press 2009); Gyanendra Nath Gongal, 'International Food Safety: Opportunities and Challenges' in S P Singh and others *Food Safety, Quality Assurance and Global Trade: Concerns and Strategies* (International Book Distributing Company 2009) 89-91.

[57] European Commission, *Communication from the Commission – The Rapid Alert System for Food and Feed of the European Union* (2009) 37 <https://ec.europa.eu/food/sites/food/files/safety/docs/rasff_30_booklet_en.pdf> accessed 6 January 2019.

also worked closely with the European Union and built on the latter's financial and technical support[58] to have created the ASEAN Food Safety Regulatory Framework,[59] the ASEAN Rapid Alert System for Food and Feed (ARASFF),[60] and the ASEAN Risk Assessment Centre for Food Safety.[61] Brazil, faced with beef and chicken import bans imposed by other WTO Members due to a corruption scandal in the government's meat inspection work, launched a series of reforms to combat corruption and law enforcement in the country.[62] These all seem to be promising steps towards institutional capacity building for actors in both developed and developing countries along the global agri-food supply chain; yet more cooperation among interdependent trading partners, especially on capacity building in a mutually-reinforcing manner, would be desirable.

(d) Enforcement

Inadequate enforcement is another stumbling block to market access. Indeed, once rules, standards, and tariff schedules are finalized, only rigorous enforcement can transplant legal texts into reality. Besides, enforcement may represent higher stakes for small, developing countries: one million dollars of foregone export revenue equals just a few seconds' export value for the European Union but represents 0.17 to 0.42 percent of GDP for Gambia or Burundi.[63]

Enforcement is an ongoing challenge in the international trade context. At the multilateral level, possible enforcement-facilitating mechanisms include the WTO Trade Policy Review Mechanism; Specific Trade Concerns at the SPS Committee; and negotiations, consultations, mediation, and formal dispute settlement proceedings. Developing countries do not always have the capacity to exercise all the options. For instance, the inability of many developing countries to utilize the WTO dispute settlement mechanism has been discussed extensively in literature.[64] This chapter merely highlights that the scientific dimension of food safety related disputes (claims under the SPS Agreement) imbues disputes with additional procedural and substantive complexities. After all, the centrality of scientific evidence calls for the ability to pinpoint noncompliance, select and work with scientific experts to shape scientific opinion in support of legal argument, challenge or engage experts appointed by the panel, and challenge expert opinions from the opposing side.[65] Whether the overlay of scientific dimension burdens and dissuades developing countries, particularly least developed countries (LDCs), from enforcing their rights under the SPS Agreement is an empirical question. As a data

[58] ASEAN Regional Integration Supported by EU, *Overall Work Plan for the period 1st May 2013 to 31st October 2016* (2013) 43-44 <http://arise.asean.org/wp-content/uploads/2014/01/ARISE-Overall-Work-Plan.pdf> accessed 6 January 2019 .

[59] Association of Southeast Asian Nations, *The ASEAN Food Safety Regulatory Framework* (2016) available at <https://asean.org/storage/2016/08/ASEAN-Food-Safety-Regulatory-Framework.pdf> accessed 6 January 2019.

[60] See ASEAN Rapid Alert System for Food and Feed <http://arasff.net/> accessed 6 January 2019.

[61] See ASEAN Risk Assessment Centre for Food Safety, Overview <www.arac-asean.org/about/overview.html> accessed 6 January 2019.

[62] China, including Hong Kong, the biggest market, has banned all imports of beef and chicken, the European Union has stopped importing all the businesses potentially involved, and Japan and Mexico have also imposed similar bans. Brazilian meat exports went from $63 million to $74,000 per day, and its government had to appeal to all the other WTO Members (about 150 import meat products from Brazil) not to impose "arbitrary" bans and reassure reform initiatives are underway. See n 49.

[63] See Gregory C Shaffer and Ricardo Meléndez-Ortiz (eds), *Dispute Settlement at the WTO: The Developing Country Experience* (CUP 2010) 343.

[64] See generally, Marc L Busch, Eric Reinhardt and Gregory Shaffer, 'Does Legal Capacity Matter? Explaining Dispute Initiation and Antidumping actions in the WTO' (2009) 8 World Trade Review 559; Shaffer and Meléndez-Ortiz (n 63); Chad P Bown and Rachel McCulloch, 'Developing countries, Dispute Settlement, and the Advisory Centre on WTO Law' (2010) 19 Journal of International Trade and Economic Development 3.

[65] See for example *EC – Hormones* (n 10).

point, it is worth highlighting that no LDC has participated as a complainant or respondent in a WTO dispute for claims arising under the SPS Agreement.

Enforcement related capacity building efforts, such as through the Advisory Centre on WTO Law, have been discussed elsewhere, including multiple chapters in this book.[66] Here again, the heterogeneity and dynamic evolution of developing countries' capacity development in WTO disputes is evidenced by active users such China, India, Colombia, and Brazil.[67]

Two SPS-specific elements of capacity building are notable. First, given that expertise in agri-food legal issues is the kernel of SPS enforcement, capacity building for SPS enforcement dovetails with efforts to improve market access generally, such as those relating to standardization, harmonization, and domestic regulatory upgrade outlined in preceding chapters. Secondly, capacity building has stages, and a gradualist approach may be optimal. The sophistication and cost of the enforcement tools could advance as capacity catches up. That is, less politically, financially, and technically demanding options could be explored first to prepare a given country for more sophisticated mechanisms. In this context, a notable innovation is the WTO mediation procedure, which stands midway between consultation and litigation and benefits from the input of a third-party mediator, usually the SPS Committee's chairperson.[68] This was an option that Nigeria explored in resolving trade friction over Mexico's import measures on hibiscus flowers.[69]

2.2 Growth Strategy

(a) Voluntary Sustainability Standards and Labels

A noteworthy subset of standard is VSSLs. Through certification and labelling schemes, VSSLs convey certain attributes related to process and production.[70] Prominent environmental and social labels include, *inter alia*, Organic Agriculture, Fair Trade, and Rainforest Alliance.[71] Compared to their conventional counterparts, products with VSSLs enjoy price premia, improved market access (particularly to valuable market niches), and longer-term supply contracts.[72] They represent burgeoning markets that developing countries have generally been unable to seize. Given the rapidly growing market demand of products

[66] See Shaffer Meléndez-Ortiz (n 63); Busch, Reinhardt and Shaffer (n 64); Bown and McCulloch (n 64).

[67] Gregory Shaffer and Henry S Gao, 'China's Rise: How It Took on the U.S. at the WTO' (2018) 1 University of Illinois Law Review 115.

[68] WTO, 'Steps officially agreed for mediating food safety animal-plant health friction (10 September 2014) <https://www.wto.org/english/news_e/news14_e/sps_10sep14_e.htm> accessed 6 January 2019.

[69] WTO, 'Nigeria to request mediation to resolve friction over plant health certificates' (14 and 16 October 2015) <https://www.wto.org/english/news_e/news15_e/sps_14oct15_e.htm> accessed 6 January 2019.

[70] Till Stellmacher and Ulrike Grote, 'Forest Coffee Certification in Ethiopia: Economic Boon or Ecological Bane?' (2011) Center for Development Research Working Paper Series No 76 1.

[71] FAO, Voluntary sustainability standards for bananas <http://www.fao.org/world-banana-forum/projects/good-practices/voluntary-sustainability-standards/en/> accessed 6 January 2019.

[72] Stellmacher and Grote (n 70); in Chris Arnot, Peter C Boxall and Sean B Cash 'Do Ethical Consumers Care About Price? A Revealed Preference Analysis of Fair Trade Coffee Purchases' (2006) 54 Canadian Journal of Agricultural Economics 555, the authors review the literature demonstrating price premiums attached to ethically labelled products in hypothetical market settings and concur through actual market setting. A similar review of chocolate was provided in Pieter Vlaeminck and Liesbet Vranken, 'Do labels capture consumers' actual willingness to pay for Fair Trade characteristics?' (2015) Working Papers KU Leuven, Centre for Agricultural and Food Economics 7. The magnitude of the price premium depends on a variety of factors, such as the label, the country of origin of the product, and the demographic profile of the consumers; as much as 50% of Willing to Pay premium was found in one study. The literature review on the magnitude is summarized in Arnab K Basu and others, 'Multiple Certifications and Consumer Purchase Decisions: a Case Study of Willingness to Pay for Coffee in Germany' (2016) Cornell University Working Paper 6, 7 <http://publications.dyson.cornell.edu/research/researchpdf/wp/2016/Cornell-Dyson-wp1617.pdf> accessed 6 January 2019.

with VSSLs and their projected growth,[73] challenges in relation to VSSLs products are analysed in this section.

The public sector plays a significant role in scaling up the production and channelling the operation of VSSLs compliant products: it could help foster economies of scale; fill market voids; provide public good, such as relevant research; and boost sector organization, particularly for small- and medium-sized enterprises (SMEs) that may need additional support.[74] In constructing the apparatus to facilitate would-be entrants into these markets, developing countries could face two primary obstacles: strategic planning; and infrastructural support.

A lack of technical expertise, leading to the shortage of research (by both the private sector as well as the government, at both micro and macro levels, and in both systematic and ad hoc/project-based fashion),[75] hampers strategic planning. An information set must be acquired to form the basis of the intervention: 1) a clear analysis of respective production assets; 2) timely and consistent data on market dynamics, to gauge which sectors and trade channels hold the most promise in the context of their respective production assets in the context; 3) navigate, choose, and sequence the web of different standards and labels; and 4) regular self-assessment of positions and advantages in the global value chain and strategies to facilitate value-added production.

In terms of the institutional infrastructure in support of VSSLs, the lack of certifications to enable low-cost participation in VSSLs has been repeatedly identified as a key challenge.[76] A number of deficiencies in the requisite infrastructural and technical capability to maintain certification processes have surfaced: "namely, conformity assessment organisations including well-equipped testing laboratories; standards institutes; and accreditation bodies."[77]

Another constraint is the inadequate cultivation of human capital, in both public and private sectors. The positive relationship between farmers' literacy, numeracy, technical skills, and their ability to implement food safety and quality standards is illustrated by case studies on

[73] Michael Jenkins, Sara J Scherr and Mira Inbar, 'Markets for Biodiversity Services' (2004) 46 Environment Science and Policy for Sustainable Development 40; Arnot, Boxall and Cash (n 72) 555; Basu and others (n 72) 4; Stellmacher and Grote (n 70); FAO, Factors driving organic agriculture growth <http://www.fao.org/docrep/005/y4137e/y4137e03b.htm> accessed 6 January 2019. For instance, in 2014, the average annual growth rate of products complying with sustainability standards was a 41 percent, considerably outpacing the 2 per cent of its conventional counterpart. See Jason Potts and others, *The State of Sustainability Initiatives Review 2014: Standards and the Green Economy* (2014) International Institute for Sustainable Development (IISD) and the International Institute for Environment and Development (IIED) <https://www.iisd.org/pdf/2014/ssi_2014.pdf> accessed 6 January 2019.

[74] International Fund for Agricultural Development, 'Access to markets: Making Value Chains Work For Poor Rural People' (2012) <https://www.ifad.org/documents/38714170/39886304/Access+to+markets.pdf/d843d356-7349-4db3-a3c1-23d5c884d3ad> accessed 6 January 2019; Aidenviornment, New Foresight and International Institute for Environment and Development, 'The role of voluntary sustainability standards in scaling up sustainability in smallholder-dominated agricultural sectors' (2015) White Paper 10 <http://pubs.iied.org/pdfs/16586IIED.pdf> accessed 6 January 2019.

[75] Bill Vorley, Dilys Roe and Steve Bass, 'A Sectoral Analysis for the Proposed Sustainable Trade and Innovation Centre' (2002) International Institute for Environment and Development 12.

[76] Swiss State Secretariat for Economic Affairs, 'Strengthening the Competitiveness of Export Oriented Agro Value Chains Cashew Nut Value Chain in Mozambique' (2011) Aid for Trade Case Study <http://www.oecd.org/aidfortrade/47427815.pdf> accessed 6 January 2019; Guy Salmon, 'Voluntary Sustainability Standards and Labels (VSSLs): The Case for Fostering Them' (OECD 2002) <https://www.oecd.org/sd-roundtable/papersandpublications/39363328.pdf> accessed 6 January 2019.

[77] Salmon (n 76).

Indonesia and Zambia.[78] This lack of technical expertise may have originated from government officials, inspectors, or private actors who could obtain the requisite technical expertise and disseminate the knowledge in easily digestible forms, which could be done in tandem with overall literacy development. Being standard-takers, rather than setters, additionally constrains the feasibility of standard compliance with local relevance. Indeed, some VSSLs are developed entirely with a regional focus.[79]

Several exemplary initiatives undertaken by non-profits and public-private partnerships targeting small holders have revolved around different angles of capacity constraints. Some dedicate their resources to technical assistance around market access; some boost access to finance; and others invest in implementation and local infrastructure development.[80] Additionally, consolidating otherwise decentralized VSSLs can streamline the certification process and open up markets. This could involve double or triple certification (such as through a combination of Fairtrade, Organic, UTZ or Rainforest Alliance). UTZ and Fairtrade have already started collaborating on double auditing to reduce certification cost. [81]

(b) Agricultural Biotechnology

The development and diffusion of agricultural biotechnology are key levers for agricultural productivity. Agricultural inputs and irrigation, for example, have witnessed sustained innovation. Given their strategic significance in the production cycle, research and development (R&D) and diffusion of quality seeds are highlighted in this subsection. Innovation in seeds could enhance crop yields and nutritional content; countervail the effect of dwindling arable land and fertility of land; and cushion against the impacts of climate change.[82] A variety of technologies and techniques are at the disposal of plant breeders. For example, genetically modified crops (GM crops) have been engineered to be more resistant to insects, herbicides and droughts.[83]

While the field of agricultural biotechnology was traditionally dominated by public and private actors in the European Union and the United States, some developing countries are quickly catching up and forging ahead. Most notably, on the R&D side, more technologically and economically advanced developing countries have deployed two capital-intensive methods to strengthen their portfolio of biotechnology: domestic R&D; and acquisition of agribusiness.

When it comes to domestic R&D investment, the front runners are China and India, which ranked third and fourth, respectively, in public spending during the period of 2000-2003.[84] In 2008, China approved an annual $584–$730 million budget increase for genetically modified crops.[85] In 2013, to further the research in a number of key areas, the Agricultural Science and

[78] For instance, OECD case studies on Indonesia and Zambia confirmed the positive relationship between farmers' literacy, numeracy, and technical skills and their ability to implement food safety and quality standards. See OECD Constraints to Agricultural Trade of Developing Countries (n 20) 30.

[79] Vorley, Roe and Bass (n 75) 13, 14.

[80] Potts and others (n 73) 50.

[81] See Centre for the Promotion of Imports from developing countries <https://www.cbi.eu/market-information/tea/buyer-requirements/> accessed 6 January 2019.

[82] See Haley Stein, 'Intellectual Property and Genetically Modified Seeds: United States, Trade, and the Developing World' (2005) 3 Northwestern Journal of Technology and Intellectual Property 161; Katherine Linton and Mihir Torsekar, 'Innovation in Biotechnology Authors: Seeds: Public and Private Initiatives in India and China' (2009) Journal of International Commerce and Economics 191.

[83] Linton and Torsekar (n 82).

[84] ibid 192.

[85] ibid 193.

Technology Innovation Program (ASTIP) was launched; the program is administered by the Chinese Academy of Agricultural Sciences and supported by central government.[86] On the business acquisition side, China National Chemical Corp, a state-owned enterprise, sealed a deal to acquire Swiss agro-giant Syngenta AG. Syngenta is a global leader in agricultural inputs such as seeds and fertilizers and has with 11 R&D centres across the world.[87] The 43 billion-dollar price tag, marking the largest foreign takeover in Chinese history, reflects the strategic significance of the deal.

A complex web of factors impacts the development and diffusion of biotechnology. Difficulties stem from inadequate financial, technological and R&D capacities, such as large-scale field trials prior to commercialization.[88] Additionally, emulation of China's two-pronged pursuit of biotechnology may pose further challenges, as the ability to orchestrate and execute central planning is a product of China's unique political structure.

Regulatory restrictions constitute another crucial impediment to the development and diffusion of biotechnology. For example, African countries largely prohibit the commercial sale of biotech seeds. [89] Some countries, such as Kenya, are considering relaxing this restriction under certain circumstances (such as importation for research), [90] a path that could be followed by others.

A number of smaller-scale alternatives are feasible, and promising capacity building efforts are already underway. One feasible path might be to concentrate on locally relevant or niche markets. While financial and technical assistance from public sector R&D institutions may be in short supply, international donors and their counterpart institutions could bridge the gap.[91] Capacity building efforts along this line has been underway and should be intensified.[92] For example, Water Efficient Maize for Africa (WEMA) is a PPP project that aims to develop and distribute drought-tolerant maize to several countries in sub-Saharan Africa, a particularly drought-prone region. [93]

3. Lessons

The section gathers several overarching lessons and proposes starting points for capacity building in the agri-food sector. First, the high heterogeneity of developing countries necessitates tailored paths for capacity building. Their heterogeneity lies primarily in legal, institutional and financial capacities; and areas of untapped market potential. For example, regarding the development of biotechnology, while some have forged ahead with comprehensive investment through domestic R&D and foreign acquisition, others struggle to afford the capital outlay. Similarly, in standard setting, while some have established the

[86] Chinese Academy or Agricultural Sciences, The Agricultural Science and Technology Innovation Program <http://www.caas.cn/en/research/research_program/index.shtml> accessed 6 January 2019.

[87] Syngenta, Research and Development centers <https://www4.syngenta.com/how-we-do-it/research-and-development/our-r-and-d-centers> accessed 6 January 2019.

[88] M R Bhagavan and I Virgin, 'Agricultural Biotechnology in Developing Countries: A Briefing Paper for Sida' (2004) Stockholm Environment Institute viii.

[89] Katrin Kuhlman, 'The Human Face of Trade and Food Security: Lessons on the Enabling Environment from Kenya and India' (2017) Centre for Strategic and International Studies 19 <https://csis-prod.s3.amazonaws.com/s3fs-public/publication/171206_Kuhlmann_HumanFaceFoodSecurity_Web.pdf?UIIn_uS4Z6IoUMSi727Q8QrUyHfGnehl> accessed 6 January 2019.

[90] ibid.

[91] Bhagavan and Virgin (n 88) ix.

[92] ibid.

[93] African Agricultural Technology Foundation, Water Efficient Maize for Africa <https://www.aatf-africa.org/aatf_projects/water-efficient-maize-for-africa-wema/> accessed 6 January 2019.

National Consultative Committees on TBT and SPS to help promote public-private partnership, others remain disengaged from international standard setting. In the same vein, while some have been able to deploy the full arsenal of enforcement tools, others have only resorted, if ever, to the least costly ones.

Their heterogeneity also lies in their most binding constraints, which implicates sequencing. To ensure optimal prioritization of scarce political, human and financial capital, the sequencing and allocation of resources must be individualized to meet the multi-faceted and heterogeneous local needs.[94] The cautionary tale of Uganda underscores the importance of prioritization and sequencing: there, legal reforms focusing on liberalizations in the 1990s failed to bring about trade expansion because the most binding constraints were not addressed first.[95] With the benefit of hindsight, it was observed that constraints such as high transport costs as well as time costs, attributable to Uganda's landlocked nature, were the primary impediments to improving its global competitiveness.[96]

Relatedly, the nature of their capacity building is also characterised by a high extent of cooperation with and reliance on other actors. Unilateral steps taken by other actors stand at one end of the spectrum. This category includes elements of trade preference agreements and harmonization among standard setters, both of which pose structural difficulties that could be hard to remedy. Unilateral steps taken by a country itself stand at the other end of the spectrum: this would encompass domestic R&D funding allocated to local laboratories and standard harmonization (potentially conforming to international standards). Regulatory collaboration embodied by United State-China Food Safety Agreement would stand in the middle.[97] Importantly, the heterogeneity of constraints and local contexts do not mean that countries should not look to emulate or adapt others' capacity building packages. To the contrary and for instance, while investing comprehensively in R&D and sealing high profile deals may be onerous, a leaner version – such as investing in and acquiring niche market products that fit well with the local context – could be viable.

The second lesson is that the commonalities of constraints signal possible priority areas of capacity building. Specifically, the lack of harmonization of rules and standards impedes market access in both MFN terms and trade preference agreements. The constraints encountered by standard takers speak volume of the need to expend political, technical and human capital in standard making. Likewise, some infrastructural inadequacies intersect at multiple points along the supply chain. The lack of certification is a case in point, as it conveys standard compliance and is a critical element of safety and quality standards for market access as well as VSSLs for growth strategy.

Third, it is imperative to install a holistic farm-to-fork capacity building scheme, as any given activities could be a bottleneck that holds up the operation of the supply chain. Consider the layers of food safety governance. The public sector must first acquire relevant technical expertise such as risk assessment and standard setting. The expertise cannot be manifested without robust institutions to perform lab testing and quarantine measures. Besides, the institutional framework must be regularly refined to channel growing expertise, particularly to absorb the dynamism of the private sector. For example, as noted, the European Union and United States went through an institutional and regulatory overhaul to upgrade their food safety mechanisms. Yet founding and maintaining robust institutions is not a panacea; relevant and multiple stakeholders must ultimately be able to exploit them. As discussed,

[94] OECD, *Succeeding with Trade Reforms: The Role of Aid for Trade* (OECD 2013) 54.

[95] ibid 94-96.

[96] ibid.

[97] See n 98.

educational levels profoundly impact farmers' ability to implement food safety and quality standards.

Lastly, a few useful starting points could fertilize the seeds of capacity building. In the short run, a necessary first step is a systematic, data-driven analysis to ascertain the challenges a country and its exporters are facing. For instance, the above discussion on the apparently varied causes for import rejection requires deeper examination. The exact contour of the analysis would depend on the trade profiles of the countries. With ample empirical evidence and rigorous analysis, a country may obtain a comprehensive and nuanced picture of its capacity constraints and local needs, be it infrastructure-oriented, legislative and institutional, supply chain-driven, or market/commodity specific. In this regard, developing countries may make use of existing platforms to acquire global regulatory and trade information, to receive technical and financial support, and to absorb best practices (especially those sector- and SME-specific) for mutual learning and sustainable improvement.[98] In addition, developing countries may take immediate measures to promote compliance with standards and rules, harmonization with relevant international standards, guidelines, and recommendations, alignment of law with trading partners and major economies, and better deployment of benefits under trade preferences agreements as well as available routes of reinforcement.

In the long run, a bottom-up, comprehensive institutional response to capacity building is advised, which may include laboratory, transport and telecommunication infrastructures; administrative reform; compliance service; supply chain re-examination or upgrade; regulatory cooperation; and legislative reform. Such institutional designs are inherently interlinked, which all together point to the solid cultivation of technical knowledge and the crucial legislative, institutional and infrastructural framework as key elements in building capacity.

Finally, strategization and planning at high levels are critical. Dynamic evaluation of unexplored market opportunities is a critical role for the public sector. This area is ripe for PPPs. Notable initiatives that involve data collection include the Observatory of Economic Complexity (a data visualization tool) and Aid for Trade projects under the WTO, particularly those in partnership with the International Trade Centre. [99] This would require self-assessment of production assets and comparative advantages in the global market, based on market structure, export profile, technical expertise, development level and geographic and climate conditions in the respective countries.

[98] We note that while developing countries may save certain transaction costs by having recourse to existing platforms, the proliferation of such platforms may increase the burden of developing countries due to potential duplication, fragmentation, and information overflow.

[99] Kuhlmann (n 47) 8.

Part II

Capacity Building Initiatives:

Lessons Learned and Outstanding Challenges

Chapter 4. The ACWL's Contribution to Enhancing Legal Capacity of Developing Countries

Jan Bohanes and Christian Vidal-Leon

1. Introduction

Since its creation in 2001, the Advisory Centre on WTO Law (ACWL) has provided legal services to its developing country Members and least-developed countries (LDCs)[1] on countless issues arising out of the legal system of the World Trade Organization (WTO).[2] The ACWL's work revolves around three sets of services: legal opinions on issues of WTO law; litigation assistance in WTO disputes; and training/capacity building. The bulk of these services are provided free of charge. The ACWL's workload has grown steadily over the past 17 years, demonstrating that ACWL user governments rely on and trust the legal services that the ACWL provides.

As this article argues, the ACWL has been an effective tool available to developing countries and least-developed countries (LDCs) in navigating the rules of the global trading system. The aim of the ACWL is that a developing country or LDC that has identified and defined its interests and takes the initiative to approach the ACWL would find all the legal resources it needs to effectively pursue these interests.

For some countries, however, the challenge consists in the domestic processes that lead to identifying and defining its interests and reaching the politico-economic decision to take action at the international level. Specifically, in a number of developing countries, political, institutional and other challenges prevent governments from taking international action and making use of international resources placed at their disposal. For example, legal capacity shortcomings in certain developing-country and LDC government structures may affect the participation of those WTO Members in the WTO legal system, including the dispute settlement process. These shortcomings affect the ability of the ACWL to assist its members/users.

This chapter offers reflections on these challenges. We begin by explaining the term "legal capacity" within developing country governments distinguishing between legal capacity in a narrow and a broader sense. Next, this chapter examines key factors or determinants that limit the effective participation of developing countries and LDCs in the WTO legal system. Finally, this article lays out the structure and contribution of the ACWL to assist developing countries in overcoming these capacity building shortfalls and identifies the inherent limits in the assistance that an institution like the ACWL can bring to these governments.

[1] We refer to the governments of both developing country Members and LDCs collectively as "user governments" or "users".

[2] We use the term "WTO legal system" to comprise the rights and obligations set forth in the covered agreements of the World Trade Organization (hereafter WTO), as well as the institutional (ie councils, committees, and working parties) and dispute settlement provisions contained in those agreements.

2. What is Legal Capacity?

The term "legal capacity" in the context of WTO law is sometimes used in different ways, and it is therefore useful to define it with precision for purposes of our analysis. In this article, we will use this term to denote two different, but related, concepts, namely: (i) legal capacity *in the narrow sense* and (ii) legal capacity *in the broader sense*.[3]

We use the term **legal capacity in the narrow sense** to describe the technical expertise in WTO law – especially the case law of WTO dispute settlement bodies – needed to solve a given problem in the light of WTO law. This type of capacity enables a bureaucracy to examine whether a legislative or administrative measure or practice of another WTO Member (or of one's own government) is consistent with the very specialized framework of WTO law. This type of capacity also enables a government to initiate and successfully litigate, or defend, a WTO dispute in order to enforce its rights or alternatively to defend itself in a WTO dispute brought by another Member.

By contrast, **legal capacity in the broader sense** is the more general ability of a government to be aware of, and to promote, its national economic interest in the WTO system by making use of WTO legal norms. Beyond legal capacity in the narrow sense, this capacity includes the ability to organize the government bureaucracy in a manner that allows effective participation in the WTO framework – including: (i) to communicate effectively and to coordinate with the private sector with a view to forming what has been aptly labelled "private-public partnerships"; (ii) to identify short-, medium- and long-term issues of external economic concern for the private and public sectors; (iii) to marshal resources within the government bureaucracy to promote economic interests at the international level; and (iv) to make its voice heard in the WTO system. This legal capacity also includes the development and use of relevant legal expertise within the private sector and among domestic law firms and in academia.

The distinction between these two types of capacity is important: before one can overcome any shortcomings in the ability of developing countries to navigate the world of international trade law, these shortcomings must first be understood and properly analysed. As a general proposition, we believe that it is easier to for international institutions or bilateral donors to address shortcomings in legal capacity in the narrow sense. That type of assistance can be provided, for example, in the form of financial support, with which the user government can hire legal counsel in the commercial market. This approach can be seen in the pre-ACWL era, for instance, the International Court of Justice (ICJ) Trust Fund.[4] Another example of addressing legal capacity in the narrow sense is a proposal tabled as part of the review of the WTO dispute settlement system ("DSU review"), where certain developing WTO Members have demanded the creation of a payment/funding mechanism to cover the legal expenses of developing countries, in the event of a WTO dispute or a victory on that dispute.[5]

Another way of providing legal aid is to place legal experts directly at the disposal of developing country governments. The best example of this approach is the ACWL, an intergovernmental organization with a team of specialized WTO lawyers that provides legal advice to user governments free of charge and assists in WTO litigation for concessionary rates. As will be explained later, the ACWL has been very successful since its creation, while

[3] See Jan Bohanes and Fernanda Garza, 'Going beyond stereotypes: Participation of Developing Countries in WTO Dispute Settlement' (2012) 4 Trade, Law and Development 45, 70.

[4] See Cesare Romano, 'International Justice and Developing Countries (Continued): A Qualitative Analysis' (2002) 1 The Law and Practice of International Courts and Tribunals 539.

[5] For a critique of these proposals see Bohanes and Garza (n 3) 94.

competing occasional proposals for financial assistance to litigating WTO Members (analogously to the ICJ Trust Fund or the funding mechanism mentioned above) have received only very limited support.

Legal aid in the form of human resources, at least in the WTO dispute settlement system, appears to have proven more successful than purely financial assistance. The ACWL is the most prominent incarnation of this approach. However, it is not the sole instance of human resource-based rather than financial assistance. A second example of "in person" legal assistance is the mechanism in Article 27 of the WTO's Dispute Settlement Understanding (DSU), whereby the WTO Secretariat employs two individuals whose task is to advise developing country Members on issues of WTO litigation. However, as discussed further below, this mechanism has never reached anywhere near the level of use as the ACWL, due to its inherent structural limitations.

In contrast to legal capacity in the narrow sense, external support to address shortcomings in legal capacity in the broader sense is obviously a more complex endeavour. Legal capacity in the broader sense is closely intertwined with domestic governance issues, and there will naturally be significantly greater sensitivity of a user government to external advice. A government will appreciate less being told how to structure its bureaucracy and institutions, how it should allocate legal or other responsibilities between different government agencies, and how government officials should communicate with internal stakeholders, including the private sector. Administrative traditions, vested interests, bureaucratic turf battles and the sheer task of changing well-established patterns of functioning of the bureaucratic machinery will complicate reform in the name of building legal capacity, even where the primary interlocutors of external donors subscribe to the stipulated goals. Moreover, unlike legal advice on a clearly defined issue of international trade law, advice on the most propitious organization of the domestic bureaucracy and the most efficient and effective communication between the private and public sector will tend to depend on the particular circumstances of each country.

3. What are the Factors Commonly Considered to Limit the Effective Participation of Developing Countries in the WTO Legal System?

3.1 To What Extent are Developing Countries Absent from the WTO Dispute Settlement System?

How are developing countries faring in the WTO dispute settlement system? From January 1995 to January 2019, WTO Members have filed 575 disputes. It is frequently asserted that these disputes have been filed only by developed countries or a handful of developing countries, usually those that have a major share of world trade. Critics of the WTO dispute settlement system often point to the fact that approximately 50 per cent of the membership (approximately 80 countries) has never participated in a WTO dispute as a main party,[6] and that this universe of non-participants is almost exclusively composed of developing countries, including all but one LDC.[7]

Nevertheless, a much more nuanced analysis is necessary. There are a number of inconvenient truths that interfere with the narrative of a system that is not responsive to developing countries' concerns and participation. First, developing countries is a term of art

[6] There are 33 WTO Members that have never participated as a main party but have participated at least once as a third party.

[7] See for instance Tania Sharmin, 'Least Developed Countries in the WTO Dispute Settlement System' (2013) 60 Netherlands International Law Review 375.

used in the WTO to designate Members whose level of development is lower than that of other Members. However, this group is heterogeneous in large part because there is no definition of a "developing country" and, therefore, it is the Member itself that self-determines its status as a developing country.[8] As a result, the "developing country" group includes, for instance, both some of the largest economies (including OECD Members) as well as LDCs and anything in between. For this reason, when one assesses the participation of developing countries in the multilateral trading system, regard must be had to the considerable developmental gaps among the countries that fall within that category.

At any rate, developing countries as a group account for almost 50 per cent of all disputes initiated[9] and also constitute approximately the same share of targets.[10] Contrary to a popular stereotype, this group includes not only some of the very large and powerful developing countries such as Brazil, China, India and Mexico, but also, on a more or less regular basis, smaller developing countries, including Honduras, Guatemala, Philippines, Thailand and Pakistan. Some of these countries have used the system more frequently than some developed countries, including Australia, New Zealand, Norway or Switzerland.

Yet there are many developing countries, including all but one LDC, that have never participated in a WTO dispute as complainant. An implicit – and often explicit – assumption in public lamentations about this fact is that this lack of participation is a result of resource limitations and thus reflects a fundamental inequity within the system. But this assumption is not necessarily correct. There are other developed, quasi-developed or extremely wealthy developing countries – including Iceland, Israel, Kuwait and South Africa (the largest African economy) – that have never initiated a dispute. The same was true until August 2017 for all Persian Gulf countries.[11] One would hardly worry about the ability of these governments to find a WTO legal expert within its bureaucracy or to hire a law firm to litigate a WTO dispute, if they so desired. The conclusion can therefore only be that at least some countries appear not to use the dispute settlement system *by choice*. There could of course be multiple reasons for that choice – perhaps these countries do not have trade frictions with their trading partners; or, more likely, because they prefer or end up solving these disputes by other means. None of this proves that the absence of a particular country in the dispute settlement system is unrelated to resource constraints; but it highlights the need for a more nuanced analysis.

Another way of challenging the story of a system responsive only to one half of its membership is to modify the metric and measure dispute settlement participation not as a percentage of total WTO membership – on a one-country-one-vote principle – but rather as a percentage of total GDP. Using that benchmark, the universe of WTO Members that have participated in a WTO dispute as a main party account for almost 100 per cent of total WTO GDP.[12] Although sometimes ignored, the link between total economic size as an important

[8] WTO, *Who are the developing countries in the WTO?* <www.wto.org/english/tratop_e/devel_e/d1who_e.htm> accessed 4 January 2019.

[9] As of August 2017, 247 disputes have been filed by developing countries, which represents 47% of disputes. The developing countries that have initiated more WTO disputes are: Brazil (31); Mexico (24); India (23); Argentina (20); Korea (17); China (15); Thailand (13); Chile (10); Indonesia (10); Guatemala (9); and Honduras (8). Source: Authors' calculations based on data available from <www.wto.org>.

[10] As of August 2017, 231 disputes have been brought against developing countries, which represents around 43% of all disputes. The developing countries that have more actively participated in WTO dispute settlement are China (39); Argentina (22); Brazil (16); Korea (16); Mexico (14); Indonesia (14); Chile (13); Turkey (9); and the Dominican Republic (7). Source: Authors' calculations based on data available from <www.wto.org>.

[11] See Qatar's requests for consultations under Article 4.4 of the DSU against the United Arab Emirates, Bahrain and Saudi Arabia (WT/DS526/1; WT/DS527/1 and WT/DS528/1).

[12] The 15 WTO Members that have initiated the highest number of disputes are: the United States, the European Union, Canada, Brazil, Mexico, India, Japan, Argentina, Korea, China, Indonesia, Thailand, Chile, New Zealand,

predictor of participation is well-established and has been extensively described in academic writing.[13]

At the same time, there can be no doubt that developing countries, especially the small- and medium-sized ones, face greater challenges of all kinds than developed countries as they navigate the WTO legal system. Developing country governments face greater human resource and financial constraints than developed countries. This is particularly true for LDCs. Even if it is possible that non-participation in WTO disputes is a choice of a given government, one can never be certain when the government at issue is a less-endowed one. These greater challenges of developing country governments are often summed up under the "more limited legal capacity" umbrella. A vast body of academic literature has sprung up over the years, analysing the specific challenges of developing countries.[14] Addressing these challenges is crucial for the legitimacy and functioning of the system.

3.2 Legal Capacity Challenges of Developing Countries and External Assistance to Overcoming These Challenges

In this subsection, we provide some thoughts on the challenges in the dispute settlement system faced by developing countries.

(a) Legal Capacity in the Narrow Sense

There can be no doubt that the more limited the human and financial resources, the less able a government will be effectively to participate in the WTO dispute settlement system. Developing countries can afford fewer highly qualified governmental officials than their developed counterparts. In addition, even if several developing country officials are highly qualified, they will likely be assigned to a greater number of files – some of which are not WTO-related – whereas developed-country Members will have robust teams dedicated exclusively to WTO law.[15] Moreover, even where knowledge and human resources are well developed, a developing country bureaucracy will tend to experience greater rotation in staff. Individuals that are well-qualified and especially capable may experience a relatively greater monetary incentive to work in the private sector.

At the same time, even if human and financial resources are sufficient, it may often not make sense to maintain within the governmental bureaucracy a significant number of officials with sufficient up-to-date expertise on all aspects of WTO law, including the vast and growing WTO jurisprudence. If a government is only an occasional user of the dispute settlement system, the more efficient and rational decision may be to ensure general WTO legal expertise within the ranks of the bureaucracy and enable access to more specialized external WTO legal expertise when the need happens to arise. Such a strategy makes sense for any occasional user, whether developed or developing.

Guatemala, Honduras, Russia, Chinese Taipei, Pakistan and Costa Rica. These 20 WTO Members account for over 93 percent of all disputes to date. Authors' calculations.

[13] See eg Marc Busch and Eric Reinhardt, 'The WTO Dispute Settlement Mechanism and Developing Countries' (2004) Department for Infrastructure and Economic Cooperation Sweden <http://faculty.georgetown.edu/mlb66/SIDA.pdf> accessed 4 January 2019.

[14] See WTO, Committee on Trade and Development, 'Biennial Technical Assistance and Training Plan 2018-19' WT/COMTD/W/227/Rev.1 (23 October 2017).

[15] In the European Commission, for instance, there is a team of 14 lawyers within its "Legal Service" department exclusively dedicated to legal aspects of "trade policy and WTO". See <http://europa.eu/whoiswho/public/index.cfm?fuseaction=idea.hierarchy&nodeID=3379585&lang=en> accessed 4 January 2019. This is in addition to 19 lawyers in the "Dispute Settlement and Legal Aspects of Trade Policy" department of the Directorate-General for Trade of the European Commission. See <http://europa.eu/whoiswho/public/index.cfm?fuseaction=idea.hierarchy&nodeID=3419197&lang=en> accessed 4 January 2019.

Put differently, if the type and extent of WTO legal issues that a governmental bureaucracy will confront on a regular basis do not justify a full-time in-house WTO lawyer, ensuring access to outside counsel is a meaningful means of "plugging the gap" in the governmental bureaucracy. For instance, Norway is as sophisticated as a governmental bureaucracy gets; but with only four complaints in 20 years, it makes little sense to maintain within its ranks officials ready to litigate a dispute without any external assistance.

Outside counsel can, however, be expensive, especially for complex disputes involving scientific experts, such as Sanitary and Phytosanitary Measures (SPS) and Technical Barriers to Trade (TBT) disputes, or disputes with complex economic questions. These disputes will thus often be beyond the means of many smaller developing countries' and LDCs' bureaucracies. Litigation fees of 500,000 US Dollars are "fairly typical" in a WTO dispute,[16] and a factually complex dispute – coupled with procedural objections that require additional legal briefs and hearings – may quickly bring a lawyer's bill over 1,000,000 US Dollars.[17]

While fully recognizing the greater challenges of developing countries in this regard, we are not convinced that in this day and age, legal capacity constraints in the narrow sense are a material factor holding back developing countries from participating in the WTO dispute settlement system. For one, a great deal of internal capacity has been built up in developing country governments through decades of technical cooperation programmes, including those on WTO dispute settlement, whether from donor governments or international institutions. While this has not eliminated the asymmetry between developed and developing countries, great progress has been made. This does not mean that many developing country governments are able to litigate a WTO dispute on their own, for the reasons explained above. But many developing country governments have become sophisticated discerning consumers of external legal advice to assist them in WTO matters of national interest.

More importantly, there are nowadays arguably many options for a resource-constrained government that has identified a trade problem – say, an export barrier in an export market – to obtain qualified and affordable legal advice and litigation assistance. The ACWL, large and small law firms and practitioners in developed and increasingly in developing country jurisdictions, and other institutions offer qualified external legal advice in their realm of expertise, and many of these institutions can also competently assist with a WTO dispute for affordable fees. For example, based on the current treaty provisions and regulations, the ACWL – open to all developing WTO Members and to all LDCs – can assist a middle-income developing country in consultations and a panel proceedings for less than 150,000 Swiss Francs.[18] It is not far-fetched to assume that in many instances in which a government is not willing to expend this amount – including perhaps with the help of the domestic industry concerned – this is because the government is uncertain whether it actually wishes to initiate that dispute, for instance, for political reasons.

[16] See Hunter Nottage, 'Small States and Least-Developed Countries in World Trade Organization Dispute Settlement' in Teddy Soobramanien and Laura Gosset (eds), *Small States in the Multilateral Trading System: Overcoming Barriers to Participation* (The Commonwealth 2015) 86.

[17] See Raul Torres, 'Use of the WTO Trade Dispute Settlement Mechanism by the Latin American Countries – Dispelling Myths and Breaking Down Barriers' (2012) ERSD WTO Staff Working Paper 10. See also Nottage (n 16); and also Håkan Nordström and Gregory Shaffer, 'Access to Justice in the World Trade Organization: A Case for a Small Claims Procedure' (2008) 7 World Trade Review 587.

[18] As per the current fees (set out in the ACWL Treaty) <www.acwl.ch/download/basic_documents/agreement_establishing_the_ACWL/Agreement_estab_ACWL.pdf> accessed 4 January 2019 and the time budget (determined by the ACWL Management Board).

In sum, we are not convinced that constraints in legal capacity in the narrow sense is today a material factor impeding an otherwise willing government to file a dispute in the WTO (or to defend itself).

(b) Legal Capacity Constraints in the Broad Sense

Many developing country governments' challenges nowadays arguably lie in legal capacity constraints "in the broad sense". To recall, these are the constraints that we have defined as residing in the ability of the government to organize itself in a manner conducive to effective and reasonably rapid reaction to defend national (trade/economic) interests in the WTO, in particular through the dispute settlement system and WTO councils, committees and working parties; and the ability to communicate and cooperate effectively with the private sector.

Both of these factors matter and are among the key reasons why some governments do not participate in the work of the WTO, including in the dispute settlement system, as fully or as often as they otherwise might. In a number of countries, different governmental departments and agencies do not adequately cooperate or share expertise to facilitate external action. Competence for international trade matters may be separate from the legal competence for international litigation. Thus, even if officials of the Ministry of Commerce are aware of the potential benefits of using the WTO dispute settlement system, they may be unable to convince their colleagues from, say, the Ministry of Justice to agree to initiate international litigation. Bureaucratic divisions of this type often hamper even third-party participation, because "signing up" to participate in a WTO dispute is subject to a deadline.

Another important aspect is decision-making. Where decision-making processes are ill-defined or depend on individual officials, the willingness to risk a WTO dispute will decrease. In governments that are frequent users of the dispute settlement system, internal decision-making procedures for initiating a dispute will typically be well-defined and will often be taken by a collective body, such as an inter-agency committee. By contrast, where the decision to initiate a dispute rests on the shoulders of a single individual, that individual's (very understandable) concerns for career implications in case of an unsuccessful outcome make it less likely that a dispute will be initiated. This effect will be compounded when the government at issue is an infrequent participant in the dispute settlement system, where limited or no experience of the system exists within the bureaucracy.

Turning to the second factor, successful communication and cooperation between the public and private sector is arguably one of the keys to sustained successful participation in the WTO dispute settlement system. The private sector will often be the first to become aware of a trade barrier and will typically have the most accurate, up-to-date information. Private sector interests typically drive WTO disputes, and most WTO complaints have a readily identifiable commercial stakeholder behind them.[19] Some developing countries have been more successful than others at creating an environment in which export-orientated industries view the government as reliable partner and facilitator in resolving market access and other economic challenges. These industries trust that the government will take up their cause, including through WTO litigation, and are willing to cooperate in these efforts, including by financing outside counsel and – in trade-remedy related disputes – sharing confidential and sensitive information with government officials.[20]

[19] A handful of WTO disputes are even colloquially referred to by the name of the company or companies behind them, eg the "Kodak-Fuji" case or the "Airbus" or "Boeing" disputes.

[20] Professor Gregory Schaffer and others have documented the successful case of Brazil. At the turn of the century, the Brazilian government undertook to strengthen the public-private relationships. Brazil developed a so-called "three pillar" structure for WTO dispute settlement. The first pillar relates to the coordination between the dispute settlement department in Brasilia and Brazil's WTO mission in Geneva. The second pillar relates to the coordination

By contrast, developing countries in which this public-private relationship is missing will tend to participate less in dispute settlement. Challenges can lie in the lack of trust and appreciation between the private sector and the government, or vice-versa. The private sector often regards government officials as bureaucrats that, rather than helping, add hurdles to their business activities; governments, for their part, remain distrustful whether the private sector is excessively seeking government intervention to advance economic interests that may not benefit the country as a whole. Furthermore, many industries in developing countries tend to be fragmented and not well organized in trade associations, which complicates communication with the government.

Adjusting intra-governmental structures, decision-making procedures and the cooperation with the private sector is, of course, first and foremost the task of the government at hand. Outside assistance can be provided to a limited extent, for example, in the form of sharing best practices; or by third parties/external donors organizing government-industry round tables, such as the programmes that were undertaken by the (recently closed) International Centre for Trade and Sustainable Development (ICTSD).[21] However, in a number of (smaller) developing countries and LDCs there is still room for improvement in this regard; and this improvement could increase the likelihood that one day these governments will join the long list of dispute settlement participants.

Many of these (sub) factors tend to be compounded by lack of experience. Once a bureaucracy has experienced one or more WTO disputes – including defensive cases – the resulting experience will mean greater openness to future disputes and may even be conducive to reforms that facilitate WTO litigation. There is considerable experience, both from large and small users, including dispute settlement heavyweights Brazil and Argentina, who were not always frequent users, which suggests that experience with the system tends to promote adjustments in internal organization that will facilitate subsequent participation.[22]

3.3 Other Factors that Prevent Developing Countries from Launching WTO Disputes

Beyond legal capacity, a number of other factors are frequently mentioned to explain the (alleged) greater reticence of developing countries to initiate WTO disputes. A wealth of literature examines this reticence. The most frequently mentioned factors in this regard include lack of retaliatory capacity; economic or political dependence on potential target countries due, for example, to development aid or unilateral tariff preferences; the tendency of at least some governments not to sue regional partners (which tends to be the case for those less-frequent user countries that regard multilateral action as particularly problematic from the perspective of sovereignty, including a number of African countries); or a culturally-driven preference for non-litigious dispute settlement and capacity, as defined above. These factors are difficult to address through external action by capacity-building institutions.[23] However, it is fair to say that the extent to which these alleged factors constitute genuine constraints on developing country governments is not always clear and will arguably often be limited. For example, much has been written about imbalances in economic retaliatory power and how

between these two offices on the one hand, and the private sector and economic consultants assisting the private sector on the other hand. The third pillar relates to the training of professionals in Brazil's mission in Geneva. See Gregory Schaffer and others, 'The Trials of Winning at the WTO: What Lies behind Brazil's Success' (2008) 41 Cornell International Law Journal 423.

[21] See for instance Bohanes and Garza (n 3) 117.

[22] Gregory Shaffer, 'How to Make the WTO Dispute Settlement System Work for Developing Countries: Some Proactive Developing Country Strategies' (2003) ICTSD Resource Paper 17 <www.files.ethz.ch/isn/92796/No_05_complete_%20Towards_a_Development_.pdf> accessed 4 January 2019.

[23] See Abdulqawi A Yusuf, *Pan-Africanism and International Law* (Brill Nijhoff 2015) 156.

smaller economies (mostly developing countries) are at a systematic disadvantage when it comes to enforcing WTO judgments against recalcitrant defendants. However, the significance of retaliation, or a threat of retaliation, for ensuring compliance with an adverse WTO judgment, and for the functioning of the system as a whole, remains highly speculative.[24] In other instances, power imbalances and fear of political retaliation by the target country might explain the absence of some disputes (for instance, SPS/novel food issues or the structure of GSP systems), but hold less explanatory force for other types of disputes, such as trade remedy disputes.

4. The ACWL's Contribution to Solving Legal Capacity Issues in Developing Country Governments

4.1 Description of the ACWL

The ACWL, created in 2001, is a unique legal aid institution. It is an intergovernmental organization and thus – despite its limited staff of 15, including administrative staff – enjoys a legal status on a par with the United Nations (UN) and the WTO. The ACWL's mandate is to ensure that developing and LDCs are able to participate fully in the WTO legal system. For this purpose, the ACWL provides legal aid to developing countries and LDCs on all matters of WTO law, which includes legal advice, support in WTO dispute settlement proceedings (litigation) and training of government officials.

The users of the ACWL's services can be divided into two groups. First, they include 35 developing countries that have acceded to the ACWL (ACWL Members). Second, they include 44 LDCs defined as such by the UN[25] that are WTO Members or that are in the process of acceding to the WTO. LDCs need not be ACWL Members to avail themselves of its legal services provided that they are WTO Members or are in the process of accession to the WTO.

In addition to the developing country ACWL Members, 11 developed country Members are also ACWL Members. These Members provide the vast majority of the ACWL's financing but are not entitled to the ACWL's services. These countries have taken the decision to support an institution like the ACWL in order to enable developing countries and LDCs to be better equipped to participate in the multilateral trading system. This enhances the legitimacy of the system as a whole. These governments thus provide an extremely valuable public good that benefits the entire WTO membership and the multilateral trading system. Strikingly, these governments of developed countries have to accept that they may become the target of a dispute in which the ACWL represents a developing ACWL member as the complainant. This, effectively, means that the government of a developed country may end up co-financing a dispute against itself. To accept the potential for this scenario requires political courage on the part of the developed country Members and a systemic vision beyond the confines of purely national economic interests. In the developed ACWL Members' view, the greater legitimacy that the ACWL confers on the rules-based trading system, by supporting its most needy and vulnerable Members and thus ensuring a better functioning of the system for everybody, justifies the (political) cost of potentially co-financing a dispute against itself.

[24] See Bohanes and Garza (n 3) 98.

[25] For a definition of LDCs and the current list of LDCs, see <http://unctad.org/en/Pages/ALDC/Least%20Developed%20Countries/UN-list-of-Least-Developed-Countries.aspx> accessed 4 January 2019. For a list of LDCs that are Members of the WTO, see <www.wto.org/english/thewto_e/whatis_e/tif_e/org7_e.htm> accessed 4 January 2019. The eight LDCs that are, at the time of writing, in the process of acceding to the WTO are: Bhutan, Comoros, Ethiopia, Sao Tomé & Principe, Somalia, South Sudan, Sudan and Timor-Leste.

At the time of its creation in 2001, the ACWL reflected a new form of international legal aid for judicial proceedings. Prior to 2001, international legal aid had been provided via two different mechanisms: monetary assistance enabling a developing country litigant to pay expenses for legal counsel (e.g. the ICJ Trust Fund); and in-person assistance by the Secretariat of an organization (especially at the WTO). It is fair to say that, despite their respective benefits, these pre-ACWL mechanisms suffered shortcomings that prevented them from fully living up to their intended role.

For example, the ICJ Trust Fund was intended to disburse monetary funds to approved recipients to enable them to litigate before the ICJ. However, in the view of some commentators, the ICJ Trust Fund did not receive sufficient financial support from donor countries. More importantly, the ICJ Trust Fund is available only: (i) if the dispute has been brought "by way of special agreement" under Article 36.1 of the ICJ Statute; or (ii) in disputes concerning the execution of an ICJ judgment.[26] As another example, as mandated by the WTO agreements,[27] the WTO Secretariat employs two individuals tasked with advising developing country Members on issues of WTO litigation; however, these two individuals are not permitted to draft written submissions for these developing country members, which significantly limits the usefulness of their assistance to the user governments. From the perspective of a busy government official, generic advice on, for example, anti-dumping disciplines in WTO law is not helpful when what she needs is a written submission in a WTO panel proceeding.[28] It was precisely these shortcomings of the existing legal aid forms that drove the idea behind the ACWL.[29]

The ACWL provides legal services upon the request of its user governments. Specifically, the ACWL acts upon the request of either a user government's diplomatic mission in Geneva or of capital-based government officials. The ACWL fosters both the Geneva-based as well as the capital-based contacts, not the least to ensure that government officials remain aware of the possibility to request the ACWL's assistance. This is important because rotation in the public administrations brings in new people who may not be familiar with the type of service that the ACWL provides. As explained further below, one way to ensure that the ACWL is always present is through training programmes provided to government officials, in particular delegates posted to the missions of their governments in Geneva.

In the following sections, we describe the ACWL's services. Generally speaking, the ACWL provides support on all matters of WTO law. This support falls into three different categories: legal/advisory opinions; dispute settlement support; and training activities.

[26] United Nations, General Assembly, Report of the International Court of Justice, Report of the Secretary-General 'Secretary-General's Trust Fund to Assist States in the Settlement of Disputes through the International Court of Justice' A/59/372 (21 September 2004) para 2 <https://documents-dds-ny.un.org/doc/UNDOC/GEN/N04/518/22/PDF/N0451822.pdf?OpenElement> accessed 4 January 2019; see also Carlos Esposito Massicci, 'Article 64' in Andreas Zimmermann and others (eds), *The Statute of the International Court of Justice: A Commentary* (OUP 2012) 1603.

[27] Dispute Settlement Rules: Understanding on Rules and Procedures Governing the Settlement of Disputes, Article 27.

[28] See for instance Bohanes and Garza (n 3) 72, 78.

[29] See Claudia Orozco Jaramillo, 'The Genesis of the ACWL' (The ACWL at Ten: Looking Back, Looking Forward', Geneva, 4 October 2011) 8 available at <http://www.acwl.ch/download/ql/ACWL_AT_TEN.pdf > accessed 4 January 2019.

4.2 Services Provided By the ACWL

(a) Legal/Advisory Opinions

Legal/advisory opinions are provided free of charge and can be grouped into three categories. The first category concerns issues arising in the WTO legal system, such as WTO accessions, participation in meetings of the WTO political bodies (councils, committees and working groups), as well as legal questions arising out of WTO decision-making and negotiations. The second category concerns the WTO consistency of measures taken by the Member requesting the legal opinion. An example is a draft investment promotion act pending in a Member's legislative body that may result in the granting of illegal subsidies under WTO law. In this instance, legal opinions may alert the ACWL user to a potential WTO inconsistency and assist it in removing that WTO inconsistency from the draft bill. This ACWL service thus has a dispute-preventing function.

The third category is legal opinions concerning measures taken by WTO Members other than the requesting Member. An example would be a market access restriction in a major export market. An ACWL legal opinion will enable the ACWL user to understand whether the trade barrier is potentially inconsistent with WTO law; and to assess accurately its options under WTO law, including whether to initiate a dispute in the WTO dispute settlement system. These legal opinions can therefore be the precursor to a WTO dispute.

Over the years, the ACWL has provided on average approximately 200 legal opinions a year. Roughly speaking, each of the three categories listed above accounts for approximately one third of the total count, the first and second categories somewhat greater, and the third category somewhat lower.[30] Statistics are provided exclusively on an aggregate basis, as the ACWL maintains strict confidentiality about its legal opinions. Similar to a law firm, this confidentiality covers which user asked which question on which topic and the ACWL answer.

(b) Dispute Settlement

In dispute settlement, the ACWL provides assistance to its Members and users in every phase of a WTO dispute settlement process. Unlike legal opinions, dispute settlement support is not provided entirely for free. Rather, user governments are required to pay concessionary rates capped at a (low) maximum level.[31]

One of the benefits of serving a broad base of user governments is that the ACWL, over time, becomes the repository of the collective experience of all its Members. This collective experience in turn benefits any given Member in a subsequent dispute. Viewed in this way, every ACWL Member and user benefits, at least indirectly, from every single dispute in which the ACWL is involved.

Since its creation, the ACWL has assisted its Members in 49 disputes as complainant or defendant.[32] This number results in impressive rankings of the ACWL *vis-à-vis* WTO Members who are frequent users of the dispute settlement system. Consider that if the ACWL were a WTO Member, its tally of 49 disputes would place it in fifth rank among all WTO

[30] In 2016, 35% of the legal opinions concerned WTO decision making and negotiations issues; 39% concerned measures of countries seeking advice; and 26% concerned measures of other countries. On a 5-year basis, from 2012 to 2016, WTO decision making and negotiations accounted for 41%; measures of countries seeking advice accounted for 34%; and measures of other countries accounted for 25%.

[31] These rates can be found on the ACWL website, at <www.acwl.ch/fees/> accessed 4 January 2019.

[32] This figure combines all the separate dispute settlement numbers, regardless of whether that dispute was settled or proceeded to litigation resulting in a panel report.

Members, after the United States, the European Union, China and Canada, ahead heavyweights such as India, Brazil and Argentina.

Arguably, this ranking even understates the ACWL's participation in WTO disputes. Looking only at figures from 2001 onwards – the year in which the ACWL officially began its operations – its 49 disputes put the ACWL one rank higher, into fourth position. This high ranking is robust to a variation of parameters; for instance, if one counts not all WTO disputes (requests for consultations), but rather only those disputes that resulted in a substantive[33] panel report, whether since 1995 or since 2001, the ACWL remains in fourth place.[34]

Needless to say, ACWL user governments are not *required* to use the ACWL in any given dispute. ACWL membership does not "lock in" a government and oblige it to use the ACWL as its exclusive dispute settlement service provider. It is therefore not uncommon to see a government use the ACWL in one dispute and a commercial law firm in another dispute. In particular, a government may choose to use a law firm where the private industry behind the dispute pays its private counsel of choice to assist the government. This is typically the case when the law firm assisted that company during the trade remedy investigation that is being challenged in the WTO. The ACWL on occasion may also act as co-counsel with a private law firm in representing a government. Finally, a government may decide to switch legal counsel in the course of WTO proceedings, retaining a private law firm for the panel process and subsequently switching to the ACWL for the appeal process.

(c) Technical Cooperation

The third pillar of the ACWL's activities concerns technical cooperation or training. Here, the ACWL's activities include an annual training course for Geneva-based delegates; ad hoc seminars on WTO legal issues of general interest; and workshops and seminars of specific interest to individual user governments. All of these training activities are provided free of charge.

Beyond these direct training activities, the ACWL also runs the "Secondment Programme for Trade Lawyers", an internship programme in which selected government lawyers from developing country Members and LDCs join the ACWL staff as paid trainees for a nine-month term starting mid-September and ending mid-June the following year.

The ACWL budget does not provide for any travel-related or accommodation expenses. This means that, when an ACWL Member or an LDC wishes the ACWL to organize a training activity outside of Geneva (for instance, in capital), it must pay for the ACWL's travel and accommodation expenses. Given that the WTO and many other organisations provide training to government officials entirely for free *and* cover the travel and accommodation expenses, ACWL user governments will typically not want to pay the ACWL's travel and accommodation expenses, and the ACWL thus typically limits its activities to Geneva. As a cost-effective way of providing small-scale training activities, the ACWL provides video conferences and video seminars for its user governments.

The ACWL also cooperates with the WTO and other organizations in training and capacity-building programmes for developing countries and LDCs. Specifically, the ACWL regularly

[33] This is meant to exclude panel reports that merely state that the parties reached a mutually agreeable solution, such as the panel report in Panel Report, *Korea – Measures Affecting the Importation of Bovine Meat and Meat Products from Canada*, WT/DS391/R (3 July 2012) unadopted.

[34] The one metric where the ACWL slips fairly low in the rankings is when one includes third party participation in the total number of disputes involved in. This, however, evidences a general (and regrettable) tendency of ACWL users to make limited use of third party participation and the tremendous learning experience that this participation may entail for less frequent users.

participates as a partner in training programmes organized by the WTO as well as with other organisations, such as the Inter-American Development Bank, the International Trade Centre, United Nations Conference on Trade and Development (UNCTAD), and International Centre for Trade and Sustainable Development (ICTSD).

The ACWL does not provide technical assistance to private enterprises. However, a WTO Member or user is free to request a training activity in which private sector people may participate as members of that government's delegation.

(d) Double Limitation of the ACWL's Services

It is worth emphasizing two key limitations of the ACWL's mandate. First, the ACWL does not provide *non-legal* advice, for instance, advice on economic policy goals, negotiating objectives or questions of a political nature. Second, the ACWL's legal framework is that *of the WTO*; thus, the ACWL does not provide advice on other areas of international law or on domestic laws of any WTO Member.

4.3 What Impact Has the ACWL Had on the Legal Capacity of Developing Countries?

Asking what impact the ACWL has had over the 17 years of its existence is a perfectly legitimate and interesting question. But assessing the impact of a legal aid institution such as the ACWL is no easy task. There are no obvious or easy metrics. Answering this question requires constructing a hypothetical world in which the ACWL does not exist and asking what developing country user governments would have done in that world to safeguard their WTO rights. This will inevitably be a speculative exercise, open to all kinds of methodological and other criticisms.

(a) Impact of the ACWL in Dispute Settlement

To assess the ACWL's impact in terms of dispute settlement, one could refer to the above ranking statistics and argue that the ACWL has had significant impact simply by virtue of its frequent use by its user governments.

Frequent use of an institution suggests a high level of trust from its membership in the ACWL's ability. Trust of government officials of ACWL Members is an important indication of success and is perhaps the most precious asset of an organisation like the ACWL. However, a high level of trust and frequent use of the institution *alone* do not address the above question of impact – what would the world look like, or would have looked like, if the ACWL did not exist?

To answer that question, one would have to consider whether the disputes in which the ACWL assisted a complainant would have been initiated even if the ACWL had not existed. That is purely speculative, both for any individual dispute as well as at the aggregate level. Moreover, even if the government would have brought that dispute in the absence of the ACWL[35] – perhaps choosing to hire a commercial law firm – the ACWL's existence can still make a difference for that Member, for instance if the ACWL charges lower fees than the commercial firm for the same service. In that case, the government would have access to equivalent legal advice for a lower price. Even if a government chooses private counsel over the ACWL – whether for a lower, equal or higher fee – the ACWL's presence on the legal market can result in competitive pressure that reduces commercial law firms' fees for countries eligible for ACWL assistance. In this way, the ACWL can provide an indirect

[35] As a former senior developing country government official said to the authors: "If it is really important, you will find the money."

benefit even to those governments that choose not to use the ACWL. Ultimately, this effect may result in savings even for non-ACWL member or user governments.

All of these effects are plausible but difficult to assess and to measure accurately. For example, greater competition within the legal market and the resulting downward pressure on lawyers' fees are triggered not only by the ACWL's existence. Another reason may be the increasing number of commercial law firms in the WTO law market, especially lower-priced law firms from developing countries.[36]

An alternative metric of the ACWL's impact on WTO dispute settlement could be the expansion of the universe of users of the dispute settlement system. Put differently, has the ACWL "brought into the system" governments that did not use the system prior to 2001? The answer is no, or at least "not really". With the exceptions of Bangladesh[37] and more recently Tunisia[38] there are no WTO Members that the ACWL assisted in a dispute that had not already participated in a dispute prior to retaining the ACWL.

More compelling evidence of the ACWL's impact on its users can be found in a study conducted in 2009 by Bown and McCulloch. According to their analysis, in the first 7 years of the ACWL's existence since its creation in 2001, it was possible to observe an increase in the use of the system by developing countries as a group.[39] Of course, this is correlation and not necessarily causation. But Bown and McCulloch also concluded, on the basis of the 2001-2008 data, that although the ACWL had not attracted new users to the system, it had enabled *existing users* to use the system more frequently.[40] This might suggest that the ACWL's low dispute settlement fees encouraged pre-existing users to return and use the system *more often*.

Bown and McCulloch also identified three additional metrics that indicated an impact of the ACWL on the system: First, developing countries now litigate a case "farther" along the full procedural duration of a dispute, instead of accepting a potentially disadvantageous early settlement. To illustrate, prior to the ACWL's intervention, a developing country litigant was statistically more likely not to escalate a consultation request into a panel process; or was more likely to settle a dispute during the panel proceedings, without waiting for a panel report. Secondly, there is a greater number of instances in which a pre-existing user has acted as sole complainant, rather than "only" co-complainant, especially as a "hanger-on" in a dispute brought by a developed country. Finally, Bown and McCulloch also found that the ACWL had enabled developing country complainants to litigate disputes over smaller values of lost trade.[41] This last point would fit with the above hypothesis that more frequent recourse by pre-existing users results from the lower fees charged by the ACWL, compared with fees that would have been charged by commercial law firms.

Although this analysis does not appear to have been updated since its release in 2009, based on the authors' day-to-day experience with developing country governments, it is highly likely that these conclusions still hold.

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[36] Consider, for example, the growing number of Indian, Chinese and Latin American law firms.

[37] *India – Anti-dumping Measures on Batteries from Bangladesh*, DS306 <https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds306_e.htm> accessed 15 January 2019.

[38] *Morocco – Provisional Anti-Dumping Measures on School Exercise Books from Tunisia*, DS555 <https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds555_e.htm> accessed 29 January 2019.

[39] Chad P Bown and Rachel McCulloch, 'Developing Countries, Dispute Settlement, and the Advisory Centre on WTO Law' (2010) 19 Journal of International Trade and Development 33.

[40] ibid.

[41] ibid.

(b) Impact of the ACWL in the Area of Legal Opinions

The impact of the ACWL's services in the area of legal opinions is similarly difficult to measure. Just like for dispute settlement, a possible method of answering the question of impact is whether, in the absence of the ACWL, there would have been an identifiable demand for this service and whether that demand could have been satisfied by another service provider.

For legal opinions that subsequently morphed into WTO disputes, it is not unreasonable to assume that governments would obtain advice from alternative service providers (including commercial law firms) even if that meant paying fees. If a case is economically or politically sufficiently important, or if the government is a defendant, a government will not be deterred by the need to pay a commercial service provider to provide a legal opinion. A commercial law firm might even offer concessionary fees, in the hopes that this would be an incentive for the client to retain the law firm for any dispute resulting from that advice. Thus, arguably, the impact of the ACWL here is not so much to provide legal advice where there would otherwise be none; instead, the ACWL provides a value-added because its advisory service is *free of charge*. This also makes the advice bureaucratically easier to access for the user government because a government official can simply pick up the phone and call, rather than go through a budgetary approval process or even struggle to divert the necessary financial resources from another important purpose.

In contrast, for legal opinions unrelated to disputes – to recall, those are legal opinions related to systemic issues, negotiations or day-to-day operations of the WTO and those related to the requesting WTO Member's own measures unrelated to any dispute – it is reasonable to assume that equivalent alternative service providers may, at least in some instances, be more difficult to find. These legal opinions are less attractive for commercial law firms to undertake because they will often be limited in scope, are unlikely to lead to a dispute, generate low fees and might conflict the law firm out of possible other, more lucrative matters. Moreover, the ACWL provides its legal opinions under very attractive conditions that are difficult to match for a private service provider: free of charge, with help from a team of 11 highly experienced WTO lawyers; in a very non-bureaucratic fashion (a simple phone call or email suffices); potentially within very short deadlines – if need be, within a few hours; on any issue of WTO law; in repeated interaction with government officials based either in Geneva or in capital, many of which know the ACWL attorneys personally; and in all of the WTO working languages. The combination of all of these factors – especially the unlimited and free-of-charge nature of these services – is arguably difficult to find in any other institution.

This is not to deny that other institutions tick at least some of the above boxes. There are of course pro bono programmes of some of the top commercial law firms; trade law clinics at excellent universities that provide research services; civil society organizations; and other individuals or institutions that match some or even most of the above aspects of the ACWL's services. But the concentration of all of these important criteria in the ACWL, and the consistent and extensive use of the ACWL by its user governments, suggests that the ACWL is uniquely placed to satisfy a certain segment of WTO Members' need for legal advice on WTO matters.

At the same time, the limitations of the ACWL's mandate necessarily limit also the ACWL's impact. To recall, the ACWL is focussed exclusively on legal matters arising in the WTO legal framework. The ACWL thus cannot advise on non-legal issues such as economic policy or negotiating strategy or negotiating objectives; nor can the ACWL advise on domestic law of WTO Members, on matters related exclusively to regional trade agreements or other areas of international economic law such as international investment agreements. Thus, a law clinic or a pro bono programme of a commercial law firm may sometimes serve the government

where the ACWL cannot. Another consideration is that the ACWL's services are geared only towards governments; the ACWL provides no assistance to commercial enterprises such as small- and medium- sized enterprises (SMEs) in developing countries that are often targeted by other organizations. In contrast, pro bono programmes of commercial law firms in practice often target those SMEs. Assistance to the private sector is important, because – as noted above – the private sector must typically lobby and assist its government in order to successfully litigate a dispute in the WTO.

Finally, as previously noted, the ACWL is exclusively demand-driven in order to ensure its neutrality *vis-à-vis* all its Members. This means that, in order to benefit from the ACWL's advice, a government must have identified an issue sufficiently well to approach the ACWL with a request for advice. To the extent that a government requires assistance in order to spot an issue or concern in the first place, the ACWL cannot assist with this aspect, and the intervention of other institutions is required.

All of the above demonstrate that, while the ACWL brings to the table a unique combination of services to its user governments for certain types of advisory assistance, it remains merely a part of a broader web of institutions of all types and sizes that make up the landscape of legal assistance in the international trading system.

(c) Impact of the ACWL in the Area of Technical Assistance

The impact of the ACWL in the area of technical assistance is most likely fairly limited. As noted above, in comparison to other institutions – in particular the WTO and other international organisations, as well as technical assistance programmes of national governments and national organisations – the ACWL is a very small organization, with finite resources and a budget that does not cover travel-related expenses for the ACWL staff. This means that the ACWL cannot in any way "compete" with, for instance, the WTO's capacity-building activities, to which the WTO devotes a much larger proportion of its (already much larger) budget than the ACWL. The absence of a travel-expense fund also means that, if an ACWL user wishes to retain ACWL staff for a training activity in its capital, it must shoulder the associated travel and accommodation expenses. Since many international organisations and other institutions organize training activities that do not impose any expenses on developing country governments, the ACWL will tend not to be the primary choice of those governments. The ACWL's activities in this area are thus typically on a small scale and are typically limited to Geneva.

Nevertheless, the training services of the ACWL and other international organisations (in particular those of the WTO) are not entirely fungible. One advantage that the ACWL may enjoy over the WTO in its technical cooperation activities is the greater liberty of ACWL staff to "speak their mind" on legal issues. Because the WTO is required to maintain neutrality *vis-à-vis* its 164 Members, WTO Secretariat staff cannot adopt definitive positions on many legal or policy issues that may be raised in a training activity. For example, during a training activity on customs valuation, an ACWL staff member may answer questions about the WTO-consistency of particular real-life evaluation issues in which the government officials in the audience express interest. A WTO Secretariat official would normally be unable to answer questions on specific measures, in order not to compromise the neutrality of the WTO itself. In contrast, the ACWL by its very design is not intended to be a neutral organization *vis-à-vis* the WTO Membership; thus, ACWL staff members are more at liberty to express their views on individual measures than WTO staff.

5. Conclusion

It is undisputed that the ACWL has contributed to enabling developing countries and LDCs to participate more actively in the multilateral trading system. Its ever-increasing membership (both developed and developing countries) attests to the recognition of the value of this institution for over 17 years.

The ACWL's main assets are the quality of its work, the trust of its Members, and the confidentiality of its work. The ACWL operates in response to specific requests by Members; and yet 200 legal opinions annually, on average, show that the user governments trust the quality and the timeliness of its work. From that perspective, it may be concluded that the legal advice that the ACWL provides has to a large extent enabled developing countries and LDCs to participate more actively in the rules-based system of the WTO.

In terms of dispute settlement, the ACWL constantly assists and represents user governments before WTO panels and the Appellate Body. One cannot predict with assurance the hypothetical rate of participation of developing countries in disputes had the ACWL not been created. However, the fact remains that the ACWL's involvement in WTO disputes is higher than ever before. This shows that user governments continue to rely on the ACWL for the defence of their disputes.

Finally, the ACWL has contributed to enhancing technical capacity through its training activities to delegates posted to the Geneva-based missions and to government officials. These training activities are primarily designed to build technical capacity; incidentally, they also allow the participants to become acquainted with the work and procedures of the ACWL. Thus, through these capacity building programmes, a myriad of working relationships continuously emerges between government officials and the ACWL.

Chapter 5. The *TradeLab* Network of Legal Clinics: Capacity Building for a More Inclusive Globalization[1]

Joost Pauwelyn and Theresa Carpenter

'There is no greater reward than being able to produce a tangible benefit for a beneficiary. TradeLab provided the space for our team to do so.'

TradeLab student, Canada

'. . . our profound gratitude . . . The brief which you have prepared will add tremendous value and input as we continue to pursue all avenues to recover the investments [of our nationals].'

TradeLab beneficiary, a developing country in the Caribbean

'TradeLab played a significant role in my growth as a young professional. I learned new skills and got more confidence in my abilities. I am on track to my dream career!'

TradeLab student, Geneva

'It has been a very enriching experience ... it allows small companies [like ours] to enter into specialized markets that generate added value.'

TradeLab beneficiary, SME exporter based in Colombia

1. What Is TradeLab?

TradeLab is a global network of universities and training centres, founded in 2013, that conducts pro bono projects for developing countries and other stakeholders such as Civil Society Organizations (CSOs) and Small and Medium-Sized Enterprises (SMEs) (hereafter: "beneficiaries"). TradeLab's overall goal is "to empower countries and smaller stakeholders to reap the full development benefits of institutions and rules that govern our global economy".[2] TradeLab's contribution to capacity building centres on "legal clinics": small teams of students work from their respective places of study with and for specific beneficiaries on a semestrial basis. Student teams are closely supervised by experienced academics and mentored by expert practitioners in the field. Using internet tools, students, experts and beneficiaries on a given project are virtually connected across the globe, from centers of expertise in Geneva or Washington DC, to remote places in Africa or Latin America. Research memoranda and other non-confidential output are posted on the TradeLab website for all interested parties to access. TradeLab thereby seeks to achieve three objectives: (i) help beneficiaries build capacity; (ii) train students; and (iii) inform and create awareness within the wider public.

Inspired by crowdsourcing and the sharing-economy, TradeLab functions as a global innovation and learning network. No one pays (all contributions are made pro bono), but all participants gain: direct beneficiaries enjoy free help and on the job training; students "learn by doing" and receive university credits; experts obtain teaching credits or other benefits of joining the network (reputation, access to a pool of highly qualified graduates) or simply enjoy "giving back to the community".

[1] Originally published as Pauwelyn J. & Carpenter T., "The TradeLab Network of Legal Clinics: Capacity Building for a More Inclusive Globalization", International Review of Law, TradeLab Special Issue, 2018.

[2] See <https://www.tradelab.org/about> accessed 15 January 2019, under "Who We Are".

Though much work is still needed, and TradeLab is but one actor in a broader universe of capacity building suppliers, the TradeLab "model" has the potential to disrupt and democratize both legal education and the legal profession in the field of international economic law and policy, spreading awareness, learning and expertise beyond a handful of highly specialized universities and "big-ticket" law firms in Europe or the United States. TradeLab also offers an alternative to technical cooperation and traditional capacity building. The latter is the focus of this paper. Section 2 describes how TradeLab is governed and financed. Section 3 explains the importance of capacity in today's global economy. Section 4 elaborates on what types of capacity are needed and where the main bottlenecks are. Sections 5 and 6 summarize the TradeLab "model" and the challenges of "scoping" and "scaling" TradeLab's work. Section 7 sets out benchmarks against which TradeLab's current and future success can be measured. Section 8 concludes by setting key objectives for the future.

2. How Is TradeLab Governed and Financed?

TradeLab is a network of Law Clinics; its governance is organised as an Association based and registered in Geneva, Switzerland, under Swiss Law[3]. It operates under Articles of Association and a number of policies such as conflict of interest and confidentiality. TradeLab members are not individuals, but the universities and training centres running or supporting a TradeLab clinic. TradeLab has an Executive Committee (headed by a President and Vice-President, currently, respectively, Joost Pauwelyn and Debra Steger) and a Coordinator (currently, Sarah Mathew, based at Georgetown University - School of Foreign Services in Qatar). TradeLab's highest body is the General Assembly, where every TradeLab member has one vote. TradeLab is further supported by an Advisory Board composed of leading experts and practitioners in the field. Current office holders are introduced here: https://www.tradelab.org/governance. TradeLab's initial steps[4] were made possible thanks to the *International Law for a Global Economy* project funded by the Swiss National Research Foundation. TradeLab has also received support under the *Legal Innovation to Empower Development* project funded by the Qatar National Research Fund (QNRF).[5]

Above all, however, TradeLab operates thanks to voluntary service and assistance by expert mentors, who give their time for free; and contributions in kind by participating universities and professors (universities contribute in kind by paying professor salaries and, in most cases, the provision of administrative and teaching assistance for the clinics that they run). Students, who invest enormous amounts of time and energy in TradeLab projects, are compensated with student credits and, most importantly, a learning experience they will never forget. TradeLab alumni, in many cases, continue to contribute pro bono even after graduation. A group of them recently translated the TradeLab website and key TradeLab documents into French and Spanish, a key condition to reach stakeholders in the non-English speaking world.

Current funding of "TradeLab central" is limited to: (i) a paid position of TradeLab Coordinator (presently, Sarah Mathew), who facilitates the network and provides institutional, administrative and legal/substantive support, including outreach to beneficiaries and TradeLab alumni; and (ii) the expenses linked to running the TradeLab website. The TradeLab Coordinator is also TradeLab's ex officio Secretary, and member of the Executive Committee. No office holders other than the Secretary/TradeLab Coordinator receive compensation.

[3] The law of association is governed by Articles 60-79 of the Swiss Civil Code.

[4] See Joost Pauwelyn and Mattia Salamanca Orrego, 'The International Economic Law Clinic at the Graduate Institute in Geneva' in Alberto Alemanno and Lamin Khadar (eds), *Reinventing Legal Education, How Clinical Education Is Reforming the Teaching and Practice of Law in Europe* (CUP 2018) 292.

[5] NPRP grant #[NPRP 7-1815-5-272], Qatar National Research Fund (a member of Qatar Foundation).

3. Why Capacity? And Why Now More Than Ever?

Capacity is key to empowering countries, and their populations, to influence and benefit from the institutions and rules that govern our global economy. The number, diversity and complexity of these institutions and rules is mind-boggling[6]: UN agencies, the IMF, World Bank, WTO and OECD; bilateral and multilateral treaties governing cross-border trade, investment and tax; public and private or CSO-led codes, standards and labels addressing anything from fairly traded bananas and best practices for the extractive industry to guiding principles for sovereign wealth funds or business and human rights.[7]

Capacity deficits affect, in particular, smaller, developing countries but also CSOs and SMEs in both developing and developed nations. For smaller countries and less resourceful stakeholders, it is a struggle to keep up, or even to be aware of what is happening and how it is affecting their interests, livelihoods and welfare. The inability to steer, influence or take advantage of, for example, a multilateral trade negotiation may badly damage a developing country. But it also affects their rich country counterpart: if the less resourceful, developing country lacks the capacity to implement the trade deal, that deal may not be worth more than the paper it was printed on.

The need to build capacity is not new, but it is more urgent than ever. In a multi-polar world, where emerging nations are integrating the world economy, the voice of developing countries matters. They are engaged in reforming the system of investment protection and investor-state dispute settlement. In a post-Doha WTO, "new issues" and reforms are on the table and might move fast toward some form of rulemaking. Bilateralism is on the rise – such as the shift away from multilaterialism in the case of Brexit and the US– and highlights the need to stand on one's own feet. In this context, developing countries and weaker stakeholders must be informed and aware of developments, able to formulate and defend their interests and capable of implementing agreed-to reforms. A globalization based on rules written by and for a small "elite group" of countries and people has shown its limits and spurred a backlash, most recently also in advanced economies. Globalization will need to be inclusive for it to survive and offer opportunities for everyone. That is the challenge that led to the founding and rapid growth of the TradeLab network of legal clinics.

4. Capacity to Do What? Finding a Pro Bono Lawyer Is Not the Problem

Capacity can be narrowly defined as, for example, Bohanes and Vidal-Leon do in this book: "the technical expertise in WTO law – especially the case law of WTO dispute settlement bodies – to solve a given problem in the light of WTO law". This is the capacity gap that the Advisory Center on WTO Law (ACWL), founded in 2001 by a group of countries, was set up to fill: providing a "pro bono lawyer" to developing country governments filing or defending a case in WTO litigation or answering a specific legal question under WTO law. This is a crucial task, and the ACWL has met this challenge with great success. Yet, it is just one (small) piece of the capacity puzzle.

[6] To get a sense of this complexity, just in the field of cross-border investment, see Joost Pauwelyn, 'Dealing with the Increasing Complexity of Investment-Related Treaties: A Framework and Some Policy Guidelines' (2012) 3 Investment Treaty News 5 <http://www.iisd.org/pdf/2012/iisd_itn_october_2012_en.pdf> accessed 2 January 2019.

[7] On the rise of informal international law and the challenges it poses especially for weaker stakeholders, see Joost Pauwelyn, Ramses Wessel and Jan Wouters, 'When Structures Become Shackles: Stagnation and Dynamics in International Lawmaking' (2014) 25 European Journal of International Law 733.

4.1 Beyond the WTO

Firstly, WTO law is but one part of the regime of complex rules and institutions regulating the global economy. It is increasingly difficult to analyse or build a strategy based exclusively on WTO rules in isolation from other trade rules (especially, preferential trade agreements) or rules on investment, tax, finance or sustainable development. The forerunner of TradeLab, the Trade Law Clinic at the Graduate Institute, was originally focused on the WTO. Today, TradeLab's International Economic Law Clinics are inclusive of potentially all rules governing the global economy.

4.2 Beyond Litigation and Law

Secondly, litigation is only part of the picture: stakeholders also need help in the preparation and negotiation of agreements as well as matters of implementation and compliance. Moreover, in all of these efforts, law and legal principles are just one part of the analysis. In addition, economic research, policy analysis and translation support, to name just a few, are often required. Working with teams of students grounded in different disciplines, alongside a variety of experts and mentors, TradeLab clinics have been able to offer broad-based support of exactly this kind.

4.3 Beyond Trade Officials

Thirdly, trade ministries are not the only stakeholders that lack capacity. Building effective capacity for global economic engagement requires efforts and coordination across ministries, ranging from justice and finance to agriculture and health. In many instances, TradeLab projects have been successful if only because they triggered an inter-agency dialogue. Crucially, capacity needs to be built also beyond the public sector. As the case studies in this book highlight, successful engagement of China and India in the WTO was premised on involving and supporting the private sector and universities, not just government officials. Unlike the ACWL, TradeLab undertakes projects not only for governments but also for CSOs, trade associations, small law firms and SMEs. And at the core of the TradeLab network are universities and students, empowered through a global network of experts

4.4 Capacity as a Demand-Side Challenge: The Need to Be Proactive

Finally, and probably most importantly, lack of capacity is less a supply-side problem than a demand-side challenge. On the supply side, besides the ACWL, plenty of law firms, consultants and development agencies stand ready to answer developing country legal questions, most often pro bono. Yet, that assumes that the developing country, CSO, or SME knows what the problem or question is and has the internal capacity (and time) to trigger a detailed request. In many cases, what is lacking is awareness about the existence of rules and institutions in the first place; how they affect the country or organization; and how the country or organization could benefit from relying on, invoking or implementing the rules in question. This means that capacity providers cannot simply open shop and wait for calls for help (a limit the ACWL is bound by). In an earlier version, TradeLab was set up as a website where anyone could ask a question, and answers would be provided for free. Yet, very few questions were posted. Demand, rather than supply, turned out to be the bottleneck. Having learned from this experience, whilst the online portal allowing anyone to ask a question remains in place, TradeLab clinics today proactively approach, engage with and coach beneficiaries. Exploratory discussions are held to identify and define specific interests and needs. Projects are carefully framed and designed to help beneficiaries and public interest goals while also maximizing student ownership and learning. Critics may call this "ambulance chasing"; TradeLab experiences this pro-active approach as absolutely necessary for an effective cooperation and learning process.

4.5 The Risk of Being "Under-Staffed" but "Over-Lawyered"

In the end, narrowing down a problem to litigation that is then farmed out wholesale to a foreign lawyer or law firm may do more harm than good. In the case of WTO dispute settlement, for example, it has made the system increasingly technical and detailed, with long delays. This may benefit the lawyers, as increased complexity further increases the need to hire outside counsel. But removing "the file" too far away from trade negotiators, government officials and their stakeholders on the ground reduces in-country ownership and makes learning and interaction, such as empowering local law firms, more difficult. This, in turn, reduces the chances of finding a mutually agreed solution to the problem ("talk to my lawyer"; parties litigate to "win") and may hamper effective compliance or implementation in the event of an adverse ruling. The formal settlement rate in WTO dispute settlement, for example, is down from over 50% in the first ten years of operation to only 25% in the last ten years, and in recent years it is close to zero. Compliance proceedings are now required in close to one out of four disputes; in more and more cases, two rounds of compliance proceedings are triggered.[8] Rules-based dispute settlement no doubt benefits the weaker players, in particular developing countries. But over-legalization is a risk. A country can be "under-staffed" but "over-lawyered".

5. The TradeLab "Model"

The TradeLab model has developed in iterative fashion, learning from experience. It started as a seminar with practical projects for "real beneficiaries" at the Graduate Institute in Geneva in 2009. Four years later, in 2013, the Association TradeLab was formally set up. Today, in 2018, the TradeLab working method is implemented in 13 different universities and training centres across the globe. Flexibility is built-in, to adapt to local needs, constraints and expertise. The TradeLab model also keeps evolving to adjust to learning and new developments. Figure 5.1 shows the TradeLab logo.

Figure 5.1: The TradeLab Logo

At the heart of the TradeLab approach are three pools of people, networked together: (i) students; (ii) experts, both academics supervising student teams, and other professionals such as practicing lawyers or officials working with international organizations who mentor students; and (iii) beneficiaries, mainly developing countries, CSOs and SMEs. The three connecting wheels part of the TradeLab logo (Figure 5.2 below) illustrate the elements of the network's composition.

[8] See Joost Pauwelyn and Weiwei Zhang, 'Busier than Ever? A Data-Driven Assessment and Forecast of WTO Caseload' (2018) 21 Journal of International Economic Law 461.

Figure 5.2: Elements of the TradeLab Network

Beneficiaries anywhere in the world can submit projects directly to one of TradeLab's legal clinics, in many cases, via personal connections with one of the clinic's academic supervisors.

Alternatively, projects can also be submitted to "TradeLab central", that is, via TradeLab's online platform (at http://www.tradelab.org) or directly to the TradeLab Coordinator. In the latter case, the TradeLab Coordinator, in consultation with the TradeLab President, allocates the project to the legal clinic best suited and available. Figure 5.3 below shows the flows of information between the various elements of the network.

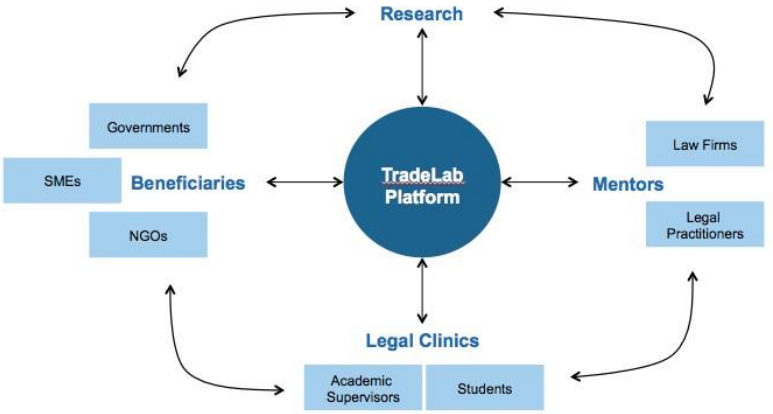

Figure 5.3: The TradeLab Network

TradeLab clinics conduct projects in full independence. TradeLab has strict conflict of interest rules, with firewalls between clinics. Each beneficiary signs a disclaimer form, stressing that projects "are conducted on a pro bono basis by students for research purposes only" and that projects "are pedagogical exercises to train students", they "do not in any way constitute legal advice and do not, in any manner, create an attorney-client relationship". Many projects are conducted on a confidential basis, whenever the beneficiary so requests. TradeLab has an elaborate confidentiality protocol. However, even where projects are confidential, a non-confidential summary or version is agreed upon with the beneficiary for public release on the TradeLab website so that the general public can benefit from the work.

Projects usually fall into one of four categories, as illustrated in Figure 5.4 below.

Figure 5.4: Main Types of TradeLab Projects

Not counting the recently initiated TradeLab pilots in Australia, China, Israel and Singapore (see Table 5.1 below), the nine TradeLab clinics operational today (in Canada, India, Spain, Switzerland, Tanzania, Qatar and the US) have already completed 109 different projects, for almost as many different beneficiaries. Given that only the clinic at the Graduate Institute in Geneva, initiated in 2009, started work before 2014, this is a tremendous rate of projects. TradeLab has thereby trained a total of 340 students. Specific examples of (non-confidential) projects completed to date can be found here https://www.tradelab.org/projects. Most projects so far have been conducted in English; some were done in French or Spanish.

Once assigned to a specific university or training centre running a TradeLab clinic, the academic supervisor(s) of the clinic select a team of students (normally 3 students). In some cases, students from different universities are assigned to one project. Georgetown Law has, in particular, worked together with Jindal Global Law School in India and the Trade Policy Training Centre in Africa (TRAPCA) in Tanzania. A legal clinic normally runs throughout a semester and is composed of several student teams, conducting several projects. The clinic convenes on a weekly basis to collectively prepare, discuss and present projects. Project teams also have individual meetings. The clinic is supervised by experienced professors and, in most cases, one or more teaching assistants. Several interactions with the beneficiary take place and the actual work product (often a memorandum) goes through a long series of drafts and comments (see Figure 5.5 below).

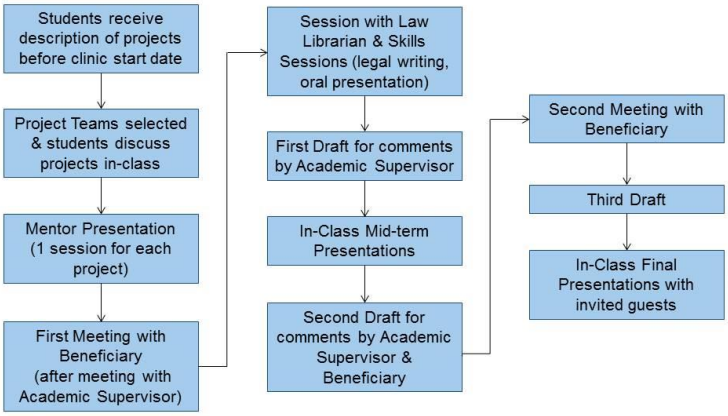

Figure 5.5: Typical TradeLab Clinic Flowchart

Throughout, student teams are assisted not only by their professor(s) but also by experienced professionals, working in the private sector or for international organizations. This often happens remotely. These professionals, referred to as "mentors", normally give an introductory presentation on the topic addressed in the project and also make themselves available for follow-up questions and to comment on early drafts. TradeLab central now has a pool of close to 200 mentors who have agreed to give some of their time for free, helping out students.[9] Any non-confidential output, often in the form of reports, memos, handbooks, draft legislation or text, or strategic plans, is posted on the TradeLab website so that everyone can benefit from the results. This output can, in turn, lead to new questions or requests for help by the same or new beneficiaries. Figure 5.6 below depicts the TradeLab process.

[9] For a selection of mentors who have worked with TradeLab, see <https://www.tradelab.org/mentors> accessed 8 January 2019.

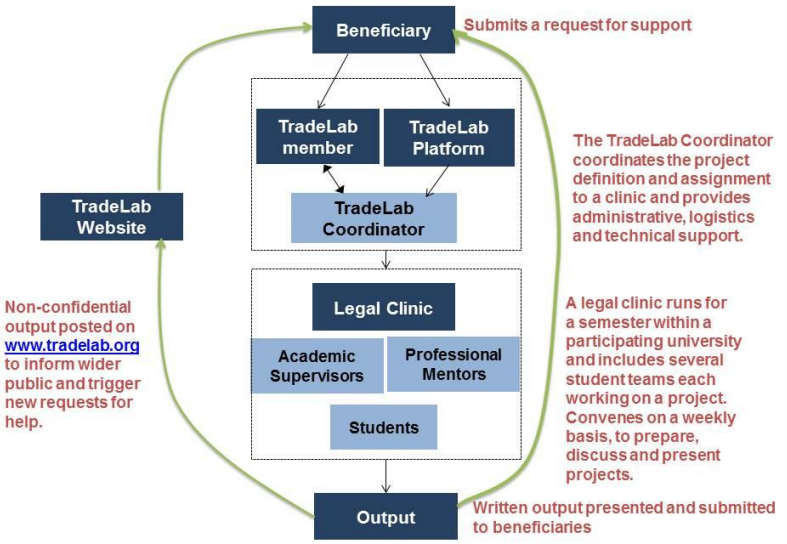

Figure 5.6: The TradeLab Process: From Question to Output

6. The Challenge of "Scoping" and "Scaling" TradeLab

TradeLab is a work in progress, continuously adapting. In terms of scope, it has expanded in membership and geographical coverage as well as the substantive topics it is able to address and the languages it can operate in. To really make a difference, TradeLab also needs to scale up, both in the number of students it trains and in the number and types of beneficiaries it assists. To do so, TradeLab is growing, seeking synergies with other capacity providers and broadening its impact through regional and professional clusters or hubs.

6.1 TradeLab Member Universities and Training Centers

Born at the Graduate Institute in Geneva, the TradeLab network currently includes nine member clinics or practica.[10] Another four clinics are going through pilot runs with the view of fully acceding to the TradeLab network. Many other universities have expressed an interest in joining. New members must first go through a pilot clinic. Full membership is subject to an assessment by TradeLab's Executive Committee and a majority vote by TradeLab's General Assembly. TradeLab's admission guidelines also provide that "TradeLab does not wish for its clinics to be in close proximity to each other within a country or region except in exceptional circumstances".[11] This means that normally within a given country only one TradeLab clinic should operate. The University of Ottawa and Queen's University, for example, both in Canada, conduct a joint TradeLab clinic. Today, TradeLab clinics are able to operate in three languages: English, Spanish and French.

[10] At Georgetown Law, the term "practicum", not clinic, is used, for institutional reasons. When this chapter refers to "clinic" it is meant to include the TradeLab practicum at Georgetown Law.

[11] The exception is Georgetown University, in the US, where two clinics are run: one at the law school, another (smaller one) at the School of Foreign Service, for undergraduate students, working mainly with the US Trade Representative.

Table 5.1: Status of TradeLab Clinics & Selected Pilot Runs with Start Date and Selected Academic Supervisors, as of September 2018

TRADELAB MEMBER CLINICS	TRADELAB PILOT CLINICS (Selected)
1. Graduate Institute, Geneva, Switzerland (2009) Edward Kwakwa, Anne Saab, Joost Pauwelyn, Fuad Zarbiyev	**1. National University of Singapore, Singapore (2018)** Ayelet Berman, Jansen Calamita
2. Georgetown Law, USA (2014) Jennifer Hillman, Katrin Kuhlmann, Joost Pauwelyn	**2. Monash University, Australia (2018)** Caroline Henckels
3. University of Ottawa, Canada (2014) Wolfgang Alschner, Debra Steger, Anthony Vanduzer	**3. University of International Business and Economics, Beijing, China (2018)** Hongliu Gong, Matthew Kennedy, Weiwei Zhang
4. Trade Policy Training Centre in Africa (trapca), Tanzania (2015) Tsotetsi Makong, James Thokozani Ngwira	
5. IELPO[12], University of Barcelona, Spain (2015) Altagracia Cuevas, Xavier Fernandes Pons, Sergio Puig	
6. Georgetown School of Foreign Service, USA (2016) Marc Busch	
7. Jindal Global Law School, India (2016) Pallavi Kishore, James Nedumpara	
8. Qatar University, Qatar (2016) Talal Abdulla Al-Emadi, Francis Botchway, Rafael Dean Brown	
9. Queen's University, Canada (2017) Valerie Hughes, Nicolas Lamp	

As of September 2018, TradeLab clinics have completed a total of 109 projects, training 340 students. In the 2013-2014 academic year, TradeLab completed five projects, all in Geneva. Four years later, in the 2017-2018 academic year, this number increased to 25, across nine clinics. With six new pilot clinics recently launched, as of 2018-2019, TradeLab expects to complete over 30 projects per year, across five continents, training close to 100 students on an annual basis. Note that even though a TradeLab clinic may be based in a developed country university (in, say, Canada, the US or Switzerland), participating students may be from all over the world. Figure 5.7 below gives a sense of the diversity of TradeLab students that have been trained to date (excluding pilot clinics launched recently), using their nationality as proxy.

[12] The LLM in International Economic Law and Policy (IELPO) Progamme at the University of Barcelona has been suspended for the 2018-2019 academic year. The hope is, however, that the programme (and with it, the IELPO TradeLab clinic) will transfer to a new university, in or outside of Spain.

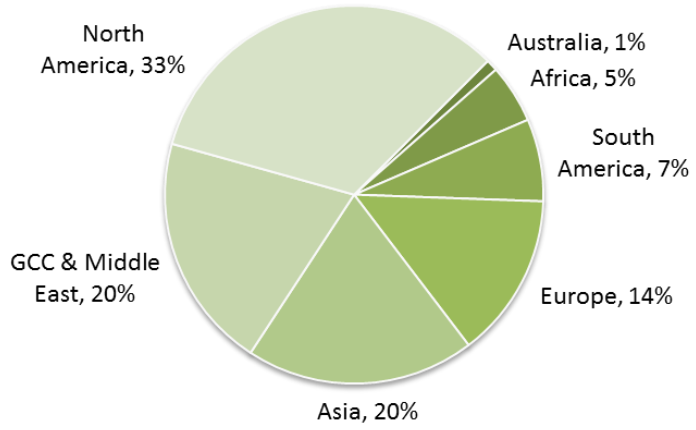

Figure 5.7: Nationality of Students Trained in TradeLab Clinics, as of September 2018

6.2 Substantive Topics Covered

TradeLab originally focused on WTO rules and negotiations. It quickly expanded to include also other international trade rules, such as questions under preferential trade agreements (PTAs) as well as questions under investment treaties and investor-state dispute settlement. Examples of questions related to PTAs include Brexit and how it may affect Tanzania; or negotiations of a Continental Free Trade Area (CFTA) in Africa. Examples of investment related questions include: should Mexico join ICSID?; how should Ecuador reform its BITs?; and does an SME have a solid case to file under the European Energy Charter Treaty?. Subsequently, projects have been conducted, for governments, CSOs and SMEs alike, on a wide range of topics, covering a variety of rules and regulations governing the global economy, including trade and climate change; market access; e-commerce; corruption; and economic sanctions. Of the projects completed by September 2018, 70% fall in the field of "cross-border trade" (broadly defined), 20% relate to "cross-border investment", whilst 10% address "other" issues affecting the global economy. As described earlier, TradeLab projects have also demanded expertise outside of law, such as accounting, business or economics. Such skills are needed when designing a retaliation scheme for a developing country following a WTO dispute or setting up a strategy for Lebanon to better integrate its SMEs in e-commerce and digital trade).

6.3 Broadening and Deepening the Pool of TradeLab Beneficiaries

TradeLab gives broad flexibility to member clinics when it comes to selecting beneficiaries. As Figure 5.8 below illustrates, most beneficiaries are governments, inter-governmental organizations, CSOs or SMEs/Cooperative/Business Associations.

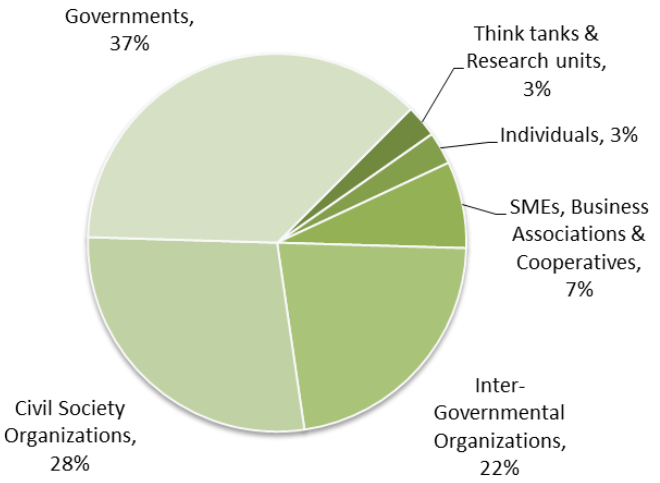

Figure 5.8: TradeLab Beneficiaries by Type, as of September 2018

When it comes to governments, TradeLab clinics have assisted not only developing countries but also developed country officials or agencies, especially when these are based in the clinic's host country (see Figure 5.9 below). The joint Ottawa/Queen's TradeLab clinic, for example, has repeatedly done work for Canada's Trade Law Bureau; the TradeLab clinic at Georgetown's School of Foreign Service has conducted projects for the US Trade Representative. Doing projects for local officials embeds the clinic in domestic expert networks; helps government agencies who, even in developed countries, may be under-staffed; and provides crucial, localized learning and employment opportunities for TradeLab students.[13] Nonetheless, TradeLab's core mission remains to help those stakeholders who otherwise would not have access to global economic law or policy expertise. More efforts are needed in this direction.

[13] Feedback from Canada's Trade Law Bureau, reflecting on its cooperation with TradeLab over the past years, puts it as follows: "… *our collaboration with TradeLab has a number of tangible advantages: It has encouraged greater interaction between legal and policy practitioners in the Canadian government and students, which I think has both been a positive learning experience for the students, and a positive outreach and learning opportunity for the government officials. Often in those interactions the officials have learned things we did not already know. More specifically, a number of projects have encouraged exploring ideas and legal concepts that we would not have been able to do in the Canadian government in the same depth*".

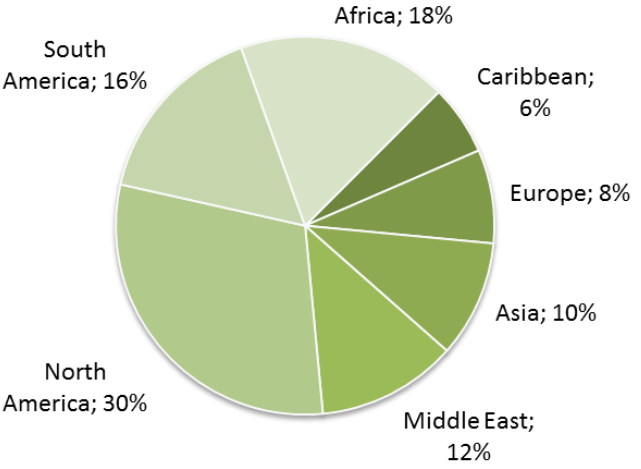

Figure 5.9: TradeLab Government Beneficiaries by Region, as of September 2018

To "broaden" its pool of beneficiaries, TradeLab has proactively sought, and engaged with, beneficiaries. The most needy beneficiaries are often not aware that a given rule or global institution affects them and even if they do, potential beneficiaries frequently do not have the time or capacity to assess a regime's impact or formulate concrete requests for help (this is the "demand-side bottleneck", referred to earlier). Examples include a diplomat from a small developing country tasked to cover all meetings and work of all Geneva-based organizations, or an under-staffed and under-funded CSO or SME fully occupied with day-to-day activities.

TradeLab has also sought to "deepen" its engagement with repeat beneficiaries. Some clinic projects lend themselves to follow-up work in another clinic within the TradeLab network. This can improve the service offered to beneficiaries (one student team can, for example, do the background research; another team, at a later date, may work on specific textual proposals). Projects that run across the TradeLab network also stimulate cross-clinic cooperation between experts and students and enable new thinking and crowdsourcing opportunities. Table 5.2 below provides a sample of past TradeLab beneficiaries.

Table 5.2: Examples of TradeLab Beneficiaries

Government-related	Argentina, Canada, Canton of Geneva, Colombia, Ecuador, Ethiopia, EU Commission, EU Parliament, Grenada, India, Mexico, Nigeria, Philippines, Qatar, Russian Federation, Senegal, South Sudan, Tanzania, US Trade Representative
Inter-Governmental Organizations	African Union, CARICOM, East African Community, IMF, ITC, OECD, Pacific Alliance, South Centre, UNCTAD, UNESCO, World Bank
Civil Society Organisations	Conservation International, IDEAS Centre, International Centre for Trade and Sustainable Development, International Institute for Sustainable Development (IISD), Lebanese Transparency Association, Oxfam, Third World Network

Source: TradeLab.org

6.4 Synergies with Other Capacity Providers and Working Through Clusters or Hubs

TradeLab's capacity building efforts do not take place in a vacuum. Experts from international organizations, law firms, CSOs and the ACWL have acted as mentors or channelled projects to TradeLab. In many cases, a TradeLab project has prepared a beneficiary for the next step, for example, to make it a better/more effective law firm or ACWL "client" in an actual litigation, or to better engage with capacity building programs at the WTO, IMF, World Bank or ITC. TradeLab has also used clusters or regional hubs to better reach beneficiaries and students: TRAPCA, a regional training centre for least-developed countries and low income countries in Sub-Saharan Africa (and full TradeLab member) has enabled TradeLab to reach both students and beneficiaries across that region; working with trade associations, regional economic communities (such as CARICOM or the East African Community) or local law firms, has further enabled TradeLab to reach beneficiaries which, individually, do not have the time or capacity to engage.

7. Measuring Success

A variety of benchmarks could be used to measure TradeLab's progress. One obvious factor is the total number of TradeLab clinics across the globe, and especially in the developing world. Linked to TradeLab's three core goals, other elements that can be tracked are:

xxvi. Helping beneficiaries: total number of projects, number of beneficiaries, number of beneficiaries from the developing world, number of CSO or SME beneficiaries, positive evaluation/feedback by beneficiaries, on the ground impact of project outcomes (e.g. actual market access obtained for an SME, draft legislation implemented in a specific country, successful conclusion of negotiation/litigation, beneficiary makes speech or declaration prepared by the clinic)

xxvii. Training students: number of students trained, student participants from developing countries, positive evaluation/feedback by students, number of communications between students on a clinic team on TradeLab's secure Mattermost platform, joint or follow-up projects where several clinics cooperate, career achievements by students thanks to the TradeLab experience (e.g. internship, journal publication, entry into Phd program, employment)

xxviii. Informing and creating awareness with the wider public: number of memoranda, non-confidential summaries, guides or handbooks that result from clinics and that are posted on the TradeLab website; number of hits or downloads of TradeLab documents; number of hits on the TradeLab website; number of questions posted and answered via the TradeLab platform. For example, Table 5.3 below lists the "top 5" most consulted memos or non-confidential summaries resulting from TradeLab clinics posted on the TradeLab website (as of September 10, 2018).

Table 5.3: Most Downloaded TradeLab Reports

Position	Report Short Title (with hyperlink)	TradeLab Clinic	Hits
1.	Dispute Settlement Mechanisms in Free Trade Agreements	Georgetown Law	1832
2.	Brexit and the EU-Canada Trade Agreement	University of Ottawa	1764
3.	An Analysis of Export Restriction Rules	Qatar University	1518
4.	Negotiations on Fisheries Subsidies	Graduate Institute	1309
5.	The US Response to Brexit	Georgetown Law	1282

Source: TradeLab.org

8. Looking Ahead

TradeLab is but one spoke in a much larger hub of novel and promising capacity building suppliers. For TradeLab to make a deep and lasting impact, a lot of work remains to be done. Below are TradeLab's key objectives for the future:

i. Expand the number, activities and output of TradeLab clinics especially in the developing world (e.g. Africa, the Caribbean and Latin America) thereby training more students from developing countries;

ii. Reach out to and help a broader range of beneficiaries especially in developing countries and, particularly so, in least developed countries (government officials, indigenous peoples, SMEs and CSOs) beyond "the usual suspects" (e.g. those based in Geneva or Washington, DC); SMEs or CSOs in developed countries are also key given the backlash against globalization in rich nations;

iii. Identify private sector entities to work for, especially SMEs in developing countries, to deliver actual market access or practical solutions for their cross-border challenges;

iv. Design truly practical and meaningful projects "doable" for students but that make tangible and usable contributions empowering beneficiaries to take the next step; in some cases this will require output different from an end-of-term memo and deeper engagement with the beneficiary e.g. through ad hoc practical assistance throughout the semester, a strategic plan, letter, draft agreement or speech;

v. Establish repeat or long-term relationships with a select number of beneficiaries, resulting in a consistent flow of high quality projects, including with beneficiaries or "feeder organizations" that can act as a hub leading to the most neglected stakeholders who do not have themselves the time or capacity to engage (using e.g. the ITC, World Bank, UN Permanent Forum on Indigenous Issues, large CSOs, trade associations or the pro bono programs of big law firms to reach smaller beneficiaries);

vi. Stimulate cross-clinic cooperation, through joint projects or carry-over projects, especially with clinics based in the developing world;

vii. Provide for clinics or work outputs in several languages, beyond English;

viii. Diversify the types of projects beyond trade and the WTO or investment treaties to analyse also other important aspect of global economic regulation; this will often include aspects of domestic law;

ix. Write user-friendly handbooks or guides based on clinic work that are accessible to everyone (e.g. a handbook on how resource-poor countries can set up and run an anti-dumping agency, or providing basic pointers for non-lawyers on how to negotiate and draft a treaty or contract);

x. Besides the annual TradeLab General Assembly meeting and 2-3 Executive Committee meetings per year, organize an annual brainstorming session with TradeLab academic supervisors, mentors and representative of the public and private sector to identify promising and important forward-looking topics and challenges to work on, which can then be used proactively to share with potential beneficiaries in order to shape practical, cutting-edge projects.

Extra energy and funding are needed to achieve these goals. Additional funding for TradeLab clinics at universities in developing countries, which do not have the resources of universities in Europe or the United States, will be indispensable. Above all, however, TradeLab is a network of *people*: students, academics and experts working together with individuals from the beneficiary. TradeLab's main capital is its social and knowledge capital and reputation, carefully established over the years. To implement, perfect, and further scale the TradeLab model of capacity building, expansion in terms of both the beneficiaries reached and the universities participating will be required. This will need to happen gradually and carefully so as to protect the TradeLab brand and reputation. Quality professors, students, and experts are vital. At the same time, TradeLab's key mission is to move beyond the traditional centres of power and expertise, to reach students, aspiring experts and neglected stakeholders in the developing world.

Chapter 6. Establishing an International Advisory Centre on Investment Disputes*

Anna Joubin-Bret

1. Introduction

The idea to establish an international centre to provide advice and defence services for states in international investment disputes is not new. It has been proposed and discussed by several Latin American states following the example of the successful Advisory Centre on WTO Law (ACWL) established to provide advice and defence services to states in World Trade Organization (WTO) disputes. It is gaining traction and global relevance with the increase of investment disputes under international investment treaties in all regions. The traditional divide between capital exporting and capital importing countries has lost relevance in the context of investor-state disputes. Investor-state arbitration is truly global and affects virtually all countries across all regions. Together with the exponential increase in costs of arbitration and the concern for the systemic legitimacy of investor-state arbitration, the establishment of an International Advisory Centre for Investment Disputes (I-CID) is timely.

After the first disputes that involved the members of the North American Free Trade Agreement (NAFTA) — Canada,[1] Mexico [2] and the United States[3] (US) — Latin America was the next region to be hit by a wave of international investment disputes based on international treaties involving countries such as Chile, [4] Peru, [5] Venezuela, [6] Ecuador, [7] and Bolivia. [8] The

* This chapter was originally published as a Think Piece, 'Establishing an International Advisory Centre on Investment Disputes?' E15Initiative. Geneva: International Centre for Trade and Sustainable Development and World Economic Forum, 2015. .

[1] There are 27 known investment treaty claims against Canada. See United Nations Conference on Trade and Development (hereafter UNCTAD), 'Investment Dispute Settlement Navigator' <https://investmentpolicyhub.unctad.org/ISDS/CountryCases/35?partyRole=2> accessed 31 December 2018.

[2]There are 28 known investment cases against Mexico. See UNCTAD 'Investment Dispute Settlement Navigator' <https://investmentpolicyhub.unctad.org/ISDS/CountryCases/136?partyRole=2> accessed 31 December 2018.

[3]There are 16 known cases against the US. See UNCTAD, 'Investment Dispute Settlement Navigator' <https://investmentpolicyhub.unctad.org/ISDS/CountryCases/223?partyRole=2> accessed 31 December 2018.

[4] There are 5 known investment treaty claims against Chile. See UNCTAD, 'Investment Dispute Settlement Navigator' <https://investmentpolicyhub.unctad.org/ISDS/CountryCases/41?partyRole=2> accessed 31 December 2018.

[5] There are 15 known investment treaty claims against Peru. See UNCTAD, 'Investment Dispute Settlement Navigator' <https://investmentpolicyhub.unctad.org/ISDS/CountryCases/165?partyRole=2> accessed 31 December 2018.

[6] There are 45 known investment treaty claims against Venezuela. See UNCTAD, 'Investment Dispute Settlement Navigator' <https://investmentpolicyhub.unctad.org/ISDS/CountryCases/228?partyRole=2> accessed 31 December 2018.

[7] There are 23 known investment treaty claims against Ecuador. See UNCTAD, 'Investment Dispute Settlement Navigator' <https://investmentpolicyhub.unctad.org/ISDS/CountryCases/61?partyRole=2> accessed 31 December 2018.

[8] There are 14 known investment treaty claims against Bolivia. See UNCTAD, 'Investment Dispute Settlement Navigator' <https://investmentpolicyhub.unctad.org/ISDS/CountryCases/24?partyRole=2> accessed 31 December 2018.

explosion of cases against Argentina in the wake of its economic crisis, (with 43 cases pending in 2005) gave rise to strong reactions in the region. Three countries withdrew from the International Centre for Settlement of Investment Disputes (ICSID) Convention, while others terminated investment treaties and sought to establish alternative instruments and institutions to deal with investment disputes. This first wave of cases between 2000 and 2010 highlighted concerns about the ability of countries to deal with disputes and the urgent need to share expertise and experience, while continuing to attract and retain foreign investment in their economies. As a result, several initiatives for an advisory centre have been discussed in the regional context. They will be reviewed in this paper.

Within the following decade, other regions, like Southeast Asia and the Arab region have had their share of investor- state disputes; but, the most important trend has been the cases against some western European countries, such as Spain, Italy, and the Czech Republic[9] or three cases against Germany. Changes in energy policies have triggered most of these cases. Some have been highly publicised and together with the ongoing negotiations of mega-regional investment treaties, have triggered a strong public opinion campaign against investor-state dispute settlement (ISDS), challenging the legitimacy of the system itself.

While ISDS is experiencing an existential crisis that is rattling its foundations, the WTO Dispute Settlement Understanding (DSU), has reached a cruising altitude and seems to be addressing the objective to allow all member countries, whether developing or developed, to make use of the DSU on a level playing field.

Among the many avenues for reform reshaping ISDS, a concrete and effective measure could be the establishment of an advisory and defence centre for states involved in investor-state disputes, along the lines of the ACWL that responds to the specificities of ISDS.

The time has come to take stock of early proposals to identify challenges for respondent states defending ISDS cases; (Section 2); to examine lessons from the successful implementation of the ACWL assisting and defending states in the WTO context (Section 4); and to identify specific questions and proposals related to an an I-CID (Section 4) before offering general conclusions concerning a way forward (Section 5).

2. Early Proposals — Challenges for Respondent States

This section will review the challenges arising from ISDS cases for respondent states. Some of these challenges are the same for all countries and are recurrent. Some new developments in investment arbitration create new challenges that will require new responses.

2.1 Revisiting Traditional Challenges

Investment disputes continue to rise at a steady pace. An annual review of development in ISDS by the United Nations Conference on Trade and Development (UNCTAD) shows that there is an increase of about 40 investment treaty cases every year, with the total reaching 608 by the end of 2014. It should be noted that the number of cases compiled by UNCTAD does not reflect all disputes between foreign investors and states. With the increase of transparency in several arbitration institutions and treaties, the number of treaty-based cases is easier to access. However, a host of cases brought under investment contracts or before the International

[9] According to UNCTAD, International Investment Agreements Issues, 'Investor-State Dispute Settlement: Review of Developments in 2014' (Issue No 2, May 2015) <https://unctad.org/en/PublicationsLibrary/webdiaepcb2015d2_en.pdf> accessed 2 January 2019, 40 percent of new cases were initiated against developed countries in 2014 (the historical average is 28 percent) with a quarter of all new disputes being intra-EU cases.

Chamber of Commerce (ICC) or regional arbitration institutions are not publicly known, and it is fair to say that the total number can easily be doubled.

By definition, states are the respondents in treaty disputes, since investment treaties provide protection for investors only and impose obligations on states alone. Thus far, investment treaties do not provide for the possibility to raise counter- claims. Moreover, investment treaty disputes are not the appropriate avenue for states to bring claims against investors. Peru[10] has recently launched an ICSID arbitration under a contract to claim compensation from a foreign company. Proposals have been made to broaden investment treaty arbitration and to allow counter-claims by states. [11] But, this in turn will broaden the need for advisory and defence services to bring all states up to speed with new opportunities.

Costs of investment arbitration have skyrocketed. Apart from a few record cases, such as the Yukos cases against Russia where the legal fees for the claimant alone are US$ 70 million or the Chevron saga that has been going on for over a decade, the average costs for an ISDS case are about US$ 10 million.[12] There is a clear relationship between the costs and the duration of investment cases. The average duration is three to five years for an investment treaty case, not taking into account annulment or review. Compared with cases brought to the WTO DSU, however, investment treaty cases are within a range of 5 to 10 times more expensive than trade disputes.

States have traditionally adopted three different approaches to the defence of their interests in ISDS cases. Some countries have decided from the outset to defend themselves with a dedicated in-house team. Other countries have used a combination of an in-house team working in various degrees of cooperation with outside counsel. The vast majority of states have outsourced their defence to outside counsel. Argentina, Canada, Spain, and the US are the four examples of countries that defended ISDS cases in-house. These countries have done it from their first case on. Among the top-10 defenders in ISDS cases, Venezuela, the Czech Republic, Egypt, Ecuador, India, Ukraine, and Poland rely completely on outside counsel.

Mexico, for example, has taken a mixed-approach. In other countries with a large number of cases, for example Ecuador or Slovakia, in-house teams have been strengthened to manage the cases, but defence of the cases always involves representation by outside counsel. Several states are beginning to organise their prevention and defence policies to ensure they can identify problems with investors at an early stage, but also manage the defence of the case in an appropriate manner.[13] It is fair to say, however, that the first investment arbitrations have always taken states unprepared and the response has been organised on an ad hoc basis.

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[10] *Republic of Peru v Caravelí Cotaruse Transmisora de Energía SAC*, ICSID Case No ARB/13/24.

[11] Proposal by Emmanuel Gaillard, 'Improving Investment Treaty Arbitration: Two Proposals' in Jan Paulson, Emmanuel Gaillard and David W Rivkin (eds), *Current Issues and Future Challenges in Investment Arbitration* (International Bar Association 2015); José Antonio Rivas, 'ICSID Treaty Counterclaims: Case Law and Treaty Evolution' in Jean E Kalicki and Anna Joubin-Bret (eds), *Reshaping the Investor-State Dispute Settlement System: Journeys for the 21st Century* (Brill Nijhoff 2015).

[12] The average party costs for claimants and respondents are in the region of US$4.4 million and US $4.5 million respectively. To this can be added average tribunal costs of about US $750.000. The average "all in" costs of an investment treaty arbitration are therefore just short of US$10 million. The median figure is notably lower, but still substantial, at around US$6 million. See Matthew Hodgson, 'Costs in Investment Treaty Arbitration: The Case for Reform' in Jean E Kalicki and Anna Joubin-Bret (eds), *Reshaping the Investor-State Dispute Settlement System: Journeys for the 21st Century* (Brill Nijhoff 2015).

[13] For an extensive discussion, see UNCTAD, *Best Practices in Investment for Development: How to Prevent and Manage Investor-State Disputes - Lessons from Peru* (United Nations 2011) (hereafter UNCTAD, *Lessons from Peru*) <https://unctad.org/en/Docs/webdiaepcb2011d9_en.pdf > accessed 2 January 2019 ; World Bank Group, 'Investor-State Conflict Management: A Preliminary Sketch' (2015) E15Initiative Geneva, International Centre for Trade and Sustainable Development (ICTSD) and World Economic Forum <http://e15initiative.org/wp-content/uploads/2015/09/E15-Investment-World-Bank-Final.pdf> accessed 2 January 2019.

A systematic review of the 50 respondents with more than three cases shows that a minority of countries have dedicated in-house teams, even with a task limited to managing the cases and interacting with outside counsel. Few countries have an identified, dedicated, and structured lead agency or management team. More often than not, the cases are dealt with on an ad hoc basis with various ministries or agencies taking the lead. While this approach is mostly driven by budgetary concerns and by the lack of institutional infrastructure, it ignores efficiency and quality of the defence and creates consistency issues in the long run. Also, it is not viable to set up a dedicated defence team when states are dealing with only one or two ongoing cases. The question of a threshold of cases when making a cost-benefit assessment of an in-house defence team is certainly relevant, but it should not be the only consideration. Cases can be complex and have consequences other than strictly financial ramifications that need to be carefully monitored and dealt with.

Availability of skilled in-house lawyers is not evenly distributed among respondent countries, and capacity has not grown with the increase of disputes. One of the main issues facing a government is the rapid turnover of officials and the constant need to train and bring new officials up to speed on disputes, while losing institutional memory.

Investment disputes are more complex and involve many different areas of domestic and international law. Early NAFTA cases have shown the trend of bringing disputes over trade measures under the investment chapter of NAFTA. Recent years have seen a proliferation of investment treaty disputes over not only contractual obligations but also environmental and public health measures (e.g. tobacco) or measures taken in response to financial crisis. With the growing role of European Union (EU) policy and regulation, it is to be expected that yet another level of international rules will be challenged in investment disputes and will further increase complexity and conflicting levels of regulation.

2.2 Today's New Challenges for Respondent States

Compared with 10 years ago, not much has changed, but everything has changed. Investments flows have become completely global, and countries continue to seek investment to boost their economies. Political risk has not disappeared with globalisation. It has only become stronger. Global investors have become stronger entities that match many countries in terms of financial and strategic power. At the same time, investment has become more footloose with an increased mobility for capital and investments. Competition for investment to position the economy in the global value chain is fierce. Investment treaties continue to be negotiated not only at the mega-regional but also at the bilateral level. And, investment treaty cases have grown exponentially.

In contrast to 10 years ago, a clear contagion from Latin America to other regions has taken place. In addition to the usual contractual disputes brought to international arbitration under ICSID, regions like Southeast Asia, the Arab Middle East or more recently Europe have become the target of investment treaty disputes. And, with this regional shift, international investment arbitration has become truly global. The players are becoming global with cases brought by developing country investors against developing countries, Chinese investors against European or Latin American[14] countries, and Arab investors against countries in the Middle East and North Africa (MENA). Law firms are becoming global with major investor-state arbitration teams, opening regional offices in Dubai, Hong Kong, or Singapore. Arbitration centres have also proliferated in all regions of the globe.[15] The World Bank continues to advocate international and domestic arbitration as a requirement in the *Doing*

[14] *Ping An Life Insurance Company, Limited and Ping An Insurance (Group) Company, Limited v The Government of Belgium*, ICSID Case No ARB/12/29; *Señor Tza Yap Shum v The Republic of Peru*, ICSID Case No ARB/07/6.

[15] The most recent regional centers being established by Mauritius and Vietnam.

Business rating.

Investor-state dispute settlement procedures have been enhanced and have become more transparent. With transparency, information about amicable settlement of disputes (a steady 30 percent of all cases) has become available and triggered the need for new alternative processes, such as mediation, for example with the adoption of a set of Rules for Investor-State Mediation by the International Bar Association (IBA) that are finding their way into investment treaties and broader free-trade agreements (FTAs). Dispute prevention policies are also being developed with best practices in Colombia, the Dominican Republic, and Peru, and interest is growing in many regions.

The increase of investor-state disputes has increased the polarisation and perceived entrenchment of potential arbitrators. However, the limited community of international arbitrators coming from the small community of international investment law, public international law, and commercial arbitration has not grown at the same pace as arbitration cases. The community is grappling now with repeat players and drastic limitations on availability to dedicate to cases. Countries experiencing multiple claims are running out of potential arbitrators to hear their cases, and an exchange of experience with other states is crucial for states that have otherwise limited exposure to investment disputes. The divide between investment arbitration and commercial arbitration is deepening with new rules and treaty provisions applying to investment arbitration and making it more difficult for parties to find competent, available, and independent arbitrators to hear their cases and deal with investment disputes.

In addition, traditional bilateral investment treaties are being replaced by investment and trade agreements with a broader scope, including investment chapters in broader trade- based agreements. While the investment disciplines remain by and large the same, at least as far as the international responsibility of states is concerned, the coexistence within the same agreement of different types of dispute settlement mechanisms renders their application difficult and calls for a clear subordination of chapters and rules related to precedence.

Three important developments, however, have direct consequences on the ability of states to effectively defend themselves in investment disputes and deal with an increasing number of investment arbitration cases: (a) the emergence of third-party funding in investment arbitration; (b) the shifting of arbitration costs from a shared-costs to a loser-pays model; and (c) the increased role of state parties to interpretation and application of their treaties. The global legitimacy crisis of the investment arbitration system further highlights the need for states to be equipped and to fully participate in the debate on the reshaping and reform agenda.

(a) Third-Party Funding in Investment Arbitration

Third-party funding in the context of investor-state disputes is a recent phenomenon, but it is clearly on the rise and gaining momentum. In a meeting of the International Council for Commercial Arbitration (ICCA)-Queen Mary Task force on Third-Party Funding, [16] a funder present at the meeting shared that for two-thirds of the cases registered by ICSID in 2014, claimants or claimants' counsels had inquired about third- party funding (if not sought funding) by this one company. To date, six international funds and one broker are active participants in the task force.

There is little doubt that the availability of third-party funding, in addition to other means of support for impecunious claimants or claimants preferring to finance their claims, will have an

[16] Meeting in Paris on 29 January 2015 of the ICCA - Queen Mary Task Force on Third Party Funding – Sub-group on Investment Arbitration.

impact on investment disputes and, therefore, also on the risks for states to be subject to investor-state cases, including poor states with a small track-record of claims. Globalisation of ISDS has reached its cruising altitude, and no state is immune from investment treaty cases in the short run. The development of third-party funding for claimants raises acutely the issue of potential financial support or assistance for respondent states and the possibility to provide defence services at a lower cost or on a contingency basis.

(b) Shifting of Costs

Another recent development in investment arbitration, alongside the skyrocketing of costs, is the trend to shift costs to the losing party[17] and to depart from the traditional rule in international arbitration that each party bears its costs. While this development could be seen as a positive way of restoring balance and barring frivolous claims, it also brings new risk for states in the defence and control over costs of investment arbitration and, of course, an increased responsibility for state actors in charge of investment arbitration cases.

(c) An Increased Role for States in ISDS Cases under a New Generation of Treaties also Comes with Additional Costs

The new generation of FTAs and particularly multi-party FTAs, also called mega-regional FTAs, include provisions allowing the member countries to intervene in dispute settlement procedures involving one of the members (non-disputing party submissions). They also favour technical committees to settle disputes related to specific measures, such as taxation or financial measures and generally involve the member states in the dispute settlement procedures related to the application and interpretation of the treaty. Such participation and involvement comes with a cost and requires human resources to ensure that each member country can participate actively and efficiently in the procedures as provided for in the treaty.

(d) The Need to Reshape and Reform ISDS and Adapt it to the Challenges of the 21st Century

The ISDS system as established in the 1960s is undergoing a legitimacy crisis that is gaining momentum globally with the recent development in the EU. While questioning of the ISDS system in the mid-2000s by Latin American countries was considered a regional phenomenon looked at with suspicion in other parts of the world, concerns and dissatisfaction have gained traction with the negotiation of mega-treaties involving the EU, the US, and other major treaty partners, and grown beyond the isolated cases of South Korea or South Africa. To date, however, there is no global forum to research, discuss, evaluate, and reshape investment arbitration or foster alternatives to the system. Proposed institutional reform, such as through an appellate mechanism or an investment court, codes of conduct for arbitrators, control of costs and timelines should not be discussed only in small circles, but also in a global debate, and a global platform is critically lacking. An advisory centre could play a role in enhancing the ability of states to participate in discussions about arbitration and treaties.

2.3 Lessons from Early Initiatives

The regional focus of ISDS cases in the early 2000s has given rise to regional initiatives by Latin American countries. With the globalisation of ISDS, a global approach is needed that can take stock and build on early projects.

[17] On the discussion of costs following the event, see Adam Raviv, 'Achieving a faster ICSID' in Jean E Kalicki and Anna Joubin-Bret (eds), *Reshaping the Investor-State Dispute Settlement System: Journeys for the 21st Century* (Brill Nijhoff 2015); Jeffrey Sullivan and David Ingle, 'Interim Costs Orders: The Tribunal's Tool to Encourage Procedural Economy' in Jean E Kalicki and Anna Joubin-Bret (eds), *Reshaping the Investor-State Dispute Settlement System: Journeys for the 21st Century* (Brill Nijhoff 2015).

(a) The UNCTAD-IADB-OAS Project

A country-driven initiative for Latin America launched with the support of UNCTAD, the Inter-American Development Bank (IADB) and the Organization of American States (OAS) was the most advanced project contemplating the establishment of an advisory centre. It involved Colombia, Costa Rica, Dominican Republic, El Salvador, Guatemala, Honduras, Panama, Mexico, Nicaragua, and Peru. Mexico formally joined the project at the last meeting, Uruguay participated in several meetings, including in the negotiations, as an observer, and Ecuador participated as an observer in the process. Chile indicated that it would not join the project formally and reserved its final decision depending on the outcome of the negotiations but pledged funds for its functioning. The US participated as an observer.

A request was made by Colombia, the Dominican Republic, and Central American countries to study the feasibility of an advisory centre to assist countries in handling and defending investor-state disputes. For this project, funded by the IADB through a Regional Public Good window, UNCTAD, the IADB, and member countries prepared a detailed set of consultation guidelines and a consultation report reviewing various services an advisory centre could provide, possible institutional options for such an initiative, and reflecting broadly the views of the international law community on this project.

On 15 April 2009, a steering committee meeting of interested countries took place to come up with a consolidated vision and develop terms of reference for an advisory centre. The following key elements were agreed:

- The intergovernmental nature of the centre, established by states, for states, and run by states.

- The model was to be the ACWL operating in Geneva and assisting developing countries in trade disputes.

- The goal was to establish financial sustainability and cost effectiveness for the initiative beyond the first three years of operation

- The need for the Centre to carry out two functions:

    - an advisory function to assist countries in negotiation of treaties, drafting of dispute settlement clauses, prevention of investment disputes, early settlement, mediation, capacity building and sharing of experience and best practice, keeping databases of cases and arbitrators, carrying out research, and proposing secondment and trainee positions;

    - a defence function to assist countries in the defence of ISDS cases, either through direct representation or as part of the defence team for the state. This issue, in turn, raised the problem of conflict of interest and the participation of home and host countries of investors, in the same mode as for the WTO ACWL.

The initiative resulted in a draft treaty as well as a consolidated budget that was submitted to the interested countries and discussed at the meeting of the steering group held in Bogota, at the invitation of the government of Colombia on 26 and 27 May 2009. Panama made a formal offer to host the Centre based on a study that did not conclude on the feasibility of locating the Centre in Washington, DC. Several countries pledged funds for the setting up of the Centre, in the range of US$200,000 each for the first year. The second week of February 2010 had been earmarked for the ministerial signature of the constitutive treaty establishing the Centre. It has, however, not been followed-up on after several government transitions and changes in the

teams involved in the steering committee discussions.

(b) The UNASUR Project

Among the objectives set by the Heads of States of the Union of South American Nations (UNASUR) in a plan of action issued in May 2008 was the establishment of an advisory centre on investment law and investor-state disputes for UNASUR member countries. The advisory centre was to be the third pillar of a complete overhaul of an ISDS system along with the creation of UNASUR investment arbitration rules and an UNASUR investment arbitration court. Upon the request of Bolivia (the coordinator of the UNASUR working group on ISDS at that time), UNCTAD had been invited to assist the working group and provide technical assistance and inputs, as far as technical options, budgetary issues, and institutional setting were concerned. Ecuador took the lead role after Bolivia and worked on a draft advisory centre treaty focusing on advisory and defence services. To date, the UNASUR advisory centre project has not made significant progress in establishing a centre.

(c) The Arco del Pacifico (ARCO)[18] Initiative

ARCO was set up as a political "counter fire" to UNASUR, but it has not been active since May 2009. The ARCO Ministerial Declaration of 10 October 2008 took note of an advisory centre project and recommended that such a centre be independent and of high technical quality and that multilateral initiatives be closely monitored. This approach was further reiterated at the Mexico meeting of the Ministers in March 2009.

(d) The ANZ-ASEAN Forum Initiative

In 2012, Vietnam proposed to the Australia-New Zealand and Associate of Southeast Asian Nations (ANZ-ASEAN) Forum that an advisory centre be established along the lines of the initiative supported by UNCTAD for Latin American countries in 2008-2010. The initiative emphasised the burden of costs and technical capacity on ASEAN member countries when faced with investor-state disputes and the need to share expertise and experience in dealing with such cases. It called upon the other members to support this initiative and to move it further into the ANZ-ASEAN agenda.[19]

A distinctive feature of all proposals was the need for a centre to provide capacity building and a forum to share experience and technical assistance to the member states with a view to building in-house capacity to deal with ISDS cases. The projects acknowledged the different levels of capacity as well as the different options chosen by states to defend ISDS cases (in-house capacity, outsourcing, or a combination). They also took into account the need to ensure perennity and stability in state teams, to build and preserve institutional memory, and to ensure coherence in the defence strategies. In addition, they all emphasised the need to provide capacity and assistance from the stage of negotiations to managing ISDS cases in an integrated approach.

Capacity building and experience sharing have been central to programmes that have been carried out, spearheaded by UNCTAD's intensive training courses on managing investment disputes (unfortunately abandoned) and more recent exchange forums, such as the annual Prague Conference organised by the Ministry of Finance of the Czech Republic and PwC for government officials, summer academy programmes by various universities, and more recently

[18] ARCO was created to expand trade and investment with Asia and is funded largely by the IADB. Member states include Colombia, Costa Rica, Chile, Ecuador, El Salvador, Guatemala, Honduras, Nicaragua, Mexico, Panama, and Peru. ARCO had created a working committee to deal with investment issues in the region, with the mandate of exchange experience on investment negotiations, investment agreements and investor-state disputes.

[19] See PowerPoint presentation by Dr. Tu Nguyen, Ministry of Justice, Vietnam.

a programme by the Columbia Center on Sustainable Investment.

Law clinics are offering research services to states in the early evaluation of cases and in the negotiation of investment treaties. An interesting project in this context was launched at the Graduate Institute in Geneva, called TradeLab.[20] It offers practical, project-specific legal expertise on trade and investment issues to developing countries, civil society organisations (CSOs), and smaller business stakeholders by teaming up expert lawyers and small groups of dedicated students, supervised by senior academics. Students work through legal clinics, pro bono, but get academic credits. Expert lawyers give some of their time for free; in other projects, clients may pay them. The ultimate goal is to offer high-quality legal services at no or lower prices to stakeholders who do not otherwise have access to legal expertise, by creating tailor-made legal teams and transferring capacity to both students and clients who are fully engaged in each project. Actors seeking advice, which has ranged from actual disputes and third-party or amicus submissions to legal scrutiny of proposed legislation and assistance with treaty negotiations, can submit questions and legal projects online or by contacting one of the legal clinics that are part of the TradeLab network (currently the Graduate Institute, [21] Georgetown Law,[22] and Ottawa Law[23]). Although TradeLab is a not-for-profit initiative based on crowdsourcing principles that can work on limited resources and should be self-sufficient over time, it has obtained major seed funding to kick-start its operations and expand, including in the Middle East and Africa.

The issue of the high cost for defending an ISDS case has been systematically addressed in the different regional initiatives, with the preferred option being to pool financial and human resources and make them available to all the member countries. The UNCTAD-IABD-OAS project favoured the recruitment of a team of high-calibre lawyers, working for the centre as they would for a law firm and with the costs paid by a trust fund to which all member countries would equally participate, allowing for lower hourly rates and costs for individual member states requesting services. It was not envisaged to fund defendant states through the centre but rather to provide the defence and advisory services at a reduced rate, secured by a multi-donor trust fund.

An interesting service is available at the Permanent Court of Arbitration (PCA) with a financial assistance fund[24] available for developing countries to help them meet part of the costs involved in international arbitration or other means of dispute settlement offered by the PCA. One might query the appropriateness of such an approach for an institution where independence and impartiality are needed. However, it offers an interesting perspective in addressing the lack of funding for respondent states. The Financial Assistance Fund was established by the Administrative Council in October 1994 and has been used so far in eight cases, two investment treaty disputes, three contract-based disputes, two state- state disputes, and one intra-state dispute. The funds made available to states can cover legal fees as well as all the arbitrators' fees and expenses. In the majority of cases, the funding by the Financial Assistance Fund was in the range of €100,000 (about US$106,000) with the largest amount

[20] TradeLab <https://www.tradelab.org/> accessed 2 January 2019.

[21] TradeLab International Economic Law Clinic, Graduate Institute, <http://graduateinstitute.ch/home/research/centresandprogrammes/ctei/projects/tradelab-clinic.html> accessed 2 January 2019.

[22] International Economic Law Practicum, Georgetown Law, <http://apps.law.georgetown.edu/curriculum/tab_courses. cfm?Status=Course&Detail=2582> accessed 2 January 2019.

[23] New Active Learning Option: uOttawa Joins TradeLab and Launches the Trade and Investment Clinic, uOttawa <https://commonlaw.uottawa.ca/en/news/new-active-learning-option-uottawa-joins-tradelab-and-launches-trade-and-investment-clinic> accessed 2 January 2019.

[24] Financial Assistance Fund <https://pca-cpa.org/en/about/structure/faf/> accessed 2 January 2019.

granted so far being €750.000 (or roughly US$ 797,000) for one case.

The Canada-Colombia Foreign Investment Promotion and Protection Agreement (FIPA) illustrates yet another approach where both signatory states have included among the tasks of the Joint Committee on Investment (Article 817 3.a) capacity building, to the extent resources are available, in legal expertise on ISDS, investment negotiation and related advisory matters. [25] A generalisation of joint committees and technical committees in treaties, for example, tasked with the assessment of tax disputes, also allows for an early assessment and cooperation for the settlement of disputes.

The main lesson from these initiatives is the importance of political support coming from the right level. The UNASUR initiative was the top-down approach with a strong political push from political leaders but no traction and capacity on the ground to develop the institutional mechanism to actually set up the Advisory Centre. The political message was maybe too strong and too entrenched to enroll support from a broader international community. Budgetary issues also played a role with several member countries facing severe budgetary constraints and not prepared to contribute with funding. [26] The lobby of international law firms definitely played a strong role in discouraging this initiative, as it did for other initiatives.

The UNCTAD-IADB-OAS initiative lacked the top political support, the topic being considered too technical to be of interest to political leaders. It further suffered from some degree of politicisation as a counter-project to the UNASUR initiative, although it was technically a precursor. In this context, the funding constraints and the lack of budgetary visibility were the main hurdles to its effective implementation. However, the draft treaty could be used as a template to illustrate the issues that need to be addressed, and the thorough research carried out for the project could be useful.

The experience gathered during the last decade in Latin America in establishing an institution capable of giving advice and providing defence services is very important in the context of a more global initiative. Several issues were raised and discussed in the regional context that are even more relevant in the global context. Issues of language, of legal system (whether common law or civil law), and issues related to the types of treaties arise and have been addressed. Similarly, the in-depth discussion of the scope of services to be provided by an advisory centre in each of the scenarios is very relevant today. Should the centre provide advisory services only or should it also provide defence services? Should it be limited to early advice and assistance, including or not the provision of amicable settlement, mediation, or conciliation? Should the centre be available to all member countries of an organisation or only to the poorer members? These questions lead to the key issue of access to services and whether the services should be provided on a cost basis or be subsidised, whether countries facing numerous disputes should be given access with the risk of exhausting available resources, as well as issues related to conflict of interest, and confidentiality.

3. Lessons From the Advisory Centre on WTO Law

The successful Advisory Centre on WTO Law (ACWL) has been considered as a viable example to be used in the context of investor-state dispute arising between foreign investors and host states from international investment agreements (IIAs).

[25] Canada-Colombia Free Trade Agreement (signed 21 November 2008, entered into force 15 August 2011) <https://international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/colombia-colombie/fta-ale/08.aspx?lang=eng> accessed 2 January 2018.

[26] Interestingly, those countries have continued to face costly ISDS cases and resorted to expensive outside representation.

One of the core objectives of establishing the WTO DSU was to level the playing-field for all member countries and to ensure that all members could access the DSU and bring claims, whether developing member countries with sophisticated legal expertise or least-developed countries (LDC) where experience of international disputes and financial means to sustain long and costly disputes was unavailable.

The ACWL gives free legal advice and training on WTO law and provides support in WTO dispute settlement proceedings at a discounted rate. These services are available to the developing country member of the ACWL (32 at present) and to LDCs that are members of the WTO or are in the process of acceding to the WTO (42 at present).

The ACWL enables these countries to obtain a full understanding of their rights and obligations under WTO law and to have an equal opportunity to defend their interests in WTO dispute settlement proceedings. [27] The ACWL was created as an independent, impartial, and non-political source of legal advice. These factors have been keys to the ACWL's success. The ACWL has developed an excellent reputation for the quality, credibility, confidentiality, and impartiality of its advice. While the ACWL does not remedy all of the legal capacity constraints facing its users in participating in the WTO legal system, it is now recognised as an essential part of the system.

The ACWL was established in the late 1990s upon the initiative of four WTO member countries concerned that "the WTO legal system was becoming too complicated and too burdensome for them to be able to participate fully in the system." The WTO ACWL was established and has been successful in advising and defending either completely or alongside state teams in WTO cases. To address this problem in a manner that did not compromise the impartiality of the WTO Secretariat, WTO members preferred to set up an independent intergovernmental organisation that would provide legal assistance to developing states and LDCs.

Agreement to establish the ACWL was reached at the WTO Ministerial Conference in Seattle in 1999, and the ACWL began operations two years later. At the ACWL's inauguration ceremony, the then-Director-General of the WTO, Michael Moore, said, "Today, and within the framework of the WTO dispute settlement system, the ACWL takes another, almost revolutionary, step forward in international adjudication, by establishing itself as the first true centre for legal aid within the international legal system." Article 2.1 of the Agreement Establishing the ACWL provides that "the purpose of the [ACWL] is to provide legal training, support and advice on WTO law and dispute settlement procedures to developing countries, in particular to the least developed among them, and to countries with economies in transition." [28]

The ACWL consists of a team of nine full-time lawyers and several lawyers seconded by member countries. To date, it has assisted eligible countries in more than 40 WTO disputes and provided more than 200 legal opinions. Maximum charges of the ACWL for a complainant or respondent for consultations, panel proceedings, and appellate body proceedings amount to between CHF138,000 (roughly US$135,000) and CHF277,000 (US$172,000), depending on the category of member country requesting assistance; for LDCs, that amount is CHF34,000 (roughly US$33,000).[29] These fees are also binding for external counsels, in case they are in conflict. Minimum free-market rates for litigating a relatively simple WTO dispute through to

[27] See Advisory Centre on WTO Law <http://www.acwl.ch/> accessed 12 January 2019; Niall Meagher, 'Representing Developing Countries before the WTO: the Role of the Advisory Centre on WTO Law (ACWL)' RSCAS Policy Paper 2015/02.

[28] ibid 4-5.

[29] See <http://www.acwl.ch/fees/> accessed 2 January 2019; Chad P Bown and Kara M Reynolds, 'Trade Flows and Trade Disputes' (2015) 10 The Review of International Organizations 145, 157-158.

the basic panel report stage may range from US$250,000 to US$750,000.

As explained by Niall Meagher, the current Executive Director in his in-depth survey of the ACWL, "the structure of an intergovernmental organization was a very suitable means of providing the kinds of services that the ACWL would provide. In the words of one commentator, 'an international organization can provide collective goods and take advantage of a variety of economies of scale, specialization, and pooling of resources more effectively than states can do on their own.'"[30] Thus, the ACWL is a public good that pools the legal experience of its developing country members and the LDCs in the very specialised field of law generally and in WTO dispute settlement procedures in particular and enables each of them to draw on this expertise to defend their own interests as needed.

There were four other main challenges facing the founders of the ACWL in devising its structure and governance.

First, the ACWL would be financed in large part by developed countries that would not be entitled to its services and, for the reasons explained in the following paragraph, could not have direct control over its operations. This required the developed countries to be able to commit to providing funding to an organisation that, while in the long term serving the policy goals of those countries in terms of the viability of the multilateral trading system, might in the short term, provide legal support to developing countries with positions opposing those of the developed countries.

Second, in the words of Claudia Orozco of Colombia, one of its main founders, the ACWL "had to be politically independent … from the policies of donor countries and from user developing countries." Thus, no member could have any influence over how the ACWL provided legal advice to the developing countries and LDCs. As one commentator stated, "the autonomy of the ACWL was of the utmost importance to the signatories of the agreement establishing it. An ACWL that was an extension of developed countries' hegemony would have been worse than not having one at all."[31]

Third, the ACWL's mandate is limited to legal advice. Therefore, it has to act in a non-political manner and not take positions on issues of policy on which its members and the LDCs might have very different views. It was very important to the founders of the ACWL that it avoid the "Frankenstein" problem whereby it might have ended up becoming a monster," impact[ing] the system in ways that harm, rather than help, the interests" of its developing country members and LDCs that seek its advice.[32]

Fourth, the ACWL had to be able to guarantee the confidentiality of its advice. Developing countries and LDCs would not be willing to use the ACWL unless they could be absolutely confident that the nature of their legal concerns or the advice they received would not be disclosed publicly or reported to any other party, including the ACWL's developed country members. These challenges were met by devising a multi-level structure for the management of the ACWL. The purpose of this structure is to ensure that the ACWL can work independently and in a non-political manner.

Under this structure, the ACWL is governed jointly by its developed and developing country members. All of the ACWL's members — developed and developing — participate in the ACWL's General Assembly. The General Assembly evaluates the performance of the ACWL,

[30] Andrew Guzman, 'International Organizations and the Frankenstein Problem' (2013) 24 The European Journal of International Law 999, 1010.

[31] Richard E Mshomba, *Africa and the World Trade Organization* (CUP 2009) 93.

[32] Guzman (n 30) 1000.

elects the Management Board, adopts the annual budget proposed by the Management Board, and adopts regulations proposed by the Management Board relating to certain other matters.

The Management Board takes the decisions necessary to ensure the efficient and effective operation of the ACWL. Accordingly, it appoints the Executive Director in consultation with members, prepares the ACWL's annual budget for approval by the General Assembly, supervises the administration of the ACWL's Endowment Fund, and initiates proposals on regulations on specific matters for adoption by the General Assembly.[33]

The Management Board comprises representatives of developed country members, each category of developing country members, and the LDCs. The members of the Management Board are selected "on the basis of their professional qualifications in the field of WTO law or international trade relations and development." Importantly, in order to ensure the independence, impartiality, and confidentiality of the ACWL's work, the members of the Management Board serve in their personal capacities and are not representing their governments or countries of origin."

Several lessons can be drawn from the experience of the ACWL from its structure, mandate, staffing, and budget, but even more so from its success in almost 15 years of functioning.

Of course, the ACWL is faced with defending states members of a multilateral system and under a state-state dispute settlement understanding where only states are parties to disputes, either as claimants or as defendants. Another major difference lies in the outcome of awards rendered by WTO panels where no monetary compensation is awarded for damages, but where the outcome seeks to restore the overall balance of the international trading system. However, in addition to the functioning of the centre, critical issues, such as the way the ACWL has navigated competition with private law firms, sets a valuable example. With a share of only 20 percent of all the WTO cases, the ACWL plays a pivotal role for poorer member countries but is not perceived as unfair competition to in-house teams or to private law firms.

4. Two Pillars of Service for an I-CID

When facing investor-state disputes, states have two major needs that can be divided into two main pillars of service. While these services, and particularly the representation services are traditionally available from law firms, more often than not, states carry out some of the tasks, such as appointment of arbitrators or negotiation of the procedural calendar, themselves. None of these services are exclusive and should be seen as necessarily outsourced to an I-CID or to a law firm. Many services can be provided by one or the other and can be mutually beneficial. A good early evaluation of the case by the I-CID may lead to the contracting of a law firm to represent the state in a dispute. Similarly, a law firm may also specialise in assisting its state clients in investment mediation procedures or in early settlement discussions. In practice, and like the area of international trade disputes, both types of services may co-exist and complement one another.

4.1 Defence Services

Defence services are the most easy to identify when an investment arbitration is looming, a notice of intent has been received, or an arbitration has been registered. At this stage, it is often too late to take proactive prevention measures and try to settle the case amicably before the arbitration starts. However, a number of decisions need to be taken at this early stage that go beyond the traditional hiring of outside counsel for representation.

[33] Meagher (n 27) 5-6.

(a) Settlement Negotiations

With the development of more detailed procedures during the cooling-off period (recourse to negotiation, mediation, or conciliation) or even as stand-alone and parallel proceedings, such as the investor-state mediation provisions in the draft Canada-EU Comprehensive Economic and Trade Agreement (CETA) and other recent treaties, advisory and defence services are also required to effectively and efficiently deal with these alternative procedures.

In practice, about 30 percent of the known investment treaty cases are settled before a final award has been rendered. With increased transparency and availability of information on such early settlements, government officials in charge of these negotiations are exposed to more publicity and possibly public scrutiny about the deals entered into with foreign investors about a dispute. Accountability becomes stronger; hence, the need for a transparent and accountable process for the negotiations. This new market niche could be filled by an I-CID and take care of the traditional suspicion that law firms do not want to support their clients in amicable settlement procedures as it means an early and less advantageous termination of a case for them.

(b) Early Assessment

At an early stage of a dispute, a risk-assessment may also be necessary for the state agency in charge of the dispute to make recommendations for settlement or for adopting an appropriate defence strategy. A neutral assessment prepared by an advisory centre, highlighting the strengths and weaknesses of the case on a *prima facie* basis may help the state take necessary decisions, decide to hire counsel, take up the defence in-house, or take a mixed approach. It may also help to identify the financial implications and earmark a budget for the defence of a case that may take several years if it goes its full course.

(c) Conformation of a Team

When the case is starting, advice is generally required on the conformation of a defence team for the state. It generally implies identifying the "aggrieving" agency and within the "aggrieving" agency, the entity responsible for the measure or for the conduct challenged by the foreign investor(s). In the absence of an identified state agency, notices of arbitration are often sent to the highest level of government (The President or Prime Minister's office). Communication of documents, identification of potential witnesses, confidentiality measures, and coordination processes are warranted at this stage. While several countries are beginning to organise themselves for the defence of investor-state disputes, the majority of state agencies in charge of disputes still vary case by case, and the communication and cooperation procedures need to be developed and enforced each time. The budgetary implications of this institutional organisation should not be underestimated, and assistance could be sought from an I-CID to deal with both the budgetary and the institutional management of the case.

4.2 Representation Services

A number of essential issues arise from representation of states in ISDS cases, all linked to the fact that the state does not take the initiative of the arbitration and is therefore subject to time constraints when preparing the defence strategy for the case. Issues of procedure, language, choice of arbitrator(s), procurement for legal services, procurement for expert services (legal experts, technical experts, documenting the case, cooperation between a lead agency in charge of the defence and the "aggrieving agency" through which the case has arisen, and assessment of possible contractual counter- claims) arise for each new case, although a lead agency can leverage the experience of a previous case or cases.

Representation of defendant states implies three essential tasks that are either completely or

partially outsourced by state agencies.

(a) Appointing Arbitrator(s)

The first step is the establishment of an arbitration tribunal, and this requires more and more technical expertise and means to research arbitrator profiles. The increase in the number of cases and the relative stability in the number of arbitrators appointed in investment disputes considerably narrows the pool of available arbitrators and makes it necessary to conduct research to broaden the list of names. The ballot process used by various arbitration institutions makes it mandatory to have a reservoir of potential arbitrators to come up with a suitable candidate after the first or second round of consultations. One of the obvious tasks for an I-CID could be to establish a comprehensive database of potential arbitrators with complete and up-to-date profiles to make them available to defendant states who wish to make the appointment themselves before hiring outside counsel.[34] More often than not, countries appoint arbitrators before having appointed counsel to represent them, either because of the threat of default appointment and the time it takes to carry out an international tender to identify suitable counsel. Mostly, however, state teams appoint arbitrators to avoid costs and to take into account the fact that the budget for the defence of the case is not secured at this stage, and a possible settlement is still contemplated. An I-CID could also promote the exchange of experience and expertise when it comes to evaluating arbitrator services, which represent the most important decision in the defence of the case. Advice and support in the case of arbitrator challenges is also essential.

(b) Drafting and Ling Memorials

A highly time- and cost-intensive step in investment arbitration is the drafting of memorials. An average of four sets of memorials, often exceeding 200 pages, is necessary in an investment arbitration, and numerous communications are necessary between the parties and the arbitral tribunal. Issues of language, legal drafting expertise, and efficiency arise; but, most importantly, technical expertise is required not only on the substantive law issues, but also on the procedural conduct of the arbitration to ensure an effective and adequate defence. Too many defendant states still rely on inexperienced local lawyers mainly for budgetary reasons and are not well versed in choosing appropriate representation. An I-CID could provide briefing services or cooperate with the state team or outside counsel, whether local lawyers or international lawyers, to ensure high quality in the briefs filed by the respondent state.

(c) Document Production

Under the influence of Anglo-Saxon litigation and arbitration techniques, arbitration often involves lengthy document production procedures that require not only experience and expertise, but also sometimes simply access to document management tools that are not available to an in-house team when confronted with the first or the second investment treaty arbitration. An I-CID could provide support for the document production phase and for overall case document management through extranet or other facilities available to defending states.

(d) Representation in Hearings

An important element of the defence in a case consists in the defence and advocacy of the case at hearings. At least two hearings, sometimes lasting several days, if not weeks, will be involved and will require teams of lawyers to prepare, react, draft, and plead the case throughout the hearing(s). Availability of high-quality legal services to handle hearings, building on expertise and leveraging the number of cases the I-CID will defend can make it a

[34] A link could be established with an initiative developed by Arbitrator Intelligence to also make qualitative evaluations available.

cost-effective and competitive service to be provided to defendant states or to the team of the state in charge of investment disputes. A lot of expertise and experience is available from state teams already and could be enhanced in an established advisory centre that could eventually benefit from the secondment of state officials not currently dealing with an active case that could be seconded to the case of another state.

(e) Dealing with Experts, Particularly Damages Experts

Damage expertise has become an integral part of an investment arbitration case, and again, synergies and leveraging expertise and experience may be useful for state teams facing cases and for states confronted with their first or second investment arbitration. Costs are high for this specialised expertise, which traditionally involves international accounting or consulting firms. Few of these firms have made it their specialty to provide damages assessments in investment arbitration. It is a service that could be mutualised or where synergies could operate, if not developed fully by the I-CID as part of the defence services it provides. Quality and cost control definitely could be also provided.

5. Two Additional Functions of an I-CID

In addition to defence and representation services, an I-CID may have two additional, broader roles, namely advisory services related to treaty negotiation; and capacity building and the sharing of best practice.

5.1 Advisory Services

States engaging in international investment agreements or investment contracts with foreign investors may require advisory services on upstream prevention mechanisms, ranging from negotiating good treaties, negotiating good contracts, providing early alerts about problems, addressing problems with investors, and providing responses to government officials when they encounter problems in their day-to-day dealing with investors. A number of recent studies on dispute prevention policies and investor-state dispute management mechanisms are available that identify the type of assistance needed by a state to establish a lead agency, ensure proper attention to potential disputes, provide adequate responses to problems with foreign investors, and defend the interests of the state at each stage.[35]

Several countries involved in ISDS cases for several years now have developed frameworks to prevent and manage disputes. While the emphasis in some countries is on the defence itself, in all cases, the framework has identified a clear role for the lead agency in charge of the defence of cases also in the upstream prevention mechanisms, from the negotiation of treaties to alternative dispute settlement or direct negotiation with investors.[36]

5.2 The Relevance of Capacity Building and Sharing of Best Practices

An essential function of an I-CID could be to provide a platform for capacity building and the sharing of information and best practices among government officials. In the absence of an international institution to serve as a forum for international investment issues and while the possibility of a comprehensive investment treaty, including institutional arrangements comparable to the WTO is remote, there is a strong need for a forum where government officials in charge of investor-state disputes can exchange information on ongoing or decided cases, legal issues, arbitrators, counsel, technical experts, costs for services, arbitration institutions, and new issues of interest to states participating fully in international investment

[35] See UNCTAD, *Lessons from Peru* (n 13).

[36] Three examples: Peru, Canada, and Dominican Republic.

negotiations and cooperation.

Capacity building is not available on investment treaty arbitration as such, and while several universities or academic institutions offer courses or summer academies with discounted tuition fees, a more hands-on training and capacity building is not available. It should be noted that states are recurrently facing recruitment issues and are in need of capacity building given the important turnover in state teams, either because government officials move to law firms or because of career moves. Several state teams have been entirely renewed since they were first set up, and while the circle of international investment lawyers is relatively small, problems of institutional memory or even case memory are important.

It could provide for career and training opportunities for young lawyers seconded by their governments, as it is done at the ACWL, contributing to further diffusing international investment law, investment dispute settlement, and dispute prevention policies within their home governments.

6. Policy Options and Institutional Models

From the early experience in Latin America, it is possible to infer that the most appropriate model for an advisory centre on investment law is an independent international institution based on the model of the WTO ACWL. It need not necessarily be a new institution; the services could also be provided by an existing institution, such as ICSID or one of the regional arbitration centres or a separate entity, like the Stockholm Centre's Institute, provided issues of conflict of interest and budget are well taken care of. Universities or CSOs have a role to play, for example, in capacity building, but it will certainly be more limited for mere reasons of budgetary constraints and control by the beneficiary states. Similarly, it would not be sustainable and healthy to rely on pro bono services by law firms otherwise involved in arbitration cases. A combination of services relying on synergies between various experts and actors of investment arbitration is desirable in order to achieve a high quality of services at an affordable cost.

As far as membership is concerned, a first question that arises is whether members and beneficiaries can or must overlap or whether it should be like in the ACWL, where members and beneficiaries are not necessarily the same and where beneficiaries are exclusively developing WTO members or LDCs? It is clear that the approach taken by WTO members is mandated by the need to ensure that all developing member countries can use and benefit from the WTO DSU in an equal manner with their industrialised counterparts. In the investment context, the issues are completely different. All countries, whether developing, least-developed, or developed are virtually the target for ISDS cases when they have signed contracts and treaties granting the right to investors to bring them to arbitration. Even assuming that a trend will emerge for states to use treaty arbitration to bring counter-claims, the system is designed for investors as claimants and states as defendants. Should this be taken into account in designing an I-CID? Certainly it should: there is a lot to gain from pooling not only resources, but also experience and expertise. The issues arising in the defence of a case for an industrial country are often the same as for an LDC. While the resources and budget are not comparable, the burden and the lack of available expertise may be the same. Access to services and membership should be carefully considered when embarking on the institutional design of an advisory centre.

Another question related not only to membership and beneficiaries, but also to the scope of services for a centre is whether it should focus solely on defendant states or whether it should also provide services to claimants, for example to small- and medium-sized enterprises, to ensure that they can use ISDS and have access to investment arbitration on an equal footing.

When discussed in the context of the Latin American project, this was discarded as not desirable. There are certainly pros and cons to broadening the mandate of an advisory centre. It would be in consonance with practice in law firms representing claimants and defendants alike, and from a technical point of view, it may not create too many difficulties. However, when it comes to funding and overall governance to ensure independence and impartiality, it may be advisable to separate the two types of clientele and consequently the focus.

Another important consideration relates to the scope of the services to be provided by an advisory centre. As discussed above, the two main pillars are advisory services and defence services with an overarching need for capacity building and pooling of expertise across the board.

Advisory services begin upfront from the negotiation of a treaty or a contract involving foreign investors to the assessment of consistency between investment-friendly and protective policies and enacting of laws and regulations, whether sectoral or of general application. Assisting member countries in early dispute prevention policies, designing conflict management systems, and setting-up early alert procedures could be entrusted to an advisory centre, taking advantage of available expertise and experience in other member countries. Early assessment of a case to identify the type of reaction and strategy is also a valuable service that will enable a member state to decide on the course of action: on whether to settle amicably; pursue mediation or conciliation; or to prepare the defence of an arbitration case.

The question then arises whether the advisory centre could provide mediation services or conciliation services, whether it should keep a roster of experts available to be called on to act as early neutral evaluators, mediators, or conciliators. Together with capacity building and pooling of resources for alternative dispute resolution mechanisms, it could provide a platform to strengthen the offer.

Regarding the scope of services, the main question arises concerning whether and to what extent an advisory centre should embark on the actual representation and defence of investor-state cases. It is obvious, again, that this is where the countries' lack of resources and expertise is more crucial. However, it raises all sorts of issues ranging from budget and staffing to conflict of interest, "hijacking" of the means of the centre by one country that is the target of numerous cases. To illustrate this concern, had Argentina been the member of an advisory centre established for Latin America, with 46 cases in 2004, it would have exhausted the means of the centre by far. These issues can be dealt with and were addressed by Latin American countries when designing their respective projects. It is clear that an advisory centre providing only advisory services without the actual defence service would lose a lot of traction. It would be considered with a lot more benevolence by private practitioners but would certainly miss its call.

Costs and funding are of course crucial when it comes to setting up a centre that has to work for several years before it will break even or even start to generate sustainable income. It will obviously depend on donor or member contributions at the beginning and before it becomes economically viable, especially if it seeks excellence in the recruitment standards and in the outputs. As a matter of principle, states should pay for the defence of their cases and should bear full financial responsibility when facing an investment dispute. However, beyond the issue of pooling resources, the mere costs of an investment arbitration procedure are prohibitive for many states. Here again, the example of the ACWL could come in handy. A system of subsidised, capped, or otherwise limited fees also applicable to outside counsel when involved in a case is an interesting precedent. It is especially interesting in the context of a highly competitive and global market for law firms and could have broader benefits than simply keeping the fees low.

Experience in Latin America has shown that it is essential for a couple of champion-countries to get together to launch an initiative and the right time and with the right level of political support. The current turmoil surrounding investment arbitration could provide the opportunity for like-minded countries to work together toward establishing such an advisory centre, inviting all other countries to join them in their initiative. International institutions could support the initiative and contribute their expertise in addition to financial support.

7. Conclusion

The time for setting up an I-CID has come, and the rationale for establishing a centre is stronger than ever.

First, it is time the international ISDS community acknowledges that it is not an isolated legal island, but part of a broader international economic law continent where synergies and parallels must be exploited for international cooperation among states to be meaningful and effective. This also includes the means to interpret and enforce rules and obligations stemming from international investment agreements under broader-based treaties, such as the new mega-regional treaties or FTAs.

Second, an advisory centre initiative needs to be global, and the issues of advice, defence, and capacity building need to be approached at a global level. The globalisation of ISDS entails the need for states to defend themselves adequately in investor-state disputes and possible recourse to mutualised defence services, prevention services, and a platform for capacity building or information exchange should be available to all states. Such advisory, defence, and technical assistance services should be available for all defendant states, whether developing or developed, whether capital importing or capital exporting, taking into account that to date, 99 of 195 states have been defendants in one or more treaty-based investor-state disputes, with likely many more being involved in investment arbitration. It is essential that the I-CID is run by states, funded by states, and available for states. It is also essential that it is available to states with no experience or otherwise ill-prepared to face such disputes (no capacity, no funds, political turmoil, pressure, etc.) on an *ad hoc* basis.

Third, the quality of the legal services provided by the Centre is essential for the system to gain in legitimacy, predictability, and efficiency. The I-CID can and must provide the best possible legal services, building on existing expertise in state teams. While the pool of international investment lawyers is limited, it should be remembered that many law firms have built an investment treaty practice entirely from scratch on the basis of a first and a second investment dispute, recruiting junior and more senior lawyers with experience in public international law for example, but mostly learning by doing. The myth of a reserved area of the law unavailable to lay men or women must be strongly questioned, as long, of course, as the highest quality of service is available.

Fourth, an adequate defence entails not only the need for high-quality legal services, but also affordable legal services, with an optimal cost-benefit ratio. Too many countries today continue to rely on cheap defence schemes, if at all, and contribute with poor defences to the creation of questionable precedents that in the end do not help claimants and defendants. Too many cases are being cited in investment disputes as "jurisprudence," where key arguments have not been developed and the defence strategies are poor. Consequently, they contribute to the poor record of international investment law. Statistics show an increasing number of cases won by defendant states. Attempts to continue to improve the ratio should be encouraged against the overall objective of peaceful settlement and continued investment.

Fifth, the creation of an I-CID would mean a concrete and effective contribution to resolving

the current legitimacy crisis of ISDS. It could accompany a transition between one type or another of dispute settlement, patterned on an international investment court or on a state-state DSU, depending on its evolution. It may help to correct the perceived imbalance between the means available to states facing investment disputes and the means available to claimants with deep pockets or benefitting from third-party funding arrangements.

Sixth, in the meantime, and with the increase of broader FTAs with mechanisms for state involvement in interpretation, in non-disputing party submissions, and in monitoring claims and arbitration procedures, the playing- field must indeed be levelled to ensure that all state members of such agreements can fully participate and benefit from the frameworks.

It could contribute to further improve the quality of international investment law and international investment dispute settlement in an era where the problems generated by political risk have not disappeared and where a specific response to investment attraction and retention continues to be crucial.

Part III

Country Specific Experiences: In Search of Best Practices

Chapter 7. Lessons from Capacity Building in China

Henry Gao and Gregory Shaffer*

1. Introduction

When China joined the World Trade Organization (WTO) in 2001, it faced many challenges, such as implementing its market access commitments and revamping its trade regime to comply with various WTO rules. To meet these challenges, China had to build capacity to understand WTO rules and to participate in new WTO negotiations. Most importantly, China needed to boost the capacity of lawyers in anticipation of the many WTO disputes that could arise after its accession.

This chapter provides a critical study of China's legal capacity-building experience. It starts with an overview of the problems facing China, discusses the strategies China adopted to solve the problem, and assesses how successful they have been. The concluding part notes whether the experiences of China may provide lessons to other developing countries, especially smaller ones.

1. The Problem

After a marathon negotiation spanning 15 years, China finally acceded to the WTO in November 2001. As the price for accession, China agreed to wide-ranging commitments including a substantial reduction of its tariffs on industrial and agricultural goods, liberalization of many service sectors, and a comprehensive revamping of its internal trade related laws and institutions. There was widespread concern that China might not be able to meet its heavy commitments, and lawsuits would quickly follow. At the time of its accession, very few legal practitioners specialising in international trade law and WTO rules existed in China. As the China Youth Daily, a major national newspaper, lamented in late 2001, "Chinese lawyers familiar with international law, international trade law and WTO rules are extremely rare."

In our view, the following were the main challenges confronting China after its accession.

First is the language barrier. The WTO has three official languages: English, French, and Spanish. Because China was absent from the General Agreement on Tariffs and Trade (GATT) following the Communist revolution in 1949, Chinese is not a WTO official language, even though it is an official language of the United Nations. This made it very difficult for Chinese lawyers to read and understand the WTO agreements and dispute settlement decisions since most of them did not have good English language skills. While these agreements and decisions were translated into Chinese, the quality of the translations was uneven. For example, the term "state trading enterprises" under GATT Article XVII has

* We wish to thank Joost Pauwelyn and Mengyi Wang for their most helpful comments. A detailed study of how China built its legal capacity, from which this chapter draws, can be found in Gregory Shaffer and Henry Gao, 'China's Rise: How it Took On the U.S. at the WTO' (2018) 1 Illinois Law Review 115.

been widely translated into "Guoying Maoyi Qiye", which means "State Owned Trading Enterprises."[1] Yet, as stated clearly in GATT Article XVII (a), such enterprises do not have to be state-owned but may be any enterprises granted with "exclusive or special privileges" for foreign trading. As such language nuances are often lost in translations, Chinese lawyers were at a disadvantage in understanding the meaning of WTO agreements, let alone participating in actual disputes involving WTO procedures, practices, and jurisprudence.

Second is the difference in the legal system. While China traditionally had its own legal system that blends traditions of Confucianism and Legalism, the current Chinese legal system is based largely on a civil law model that China inherited from the Soviets. The WTO legal system is, strictly speaking, based on neither a civil or common law model. However, with the establishment of the Appellate Body, a *de facto* case law system has emerged in the WTO. Such an approach is more similar to a common law model, which is quite foreign to most Chinese lawyers, since most decisions by Chinese courts are rather brief and there is no rule of judicial precedent. Thus, Chinese lawyers found it a major challenge to read, understand, and apply the tens of thousands of pages of WTO judicial decisions.

Third is the difference in the economic system. While not explicitly stated, the WTO system is based on market economy principles that assume that the state does not intervene directly in the economy to a significant extent, but uses various tariff and non-tariff measures to regulate trade. These tariff and non-tariff measures are, in turn, constrained by WTO rules. By contrast, China has operated as a planned economy since 1949. Although state control of the economy has been relaxed gradually, with economic reforms starting in the late 1970s, the state still plays a major role in the economy due to China's unique political system. For example, until 2004, the right to trade was reserved only for a few state-approved firms. Thus, it was also difficult for Chinese lawyers to understand WTO rules, which were designed to apply to a different type of economic system.

Fourth is the lack of practice among Chinese lawyers at the domestic and international levels. Before China's accession to WTO, Chinese lawyers had no opportunity to practice international trade law, which was a new field in China. Since the government had direct control of the economy, there was no need to establish complex frameworks to regulate international trade. The first set of international trade regulations was introduced in the late 1990s when China started to establish its trade remedies framework. The first trade remedies case was filed only in 1997, by a group of newsprint producers who filed a petition for anti-dumping investigations. In fact, the anti-dumping regulation itself was introduced after the lawyer representing the newsprint producers first approached the Ministry of Foreign Commerce (MOFCOM) to file the petition. At the international level, Chinese lawyers also lacked the opportunity to practice international trade law as the Chinese government shunned international litigations before its accession to the WTO.

With China's accession to the WTO, all was about to change. Many commentators predicted that its WTO accession would open a floodgate, releasing a stream of cases against China. They questioned whether China would be willing to subject itself to the jurisdiction of the WTO dispute settlement system in such cases, which is the only global tribunal to have compulsory jurisdiction. Would China hire foreign lawyers or rely on its own lawyers to defend its interests in the WTO? How would the Chinese build capacity in WTO laws? These issues are explored in detail in the next section.

[1] Zhao Wetitian, *The Legal System of the World Trade Organization* (Jilin People's Press 2000) 197.

2. The Solution

To solve the shortage of capacity in WTO litigation, China made substantial investments after its accession. Significant efforts were made to boost trade-related legal capacity in government and Chinese law firms, which together directly enhanced China's ability to participate in WTO dispute settlement and shape China's implementation of WTO law. At the same time, the Chinese government and private actors invested considerable resources to boost capacity in academia, private companies, and industry associations, which indirectly affects China's capacity in WTO litigation, implementation, and bargaining under the ambit of the law.

These capacity-building efforts started as paternalistic initiatives by the government, as the WTO accession was regarded as a major political achievement of then President Jiang Zemin. To better prepare senior officials for the accession, President Jiang organized a week-long, high-level WTO seminar for officials at the governor and ministerial levels in February 2002. In addition to the lectures by leading WTO experts, President Jiang himself gave an important speech, in which he stressed: "The accession to the WTO demands major changes in the ways the economy is managed by our governments at all levels. We shall further adjust and improve our modus operandi and legal system to meet the demands of the socialist market economy in accordance with the general rules of the market economy."[2]

Pursuant to such high-level exhortations, numerous capacity-building programs mushroomed around the country. Participants in WTO-related programs included not only those directly affected by the WTO, such as government officials, students, businesspeople and lawyers, but even ordinary people, such as taxi drivers.[3] As time went by, however, this WTO "craze" gradually faded and most provincial and local governments quietly abandoned the specialized WTO centres they had created. As of now, only the WTO centres in Beijing, Shanghai, and Shenzhen remain active. To maintain their relevance, those centres broadened their mandates to encompass bilateral and plurilateral trade and investment agreements.

However, at the same time, many private firms gradually recognized the need to develop their capacities in WTO law, which directly affected their interests when they encountered trade barriers abroad. The biggest firms chose to build capacity in-house, while the smaller firms developed capacity mostly through industry associations.

2.1 Law Firms

China recognized that, due to its lack of capacity, it would have to rely on foreign lawyers for WTO litigation, at least initially. Nonetheless, it made conscious efforts to build up its own capacity from the very beginning. For example, in its first case, the *US Steel Safeguard Measures*, China selected the French firm Gide Loyrette Nouel to represent it. At the same time, it also hired four Chinese law firms to assist Gide, and, more importantly, to learn from the Western lawyers. Later, the Chinese government hand-picked 10 Chinese law firms to groom them for WTO work by involving them in WTO disputes. These Chinese lawyers were to support the foreign law firms in cases where China was a main party and to be the sole outside legal counsel for China in cases where China participated as a third party.

Most of the original 10 firms were boutique firms specializing in import relief law, comprising of anti-dumping, subsidy, and safeguards law. The main lawyers in those firms

[2] Jiang Zemin, *Selected Works Of Jiang Zemin* (vol III, Foreign Language Press 2010) 454.

[3] Li Ganlinm, 'Who Dares Not to WTO?' (Zhongguo Qingnian Bao, 2 April 2002) <http://business.sohu.com/10/34/article200453410.shtml> accessed 8 January 2019. According to Li, taxi drivers are required to attend WTO training courses, otherwise they will not be allowed to send their cars for annual inspection.

tended to have strong MOFCOM connections. They thus seemed to be the ideal candidates for China's budding WTO bar. However, all but one of the original ten firms have discontinued their WTO litigation practices over the past decade, even though trade remedies practices boomed in China. As of 2017, five firms handle China's WTO cases: King & Wood Mallesons (KWM); Zhong Lun; Jincheng, Tongda & Neal (JTN); AllBright; and Gaopeng & Partners. Among them, KWM is the only firm from the original batch of 10.

There are several reasons for this change, but the main reason is that WTO law as a practice area is hard to sustain on its own. After China's first WTO case, *US—Steel Safeguard Measures*, ended in 2003, China did not have another major WTO case litigated before a panel until 2006, when the United States brought the *China-Auto Parts* and *China-Intellectual Property Rights* cases. Due to a lack of cases in the intervening 3 years, the boutique law firms had little incentive to continue investing in a WTO practice. Instead, they chose to turn to more lucrative areas.

In contrast, larger law firms had more resources to support a WTO legal practice. Although WTO work remains much less lucrative than these firms' other practice areas, maintaining a WTO practice can enhance the firm's prestige since it involves representing the Chinese government, which every Chinese has been taught to be sacred and infallible. On the practical side, working on these cases helps the big law firms maintain good "guanxi" (relationships) with MOFCOM, which in addition to its jurisdiction on trade is entrusted with regulatory powers over commercially important areas such as the approval of foreign investment and the enforcement of China's competition laws. While different divisions in MOFCOM handle these issues, building "guanxi" with officials of the Department of Treaty and Law (DTL) through WTO cases makes it easier for the law firms to contact officials in other divisions.

So far, China's strategy seems to have worked well in building its WTO bar, as Chinese lawyers are playing an increasingly active role in its WTO disputes. In a typical WTO case, the private lawyers are involved at a very early stage. Once MOFCOM determines that a WTO complaint will be litigated, it starts the process of selecting outside law firms by asking firms to submit bids. In formulating the bid, the firm provides, along with its fee schedule, a 20-to-50 page memorandum analysing the legal issues. In deciding whom to select, MOFCOM considers both the quality of the memorandum and the fees.

For WTO complaints that do not proceed to litigation before a panel, but only involve consultations, the government hires only Chinese law firms. It likewise hires only Chinese law firms when China is a third party before a WTO panel, except in rare cases involving important systemic issues. Where China is a third party, the government can still be quite demanding. To submit a bid to represent China in these cases, a Chinese law firm may again write a legal analysis of 30-50 pages. The government's actual third party submissions, in turn, can fall within that range. The case *EU - Antidumping Measures on Biodiesel* brought by Argentina, for example, was of systemic importance because it involved the use of surrogate prices from third countries in antidumping calculations. This practice can favour the finding of dumping and, where dumping is found, inflate anti-dumping margins. It is often used against Chinese imports. China made a 50-page submission supporting Argentina's arguments. Because of the case's systemic importance, the government hired a US law firm (Sidley Austin) and a Chinese law firm (Zhong Lun) for the third party submission and the WTO hearings. Argentina won the case establishing precedent to China's benefit.

In contrast, when China is a main party and the case is argued before a panel, MOFCOM has always hired a foreign law firm together with a Chinese law firm, each selected in a separate bidding process. The first 15 WTO cases filed by China were against the U.S. (10 cases) or the European Union (EU) (7 cases, including one case where both the EU and two of its

member states were named as respondents). In these cases, MOFCOM respectively hired American and European law firms because they understand better their home jurisdiction's trade laws and practices.

When facing cases brought by other WTO members, China again relies primarily on foreign counsel for its defence because of their greater familiarity with WTO jurisprudence, procedures, and courtroom advocacy. The foreign law firm is primarily responsible for the legal analysis, while the Chinese firm assists primarily with the factual presentation of the relevant Chinese measures. As a Chinese lawyer quips, "the Chinese law firm collects the ingredients, while the foreign law firm cooks them into a dish". The foreign law firms can (and often do) hire and pay higher salaries to employ Chinese lawyers to do this analysis in parallel, but the government insists that a Chinese law firm be included. In the process, the foreign law firms grant the Chinese lawyers access to the firms' WTO databases and WTO submissions used in earlier cases. From these experience, Chinese lawyers acquire significant legal skills involved in building and defending WTO cases. Although the foreign law firms draft China's submissions, the Chinese law firms can assist and comment on them. For example, in the *China-IPR* case, the US alleged that the Chinese threshold for criminal prosecution was too high to effectively deter violations of intellectual property rights (IPR). The Chinese lawyers helped gather information on how Chinese cases operate in practice so that the panel could see the issue in broader context. The panel found that the US failed to make a *prima facie* case.

To help understand the Chinese measures at issue, the foreign law firms sometimes request meetings with the relevant government agencies responsible for the measure, which MOFCOM helps to arrange and coordinate. Initially, many ministry officials were annoyed by the meetings and regarded the foreign law firms as troublemakers. However, after MOFCOM explained to them that the meetings help the law firms better understand and defend the Chinese measures before the WTO, ministry officials softened their attitude and became more welcoming. For example, in the *China-IPR* case, lawyers met with the Ministry of Public Security and the Supreme People's Court because the US challenge had raised issues of judicial interpretation of Chinese law and judicial practice.

For the panel hearings in Geneva, MOFCOM typically sends the largest delegations of any WTO member. The Chinese delegation includes MOFCOM officials, lawyers from both foreign and domestic law firms, representatives from the relevant ministries, and possibly also industry association representatives and academics. Unlike some WTO members, which keep the private lawyers outside of the panel hearing room, MOFCOM has no reservation about bringing foreign lawyers into the hearing and having them make China's oral arguments and answer the panel's questions.

Although foreign lawyers generally handle the oral proceedings, Chinese lawyers and officials inform the authors that, more recently, the Chinese lawyers have contributed to a greater extent. MOFCOM officials refer to the increased substantive role of Chinese lawyers in stages. The "first stage" was for Chinese lawyers to learn about the process, while the "second" was for them to engage more substantively. In 2014, in the case *China — Measures Imposing Anti-Dumping Duties on High-Performance Stainless Steel Seamless Tubes* ("HP-SSST"), the Chinese lawyer's oral argument on an important factual issue in the panel hearing garnered praise from both the foreign lawyers and MOFCOM officials who attended the hearing.

Chinese officials and lawyers talk about a potential "third stage", in which Chinese firms would become solely responsible for China's WTO cases. In the 2012 case of *US-Antidumping Measures on Shrimp and Diamond Sawblade*s from China, a Chinese law firm

assumed the role of lead counsel. The US did not defend itself because the case involved Appellate Body precedent on "zeroing" methodology (for antidumping cases) that the U.S. no longer challenged. In the meantime, lawyers in China have gained substantial expertise with which to advise the Chinese government and companies on trade law matters.

2.2 Academia

In addition to building the capacity of Chinese lawyers, China also recognized the importance of capacity building for the future. Thus, the government expanded its capacity-building efforts to academia, both for teaching and research.

(a) Teaching

China's legal capacity-building efforts in teaching include developing the law curriculum; teaching law in English; using the case law method; and developing oral argument skills through a national WTO moot court competition.

(i) Curriculum

In 2000, the year before China joined the WTO, the government made International Economic Law (which includes WTO law) a mandatory subject in the national bar exam. Correspondingly, the official curriculum for law schools approved by China's Ministry of Education includes International Economic Law (which includes WTO law) as one of 16 mandatory courses. These measures reinforced the importance of WTO law as a subject and helped raise interest in WTO law among professors and students. As a result, in most of the more than 600 law schools in China, at least one professor teaches and claims to have special expertise in WTO law. This is a much greater number and percentage than in the US, where the study of WTO law has never been mandatory and, in practice, has waned.

(ii) Language

English language capability was another major barrier facing China upon its accession. To solve this problem, the Chinese government created many programs to boost the English language capacity of lawyers and law students. In 2001, for example, the Ministry of Justice issued a set of recommendations to enhance the training of "high-level lawyer talents" who understand not only WTO rules and the dispute settlement system but also foreign languages.[4] In 2007, the Ministry of Education of China launched a comprehensive teaching reform plan to improve the teaching quality in Chinese universities. One important component of the plan is to develop bilingual courses that can "substantially improve the English levels of college students in their areas of studies and enhance their capacities to conduct research in English."[5] Among law school subjects, WTO law is considered one of the few that is most suitable for teaching in English. Many law schools thus began to offer courses on WTO law in English to build students' facility with English. In turn, this development helped professors and students become more familiar with foreign scholarship on WTO law.

(iii) Case Law Method

Professors teaching WTO law in China have spearheaded the use of case study method in China. As China is a civil law country where judgments are short, conclusory, and do not have precedential value, it has been difficult to adopt the case law method in Chinese law

[4] Ministry of Justice, 'Opinions of the Ministry of Justice on Accelerating the Reform and Development of the Legal Profession after China's Accession to the WTO' *Lawinfochina* (8 March 2001) <http://www.lawinfochina.com/display.aspx?lib=law&id=2970&CGid=> accessed 8 January 2019.

[5] Ministry of Education and Ministry of Finance, 'Advice on the Implementation of the Project on Quality of College Teaching and Teaching Reform in Higher Education' (22 January 2007).

schools. The WTO legal field, however, is completely different. WTO panels and the Appellate Body have decided over 300 cases and built an elaborate, evolving jurisprudence. These decisions create *de facto* precedents that affect the interpretation and application of the law in future cases, so that Chinese students need to study them carefully. To learn and appreciate WTO law, the students cannot simply study legal texts and general principles, as in other subject areas in China. Instead, Chinese professors started to include WTO cases in their curricula to teach WTO law more effectively.

In the beginning, most professors translated the WTO case reports into Chinese since the students lacked sufficient English language skills. Given the length of WTO reports, which can vary from over 100 to over 1000 pages, the task of translation can be considerable. Gradually, some professors started to include excerpts in English and even publish an entire book of cases in English. For example, in 2003, Professor Huang Dongli from the Chinese Academy of Social Sciences published *International Trade Law: Economic Theories, Law and Cases*, which mirrors the casebooks used in American law schools.

Many Chinese law professors have overseas study and/or training experiences. Such experiences can shape their teaching to assume more of a common law approach to factual analysis and legal interpretation. As one law professor noted, "more and more professors in China are trained in the United States". Many of them take a course in international trade law, and these experiences could have significant effects over the next 10 to 20 years for teaching law in China. Many of these academics stress that much is at stake in the study of the WTO in China, both for the multilateral trading system and internally within China.

The study of WTO case law thus can have broader implications on the formation of legal professionals in China, including those who will enter commercial practice, and also those who will enter government or the judiciary. When graduates work in ministries outside of MOFCOM, basic knowledge of WTO law diffuse through the government and MOFCOM has interlocutors in other ministries acquainted with WTO legal rules and principles. Such diffusion of expertise facilitates compliance of China's WTO commitments and potentially deepens the understanding and application of trade law principles and legal reasoning.

(iv) Moot Court

To build students' understanding of WTO rules, MOFCOM organizes the China WTO Moot Court Competition with two of China's elite law schools, the China University of Politics and Law (CUPL) and the Southwest University of Political Science and Law (SWUPL). The competition, which is conducted in English and simulates WTO panel procedures, aims to "promote the training and selection of [China's] personnel for WTO negotiations and dispute settlement." The first competition, held at CUPL in Beijing in November 2012, drew teams from eight universities from four cities. The number of teams doubled to 16 in 2013 and rose to 18 in 2014. The panelists include Chinese trade lawyers, professors, and MOFCOM officials that handle WTO cases. MOFCOM officials and private lawyers use the opportunity to identify and recruit young talent. The skills and experience gained in the domestic moot court competitions helped the Chinese teams make progress in international WTO moot court competitions, raising their global profile, including before representatives of the WTO. For example, in 2016, the Tsinghua University team made it to the quarterfinals of the ELSA Moot Court Competition's Final Oral Round held in Geneva.

(v) Participation in WTO Hearings

China often includes Chinese law professors in its delegations to WTO hearings before panels and the Appellate Body, and they take this experience back home with them. A law professor attending an Appellate Body hearing, for example, emphasized how quickly and repeatedly

the legal issues arose, reflecting more of an "inquisitorial process" involving "common law" reasoning. From the experience of the hearing, he highlighted how "the training of our students should be harder, should be tougher."[6] Another law professor attending a WTO hearing noted that the experience gave him a completely new perspective of the WTO that he brings to his classroom. Now he gives factual scenarios to his students and lets them work through the facts while studying the WTO background rules on their own. Professor Yang Guohua, a former Deputy Director of MOFCOM's Department of Treaty and Law, stresses how WTO reports provide "excellent teaching materials to help the students to develop a good sense of legal reasoning and rule of law". He writes of "the appeal of the legal reasoning in the Panel and Appellate Body reports which were very rare in my legal education [during the 1990s]."[7]

(b) Research

The government's capacity-building efforts also aimed to enhance WTO law research in China that, in turn, could be useful for the government.

(i) Research Associations and Networks

To promote research on WTO issues, the government supported the creation of several WTO research associations. The oldest is the Chinese Society of International Economic Law (CSIEL), which was established in 1984 by Professor Yao Meizhen from Wuhan University and later headed by Professor Chen An from Xiamen University until 2011. When China joined the WTO, the government established the WTO Law Research Society under the auspices of the China Law Society. It appointed Sun Wanzhong, a former Director-General of the Office for Legislative Affairs at the State Council, as its first President. Two years later, MOFCOM established the China Society for World Trade Organization Studies. China's first ambassador to the WTO, Sun Zhenyu, took the helm in 2011, and the Society became quite active, organizing many training courses and research projects.

The annual meetings of these research associations provide a forum for WTO scholars and trade officials in China to exchange views. Starting with its 2010 Annual Meeting, the Chinese Society of International Economic Law has organized an annual Special Symposium on WTO Law jointly with MOFCOM's DTL, where its officials, private lawyers involved in China's cases, and leading WTO scholars in China review and discuss reports of the WTO panel and Appellate Body. Senior MOFCOM officials deliver keynote speeches at the meeting, where they update the academic community on the state of play of trade negotiations and disputes and the most important trade law issues that China faces. These interactions help spur Chinese researchers to focus on topics of practical relevance to the government.

In addition to the formal research societies, entrepreneurial individuals have established informal networks to exchange views on WTO law. Yang Guohua, when he was Deputy Director-General in DTL, established an email list entitled "Academic Circle on WTO" and a WeChat group named "Rule of Law Utopia." Most of China's leading WTO scholars are members of these groups and they often engage in heated discussions on cutting-edge issues in WTO law.

(ii) Publications

After China's accession to the WTO, Chinese scholars published thousands of books and articles on almost all aspects of the WTO and WTO law, exemplifying the remarkable

[6] Personal communication from an anonymous source.

[7] Yang Guohua, 'China in the WTO Dispute Settlement: A Memoir' (2015) 49 Journal of World Trade 1, 5.

enthusiasm in China regarding its accession, which the government promoted. The WTO books range from introductory textbooks to highly specialized treatises. Early publications tended to be in Chinese, given that the primary goal was to explain the basics of WTO law to Chinese readers, especially to officials, businesspeople, and students. Gradually, however, as Chinese scholars improved their English language skills and as they pushed deeper in their research, some of them started to publish works in English, including in the main English language journals in the field, such as the *Journal of World Trade* and the *Journal of International Economic Law*. These publications enable them to exchange ideas with non-Chinese scholars, and bring Chinese perspectives to these journals' broader readerships. They can help the Chinese government in two ways. First, these efforts help Chinese scholars become more proficient in WTO law in English so that they become useful as consultants to the government and law firms, as well as trainers of the next generation of Chinese trade law specialists. Secondly, they potentially help these scholars advance jurisprudential interpretations and arguments informed by a Chinese perspective and thus more favourable to the government's positions, such that this work may inform the broader WTO legal field, including the WTO secretariat and WTO panelists.

(iii) Direct Contribution to Government Policy making

MOFCOM and Chinese law firms occasionally seek advice from Chinese law professors on international trade matters. They initially did so on an *ad hoc* basis where an individual official knew a particular professor. This practice gradually became institutionalized after MOFCOM organized regular seminars on current WTO cases. The exchanges helped the government tap into academic expertise, and helped the academics keep abreast of legal developments.

In addition to its consultations with academics, MOFCOM has run a formal secondment program for law professors since 2011. Under the program, MOFCOM selects young academics from elite law schools around the country and assigns them to the DTL. During their one-year stay, the professors are treated as MOFCOM staff members, conduct research on legal issues, and participate in all aspects of the WTO dispute settlement process. MOFCOM invites law professors to observe WTO hearings in Geneva as members of the Chinese delegation. It also invites them to hear presentations at MOFCOM by foreign lawyers who handle China's WTO cases. These opportunities help orient their research and pedagogy.

The government has nominated several Chinese academics to the Indicative List of Panelists maintained by the WTO secretariat. MOFCOM nominated three individuals in 2004, followed by two in 2006, six in 2010, and eight in 2011. By 2017 the government had nominated 21 individuals, 9 of whom were full-time academics, 8 were sitting officials at MOFCOM at the director or director-general level, and the remaining 4 were former government officials practicing law or teaching part-time.

2.3 Private Companies and Trade Associations

Before China's accession to the WTO, Chinese companies also faced significant trade barriers abroad. Most of them chose to abandon the foreign market rather than fight in a foreign legal procedure. Following China's accession, the government launched extensive education campaigns to help Chinese companies understand and benefit from WTO rules. These programs were usually conducted by Centres for WTO Affairs that ambitious local officials established in major cities around the country. For example, the Shanghai WTO Center launched a "50/100 Senior WTO Affairs Experts Training Project" in July 2001, which provided WTO training to 100 participants selected from 50 organizations, including government departments, state-owned enterprises, professional service organizations, and government-formed industry associations. The program lasted one year and was in three

parts. Phase 1 provided a three-month introductory course; Phase 2 added a three-month course on more advanced topics; Phase 3 culminated with an overseas internship for participants to work in the US, EU, Japan, and other countries. The government launched the project with great fanfare and the response was overwhelming. The first morning after the announcement, the Shanghai WTO Center received more applications than places available. Hundreds of similar programs mushroomed around the country and the WTO centres trained thousands of Chinese officials and other stakeholders.

(a) Private Firms

In addition to these government initiatives, private companies and industry associations boosted their capacity in WTO law. Larger Chinese companies saw the need to develop WTO knowledge from their experience with foreign antidumping and other trade measures, and so they built internal expertise. Import relief investigations often target Chinese companies, which hire specialized employees to respond to them. Baosteel, one of the largest steel manufacturers in China, has an anti-dumping task force that coordinates over 110 people from 22 internal departments. Combining internal expertise with assistance from external legal counsel, Baosteel learned to defend itself in anti-dumping investigations. In the WTO case *China-Certain Measures Affecting Electronic Payment Services*, the banking association China UnionPay directly hired one of the Chinese law firms that MOFCOM had included in its WTO delegation, complementing the Chinese law firm that MOFCOM hired.

Larger Chinese companies have built internal legal expertise on many trade-related issues, including intellectual property, import relief, customs, trade facilitation, and investment law. For example, the Chinese technology giant Huawei has over 100 in-house counsel. In 2013, Huawei hired international trade lawyer James Lockett as its Vice-President and Head of Trade Facilitation and Market Access. Before he joined Huawei, Lockett had worked for the US Department of Commerce, served as the Chairman of the American Chamber of Commerce in Brussels, and been a lawyer for US law firms in Brussels and Vietnam. He was thus highly familiar with the US and EU regulatory systems. His hiring indicates that leading Chinese companies like Huawei are looking beyond their defensive interests in foreign trade remedies cases and increasingly lobbying proactively to open foreign markets.

During our discussion, Lockett maintained that Huawei plays an important role in developing international standards on telecommunication equipment and reducing tariffs on information technology products. For example, Huawei lobbied for the expansion of the WTO Information Technology Agreement (ITA) to include Latin American countries such as Brazil and Mexico, and its position on the ITA publicly differed from that of the Chinese government. Huawei's taking such a public position exhibits a growth in confidence of a large firm to advance its views before state officials.

Building in-house trade law expertise takes time and resources that most Chinese small and medium-sized enterprises cannot afford. To encourage more Chinese companies to bring their problems to the government, MOFCOM introduced a Foreign Trade Barrier Investigation mechanism in 2002, which was modelled after U.S. Section 301 legislation and the E.U.'s Trade Barrier Regulation.[8] The mechanism allows private companies to petition MOFCOM to launch an investigation and take necessary action, whether through bilateral consultation or WTO litigation, when the companies encounter foreign trade barriers. The government introduced the mechanism with great fanfare. However, companies have only formally invoked it in two cases in the first 12 years, the first involving a 2004 investigation regarding

[8] For a detailed discussion of the mechanism, see Henry Gao, 'Taking Justice into Your Own Hand: The Trade Barrier Investigation Mechanism in China' (2010) 44 Journal of World Trade 633.

Japanese import quotas on laver (seaweed) that was later settled,[9] and the second regarding U.S. subsidies in the renewable energy sector initiated in 2012. The main reason Chinese private companies do not use it is that traditionally they lacked access to the government.[10] Thus, when they encountered trade barriers, they often chose to resolve the problem by shifting their exports elsewhere or switching to other products.

Because the formal Foreign Trade Barrier Investigation mechanism was rarely used, MOFCOM introduced an informal alternative around 2005. This new approach – nicknamed the "Quadrilateral Coordination" mechanism – involves the cooperation of four parties: the central government; local governments; industry associations; and individual companies.[11] Under it, industry associations play a key role in connecting private companies with the government, thus resolving some of private companies' concerns about access. But to act effectively, industry associations would have to enhance their trade law capacity and their independence.

(b) Industry Associations

Historically, industry associations have not been independent of the government in China. Rather, they were established by and affiliated with functional ministries in particular domains, which were separate from the Ministry of Foreign Trade and Economic Cooperation (MOFTEC), which is MOFCOM's predecessor. Moreover, these associations had no expertise on foreign trade issues. To address this problem, in the late 1980s MOFTEC created seven official trade associations for importers and exporters of products, divided into broadly defined sectors.

Although these official trade associations have close links with MOFCOM, they are ineffective in assisting most Chinese companies for multiple reasons.[12] First, their scope of coverage is extremely broad, so that products and producers under their coverage often do not share the same concerns. To address a problem involving a specific product, a company must work through layers of trade association bureaucracy. Secondly, these associations are typically based in Beijing and do not have branch offices in the provinces. Companies facing trade remedies cases, however, are often located in distant provinces like Guangdong, Fujian, and Zhejiang and they do not engage with the official trade associations. Thirdly, since these associations target trading firms, their memberships were typically limited to companies granted foreign trading rights by the government. Until the revision of the Foreign Trade Law in 2004, MOFCOM granted trading rights only after careful examination and subject to particular criteria. The high procedural threshold effectively limited trading rights to state-owned enterprises and large companies. Since most small and medium-sized companies did not enjoy trading rights, they could not join the associations. Fourthly, these trade associations are government-established, and tend to be bureaucratic and non-responsive to companies' needs and demands. Companies rarely turn to the trade associations since they view the associations as governors, rather than representatives. As one lawyer told authors, "This is central planning." The lawyer suggested that the free formation of independent trade associations will signal China's becoming a market economy.

In the last decade, more independent industry associations have emerged, representing a significant development in China, catalysed by its integration into the global economy. These private associations respond to company interests. Their scope of coverage is usually narrow

[9] For a detailed discussion of the case, see ibid 643-649.

[10] ibid 653.

[11] For a detailed discussion of the mechanism, see Henry Gao, 'Public-Private Partnership: The Chinese Dilemma' (2014) 48 Journal of World Trade 983.

[12] ibid 997-1004.

and tend to cover just a single product or several closely related products. For example, there are associations for fasteners, for parasols, and for cigarette lighters. Such high degree of product specialization facilitates their ability to identify specific trade measures affecting the industry, such as antidumping investigations. The new associations are located in the cities and counties where industry operates, such as in provinces such as Zhejiang and Guangdong. These local associations accept both exporters and manufacturers as members, and are more representative of the overall industry's interests. As these associations are formed on companies' own initiatives, they are more responsive to the companies' needs and demands. Companies are more comfortable approaching them when they encounter trade barriers.

To help their members deal with trade barriers, the private industry associations hire personnel with trade law expertise, train existing staff, and work with government trade departments and private law firms in individual cases. The EU's 2007 antidumping investigation on Chinese iron and steel fastener imports illustrates the proactive role that local industry associations can play. In that case, the Jiaxing Fasteners Export and Import Industry Association helped fight the EU investigation at every step of the process. It helped firms complete the EU antidumping questionnaires and worked with lawyers to challenge the EU measures before EU courts, a WTO panel, and the Appellate Body.

The association engaged in extensive lobbying efforts. Its representatives went to Brussels to meet with Commission officials and work with other stakeholders, such as European importers, distributors, and downstream industries, to lobby against the EU investigation. After the Commission imposed anti-dumping duties, the association pressed MOFCOM to initiate an anti-dumping investigation against EU producers as retaliation, and to file a WTO complaint that led to an Appellate Body ruling against the EU. It also convinced the government to challenge the EU's compliance with the Appellate Body's findings.

This arrangement involved public-private coordination comprising the central government, local government, an industry association, individual companies, and private lawyers. As one Chinese lawyer told the authors, he learned how US trade associations operate when he worked with a US law firm in Washington DC. Now in China, he advises his clients to form industry-led coalitions with a secretariat to defend themselves against foreign antidumping proceedings. Such arrangements represent learning from US practice.

In addition to assisting companies in individual cases, new industry associations provide other trade-related services, such as the creation of Foreign Trade Prewarning Centres. These centres monitor trade data in a particular sector and alert companies when they identify risks of impending trade barriers. First pioneered in Zhejiang Province, more than 100 pre-warning centers had sprouted around the province by late 2011. Linking more than 6,000 companies in sectors ranging from textiles and clothing, to steel, consumer electronics, and agricultural products, the centres cover every major regional economic block in the province. On average, every centre has two full-time staff. They distribute pre-warning information to companies through newsletters, websites, bulk text message broadcasts, and instant messaging programs. In 2010, the centres in Zhejiang sent more than half a million pre-warning messages through websites and text messages. Based on the experience in Zhejiang, associations in other provinces established similar pre-warning centres.

Forming independent industry associations remains a much greater challenge in China than in the US or Europe. A Chinese lawyer who earlier worked for a law firm in the US listed three challenges. First, he finds that "the mentality in China" differs because the firms are so focused on competing against each other in foreign markets that they have trouble cooperating in foreign antidumping investigations. Secondly, the firms lack faith that WTO law can help them, given the frequent limits of real market access following a WTO case.

Thirdly, creating *ad hoc* coalitions is much more difficult in China because they invite closer scrutiny by the Chinese government. These challenges inhibit the bottom-up push from Chinese industries to organize collectively, hire lawyers, bring matters to MOFCOM, and challenge foreign measures. Nonetheless, the development of independent industry associations for trade matters represents a significant development in China.

3. Our Assessment

China has been very successful in building its legal capacity on WTO law since its accession. Such successful experience provides many useful lessons for other developing countries.

First, the Chinese experience shows the importance of government initiatives that help catalyse and enlist the support of the trading sector and individual expertise. The key reason behind the success of the Chinese capacity-building efforts is that they combine government initiatives with individual professional expertise from outside and also take support from private companies and trade associations. While there were some difficulties in early years due to lack of communication channels between the government and these actors, the gaps have been narrowed through innovative initiatives such as the Trade Barrier Investigation mechanism and the Quadrilateral Coordination mechanism. For most developing countries, it is important for the government to take the lead in spreading knowledge on WTO law in order to generate support from the trading sector and legal professionals, including academics, in the country.

Secondly, WTO capacity-building efforts not only help to directly enhance the capacity of the government in participating in WTO disputes and negotiations, but also help the government implement WTO commitments and ensure that such implementation furthers the government's development goals. Moreover, the capacity-building efforts help the government and private firms identify and address foreign trade barriers that can be challenged under WTO law in litigation and in negotiations in the shadow of litigation.

Thirdly, the enhanced capacity on WTO law can have spill-over effects in other areas of international economic law. As the Chinese experience illustrates, knowledge and experience gained on WTO matters can be transferred and used in other fora such as in regional and bilateral trade agreements, as well as in matters of international investment law that involves issues of market access and non discriminatory treatment.

Other developing countries nonetheless should recognize the limitations of the Chinese model and analyse carefully their own needs in light of their own national contexts. First, the WTO dispute settlement system might not be suitable for all countries' trade claims because, for many developing countries, the bulk of their foreign trade is most commonly affected by preferential regimes such as the Generalized System of Preferences, region- or country-specific preference programs such as the Cotonou Agreement, and free trade agreements. For them, the WTO dispute settlement system may be of less use as it only applies to the "covered agreements" under the WTO's umbrella, and not to these other arrangements of greater importance to their exports.

Secondly, for many developing countries, investing in extensive home-grown expertise in WTO law is not required because the likely benefits are limited. For smaller developing countries, the value of individual trade claims is less because of the smaller amount of exports and may not justify the costs of WTO litigation. This is especially important as the countries may have other priorities. Thus, some developing countries may choose not to invest in WTO capacity building, which requires a steady stream of cases to sustain the expertise. This problem existed even for a big country like China, which had a dry spell of WTO cases for

three years after its accession. Thus, not investing extensively in WTO legal capacity building might be a rational decision for a small or developing country.

Thirdly, even for developing countries with real needs and resources to build WTO legal capacity, the Chinese model may be difficult to replicate. With its unique political system, China could simply order government officials and private actors to undergo training in WTO law. But this approach is not possible in most countries due to their political system. At the end of the day, demand for WTO legal capacity should come from commercial firms, which are the most directly affected by foreign trade barriers. This process is partly reflected in the Chinese experience of rise of independent trade associations in some sectors to organize collectively to combat trade barriers.

Despite these obstacles, it might be feasible for many countries to mobilize the trade associations and other stakeholders to develop voluntary programs to build internal legal capacity. For example, secondment programs that enlist academics and private lawyers to work with a country's trade ministry and WTO mission can be a good way to attract bright professionals to advance the government's trade policies and defend its trade interests.

The Chinese experience in WTO legal capacity building provides an important case study of how a WTO member managed to overcome its capacity constraints to become one of the most experienced players in WTO law and dispute settlement. The story provides insights into how WTO members can learn to adapt to the WTO legal system to defend their trade interests. Hopefully, this study can inspire other WTO Members to build up their WTO legal capacity in their own ways.

Chapter 8. India and the World Trade Organization: Charting a New Model of Trade Law Capacity Building

James J. Nedumpara and Amrita Bahri*

1. Introduction

India's journey in building capacity in international trade law is a story worth telling: there have been several excellent articles on this topic in recent times.[1] However, there have been fresh challenges and new methods; in particular, emerging economies have carved out their own prototypes for developing capacity to deal with the World Trade Organization (WTO) and other economic treaties. The quest for trade law capacity building may be borne out of necessity and precipitated by the apparent turgidities of the issues, unusually tight deadlines and, perhaps, the judicialized nature of the dispute settlement process. It may also be due to the fact that most of the emerging economies treat active participation in WTO matters as an important feature of playing a key role in institutions of global governance. This chapter will focus on India's reinvigorated role in playing a crucial role in institutions of global governance, especially the WTO dispute settlement system.

Participating in WTO or investment dispute settlement is often challenging. Picking one's battles, especially in monitoring and choosing trade measures for dispute resolution; evaluating the political, economic and legal costs and benefits of such actions; and identifying and selecting the right personnel to pursue these matters to their logical conclusion requires a good understanding of the system and deep engagement with several stakeholders. In short, it requires commitment, strategising and planning. Of late, the launch of international trade disputes has been unexpected and has caught many countries off-guard. The recent developments in the field of international trade underlie the importance of having a strong domestic trade law bar and other supporting institutions.

This study provides one of the most practically informed and empirically grounded analyses of how India has strengthened its dispute settlement participation in trade law through capacity building, using cost-effective strategies employed at the domestic level. In particular,

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[1] Gregory Shaffer, James Nedumpara and Aseema Sinha, 'State Transformation and the Role of Lawyers: the WTO, India and Transnational Legal Ordering' (2015) 49 Law and Society Review 595; James Nedumpara, 'WTO, State and Legal Capacity Building: An Indian Narrative' in Leïla Choukroune (ed), *Judging the Sate in International Trade and Investment Law* (Springer 2016) 33; Abhijit Das and James Nedumpara (eds), *WTO Dispute Settlement at Twenty: Insider's Reflections on India's Participation* (Springer 2016); Amrita Bahri, 'Pubic Private Partnership: Enabling India's Participation at WTO Dispute Settlement Mechanism' (2016) 8(2) Trade, Law and Development 151, 157; Gregory Shaffer and others, 'Equalizing Access to the WTO: How Indian Trade Lawyers Build State Capacity' in David B Wilkins, Vikramaditya S Khanna and David M Trubek (eds), *The Indian Legal Profession in the Age of Globalization* (CUP 2017) 631; Mihaela Papa and Aditya Sarkar, 'Rising India in Investment Arbitration: Shifts in the Legal Field and Regime Participation' in David B Wilkins, Vikramaditya S Khanna, and David M Trubek (eds), *The Indian Legal Profession in the Age of Globalization* (CUP 2017) 705; Amrita Bahri, *Public Private Partnership for WTO Dispute Settlement: Enabling Developing Countries* (Edward Elgar 2018) 147.

this chapter examines the steps that India has taken to transform its domestic institutions and key participants by responding proactively to the demands of the WTO legal system.

Methodologically, this chapter draws from several interactions and interviews the authors have made with a large number of key public and private sector participants working on trade policy matters. The authors of this chapter, in their course of work, have interacted with multiple stakeholders cutting across government, industry, law firms and civil society. One among us (Nedumpara) is currently heading a think tank established by the Government of India for building trade and investment law capacity within the Department of Commerce and other allied government agencies. The second author (Bahri) is a co-chair holder for Mexico of the WTO Chair Programme and has spent several years researching this topic with an empirical approach. She has recently published a comprehensive work on dispute settlement capacity building from the perspective of developing countries.[2] The insights and inferences that we have drawn based on our previous studies inform and guide our analysis and conclusions in this chapter.

The organization of this chapter is as follows: Sections 2 and 3 examine the importance of WTO and its dispute settlement for India. This part also narrates India's major contributions in enriching and embellishing WTO jurisprudence. Section 4 looks at the various initiatives taken by the Indian government and other public and private institutions in developing trade law capacity and creating a demand for trade law in India. A major focus of this chapter is on the role of law schools in harnessing trade law capacity in India through initiatives such as trade law moot courts and similar competitions. The discussions in this part also examine the areas where the government can play an active role in synergizing the participation of stakeholders such as law firms, law schools and industry. Section 5 concludes.

2. The WTO Dispute Settlement Mechanism: Relevance for India

The WTO dispute settlement system is a remarkable example of an international 'rule of law' and multilateral adjudication. The WTO grants several rights to its Members, whilst the WTO Dispute Settlement Understanding (DSU) provides a rule-oriented consultative and judicial mechanism to protect and enforce these rights in cases of WTO-incompatible (trade) policies. It empowers its Member States to protect and expand their international market access by challenging foreign trade practices and defending its measures through a time-defined procedure of consultation, litigation and implementation.[3]

Open markets and an increase in foreign trade activities can create more employment and investment opportunities and thereby contribute to a country's better living standards and overall development.[4] More particularly, experience in WTO dispute settlement can enhance a Member State's understanding of, and expertise in, international trade law, which the government can utilize in identifying WTO-incompatible foreign trade practices and invoking WTO DSU provisions. With the experience, expertise and confidence to "play with [WTO]

[2] Amrita Bahri, *Public Private Partnership for WTO Dispute Settlement: Enabling Developing Countries* (n 1).

[3] World Trade Organization (hereafter WTO), Understanding on Rules and Procedures Governing the Settlement of Disputes (Dispute Settlement Understanding) LT/UR/A-2/DS/U/1 (15 April 1995) <https://www.wto.org/english/tratop_e/dispu_e/dsu_e.htm> accessed 8 January 2019.

[4] Thomas W Hertel and Alan Winters (eds), *Poverty and the WTO: Impacts of the Doha Development Agenda*, (World Bank and Palgrave Macmillan 2006) 3, 4, 427; WTO, The WTO and the Millennium Development Goals, MDG 8: A Global Partnership for Development, 3-4 <https://www.wto.org/english/thewto_e/coher_e/mdg_e/mdg_e.htm> accessed 8 January 2019. This argument has been a subject of academic debate, and some authors have vehemently argued that free trade may not have a positive impact on living standard, economic growth and poverty reduction in a country. See for example, Sarah Joseph, *Blame it on the WTO: A Human Rights Critique* (OUP 2011) ch 5: 'The WTO, Poverty, and Development'.

rules",[5] the governments can develop bargaining strategies which they can deploy to amicably resolve (and defuse) trade conflicts and thereby protect their industries' trade interests in the "shadow of a potential WTO litigation".[6] Galanter refers to this process as "litigotiation", as he observes that "the career of most cases does not lead to full-blown trial and adjudication but consists of negotiations and manoeuvres in the strategic pursuit of settlement through mobilization of the court process."[7] In this manner, developing countries can strengthen their negotiating abilities once they have strengthened their litigation skills. With better bargaining and litigation strategies, and with the consequentially enhanced capacity to raise credible litigation threats, Member States can improve the terms on which they can trade with other member countries.[8]

As a founding member of General Agreement on Tariffs and Trade (GATT) 1947 and an original member of WTO, India has played a defining role in shaping the WTO jurisprudence through negotiations and litigation. It has actively participated in the WTO dispute settlement process ever since its establishment. From January 1995 to January 2018, India has acted as a complainant in 24 cases, as a respondent in 25 cases, and as a third party in around 150 cases.[9] Cumulatively, India has participated (actively or passively as a third party) in over a third of the cases filed at the WTO during this period. India's engagement with the WTO DSU can also be evidenced from the number of times it has filed complaints against its major trading partners, such as the United States (US) and the European Union (EU). Out of 24 complaints India has filed at the WTO, 11 have been against the United States and 7 against the EU.[10]

India has not only been a subject of many WTO disputes, it has also been the leading WTO Member in launching trade remedy actions to protect its domestic industry. India initiated 839 anti-dumping investigations between 1 January 1995 and 31 December 2016, which makes India the world's most active user in terms of anti-dumping initiations. India is followed by the United States (with 606 anti-dumping initiations) and the EU (with 493 anti-dumping initiations) during the same period of time.[11] India has also initiated as many as thirty-seven safeguard actions prior to 2017.[12] The very high use of anti-dumping and safeguard measures by India may, on the one hand, come across as a protectionist approach; but, on the other hand, India has its own justifications for using this measure as a legitimate means of protecting its domestic industry against import competition. Use of trade remedy instruments

[5] Gregory C Shaffer, 'How to Make the WTO Dispute Settlement System Work for Developing Countries: Some Proactive Developing Country Strategies' in Victor Mosoti (ed), *Towards A Development-Supportive Dispute Settlement System in the WTO* (2003) International Centre for Trade and Sustainable Development (ICTSD), Resource Paper No 5 <http://ictsd.org/downloads/2008/06/dsu_2003.pdf> accessed 8 January 2019.

[6] Marc Galanter, 'Contract in Court; or Almost Everything You May or May Not Want to Know about Contract Litigation' (2001) 3 Wisconsin Law Review 577, 579 has called this process 'litigotiation'. He describes it in the following words: "[T]he career of most cases does not lead to full-blown trial and adjudication but consists of negotiation and manoeuvre in the strategic pursuit of settlement through mobilization of the court process." See also, Marc Busch and Eric Reinhardt, 'With a Little Help from Our Friends? Developing Country Complaints and Third-Party Participation' in Chantal Thomas and Joel P Trachtman (eds), *Developing Countries in the WTO Legal System* (OUP 2009) 247, 248; Gregory C Shaffer, 'Developing Country Use of the WTO Dispute Settlement System: Why it Matters, the Barriers Posed' in James C Hartigan (ed), *Trade Disputes and the Dispute Settlement Understanding of the WTO: An Interdisciplinary Assessment* (Emerald Group Publishing 2009) 173.

[7] Galanter (n 6) 579.

[8] Shaffer (n 5) 10-11.

[9] WTO, Disputes by Member, <https://www.wto.org/english/tratop_e/dispu_e/dispu_by_country_e.htm> accessed 8 January 2019.

[10] ibid.

[11] WTO, Anti-dumping, <https://www.wto.org/english/tratop_e/adp_e/adp_e.htm> accessed 8 January 2019.

[12] Information and findings can be accessed at Directorate General of Safeguards under Ministry of Finance, Government of India, <http://www.cbic.gov.in/htdocs-cbec/info-act/dg/dg-safeguards> accessed 20 January 2019.

presupposes the existence of a very active and knowledgeable domestic industry capable of mobilizing support to obtain various price and cost data and ultimately the industry cooperating to file an application. This heavy use of trade remedy provisions has significantly enhanced the amount and scope of career opportunities for trade lawyers in India. It has contributed in making India's domestic trade law bar as one of the most proactive and well-informed in the world.[13]

India has also participated actively within WTO committees. Consider the cases of the Technical Barriers to Trade (TBT) and Sanitary and Phytosanitary Measures (SPS) committees. Specific trace concerns (STCs) can be raised before the Committees to consult on measures proposed or adopted by other Members on technical regulations, standards or conformity assessments. Out of a total of 495 SPS related special trade concerns raised at Committee meetings, 20 concerns have been raised against Indian measures, whilst India has raised 19 trade concerns against foreign measures. Of 554 TBT concerns that have been raised at Committee meetings before the end of 2018, 27 concerns have been raised against Indian measures, whilst India has raised 6 trade concerns against foreign measures.[14] The committee system is not, strictly speaking, a forum for the resolution of trade conflicts and disagreements. But in practice, it has contributed to "defusing trade tensions" in its respective trade disciplines. India has used the committee system as an expert-driven forum for discussing and resolving trade conflicts.

This high level of participation in various multilateral and bilateral forums can be linked to India's level of trading stakes. India's share of trade to GDP (sum of exports and imports of goods and services measured as a share of gross domestic product) has shot up from around 6 percent in the 1970s to 40 percent in 2016. Interestingly, India's share of trade to GDP in the year 2014 was, at 49.6 percent, higher than those of the US and China.[15] Today, this figure stands close to 40 percent.[16] Hence, what happens in international trade and how it is regulated multilaterally as well as bilaterally have significant ramifications for Indian economy.

Bohanes and Garza observe that "larger WTO members trade greater volumes of more diversified trade to a greater number of trading partners, which in turn leads to a greater number of potential trade frictions and greater propensity to bring disputes."[17] Shaffer and Sutton have also observed a positive correlation between market size, the capacity to participate and the power to retaliate or negotiate.[18] They observe that "[power] in the international trading system roughly corresponds to the size of a country's market – measured

[13] Interview with Mukesh Bhatnagar, former Joint Director General of Foreign Trade and currently Professor, Centre for WTO Studies, Indian Institute of Foreign Trade (New Delhi, India, 30 April 2018). Bhatnagar has recounted to us that the Indian trade remedy case handlers and the trade remedy bar are, perhaps, the most astute and knowledgeable that he has seen among developing or emerging economies. Bhatnagar is the coordinator for a WTO sponsored Trade Remedy Regional workshop that is being held in New Delhi and his views are widely borne out from his interactions with the staff of the WTO Rules Division and case handlers from different jurisdictions.

[14] WTO, The New Dataset on TBT Specific Trade Concerns (2012) <http://www.wto.org/english/res_e/publications_e/wtr12_dataset_e.htm> accessed 8 January 2019.

[15] World Bank, Indicators, <https://data.worldbank.org/indicator/> accessed 8 January 2019.

[16] ibid.

[17] Jan Bohanes and Fernanda Garza, 'Going Beyond Stereotypes: Participation of Developing Countries in WTO Dispute Settlement' (2012) 4(1) Trade, Law and Development 45, 57.

[18] Gregory Shaffer and Charles Sutton, 'The Rise of Middle-Income Countries in the International Trading System' in Randall Peerenboom and Tom Ginsburg (eds), *Law and Development of Middle-Income Countries: Avoiding the Middle-Income Trap* (CUP 2014) 64.

in terms of the ability of a country to exercise leverage by offering market access, or threatening to withdraw access, for foreign goods and services."[19]

These studies suggest that there is a positive correlation between a country's participation in multilateral trading system and its overall trading stakes. In the case of India, high aggregate trading stakes, export-oriented economic structure and a wealth of DSU experience has prompted the country to develop its dispute settlement capacity in this field. However, looking merely at the quantitative aspects of India's participation may not fully justify why India's participation experience is worth sharing and learning from. It is also important to examine the way India has handled and prepared for the dispute settlement procedures at the domestic level and how it has litigated these disputes at the WTO. The following section provides a bird's-eye view of certain landmark litigations where India's involvement was instrumental in shaping WTO jurisprudence.

3. India's Engagement with the WTO DSU: Landmark Contributions

India has played an important role in shaping WTO jurisprudence through its proactive involvement in dispute settlement. India's contributions lie in identifying novel causes and making innovative claims and arguments. The Appellate Body ruling in *US – Shirt and Blouses*,[20] a case decided in the early days of the WTO, still stands as the most authoritative proposition of law on the burden of proof requirements in WTO dispute settlement. *US – Shrimp*[21] remains till date as one of the seminal cases in the history of the WTO, especially in connection with the relationship between the WTO regime and environmental concerns.[22] India was one of the complaining countries in this case, challenging the United States' regulations on importation of shrimp products purportedly taken for protecting sea turtles. As Appleton notes, *US – Shrimp* laid down the foundations for importation, under very limited conditions, on another Member's compliance with the regulating Member's environmental rules and other concerns based on how a product is produced—a debate centring the acronym "PPM" in WTO terminology. The outcome in this dispute is credited by many to have "saved the WTO".[23]

Turkey – Textiles[24] is a unique case in the history of the WTO. It examined, for the first time, whether a GATT-inconsistent measure can be justified for the formation of a Customs Union. In *EC – GSP*,[25] the WTO Panel and the Appellate Body had the opportunity to clarify the interpretation of the Enabling Clause and whether a GSP granting country can differentiate between developing countries based on certain conditionalities. In *EC – Bed Linen*,[26] the concept of zeroing – a practice of ignoring negative margins in dumping calculations – was given a definitive rejection. That the concept of 'zeroing' has consumed a significant amount of time and has posed major systemic challenges to the WTO is another matter.

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[19] ibid.

[20] Appellate Body Report, *United States – Measures Affecting Imports of Woven Wool Shirts and Blouses form India*, WT/DS33/AB/R (adopted 23 May 1997).

[21] Appellate Body Report, *United States – Import Prohibition of Certain Shrimp and Shrimp Products (US - Shrimp)*, WT/DS58/AB/R (adopted 6 November 1998).

[22] Arthur E Appleton, 'The *US – Shrimp* Appeal, 20 Years On' in Abhijit Das and James J Nedumpara (eds), *WTO Dispute Settlement at Twenty: Insiders' Reflections on India's Participation* (Springer 2016) 93.

[23] John H Jackson, *Sovereignty, the WTO, and Changing Fundamentals of International Law* (CUP 2006).

[24] Appellate Body Report, *Turkey – Restrictions on Imports of Textile and Clothing products*, WT/DS34/AB/R (adopted 19 November 1999).

[25] Appellate Body Report, *European Communities – Conditions for the Granting of Tariff Preferences to Developing Countries*, WT/DS246/AB/R (adopted 20 April 2004).

[26] Appellate Body Report, *European Communities – Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India*, WT/DS141/AB/R (adopted 12 March 2001).

More recently, in the case of *US – Carbon Steel*,[27] the Appellate Body made important clarifications on the definition of 'public body' under the SCM Agreement. In the landmark case *US – AD/CVD (China)*,[28] the Appellate Body laid out the general principle that a public body is an entity that "possesses, exercises or is vested with governmental authority". India's appeal in *US – Carbon Steel* provided much-needed clarity on the legal evidentiary elements necessary for demonstrating these characteristics. Additionally, in *US – Customs Bond*,[29] the Appellate Body had the opportunity to examine the operations of the customs bonds requirements in anti-dumping proceedings in legal systems following the retrospective system of duty collection in anti-dumping, for instance, the United States. More recently, in *India – Solar Cells*,[30] India invoked the general exception under Article XX(j) of the GATT 1994, which contributed to a better understanding of this exception in WTO rules.

There is no denying the fact that each of the above decisions made an indelible impact on the WTO legal system. Almost all of the above decisions have been frequently cited in subsequent WTO panel and Appellate Body decisions. These path-breaking decisions would not have been possible without an active domestic industry, responsive government officials, and the country's willingness to engage in a long, time-consuming and resource intensive dispute settlement process.

4. Participation Capacity and Developing Countries: India as an Exemplar

Academics, lawyers, economists and political scientists have written extensively about the participation challenges that developing countries in general face with the WTO DSM.[31] Bohanes and Garza observe that the main challenges which various developing countries have faced in the process of enforcing international trade rights are the lack of legal capacity, weak domestic governance, insufficient retaliatory powers and fears of political consequences and pressures.[32] Shaffer succinctly describes these challenges as "constraints of legal knowledge, financial endowment and political power, or, more simply, of law, money, and politics."[33]

Multiple participation challenges, as listed above, are central to the most common problem that developing countries have faced: the problem of capacity constraint. The term 'capacity' in this chapter has a broad connotation as it includes a country's political, legal and financial power, and it generally refers to a country's overall ability to utilise the WTO dispute settlement provisions. Capacity, in the context of the WTO DSU, should not be measured on purely economic indicators (such as a country's per capita income) as a country can have a low per capita income but large export markets and, therefore, advanced expertise and experience of participation in the WTO DSU.

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[27] Appellate Body Report, *United States – Countervailing Measures on Certain Hot-Rolled Carbon Steel Flat Products from India*, WT/DS436/AB/R (adopted 19 December 2014).

[28] Appellate Body Report, *United States— Definitive Anti-Dumping and Countervailing Duties on Certain Products from China*, WT/DS379/AB/R (adopted 11 March 2011) para 317.

[29] Appellate Body Report, *United States – Customs Bond Directive for Merchandise Subject to Anti-Dumping/Countervailing Duties*, WT/DS345/AB/R (adopted 1 August 2008); Appellate Body Report, *United States – Measures Relating to Shrimp from Thailand*, WT/DS343/AB/R (adopted 1 August 2008).

[30] Appellate Body Report, *India - Certain Measures Relating to Solar Cells and Solar Modules*, WT/DS456 (adopted 16 September 2016).

[31] For details, see Michael Ewing-Chow, 'Are Asian WTO Members Using the WTO DSU "Effectively"?' (2013) 16 Journal of International Economic Law 669; Shaffer (n 6) 182–185.

[32] Bohanes and Garza (n 17) 69.

[33] Gregory C Shaffer, Marc Busch, and Eric Reinhardt, 'Does Legal Capacity Matter? A Survey of WTO Members' (2009) 8 World Trade Review 559, 572.

India, for example, has low indexed per capita income, but it is a major emerging economy which has participated actively at the WTO DSU and has demonstrated its capacity to mobilise the required resources to monitor and enforce its WTO rights. Hence, the dispute settlement capacity should be measured by taking systemic account of a country's ability to mobilise resources, as and when required, for monitoring and enforcing its WTO rights. The problem of 'capacity constraint' refers to a situation where a country is unable to effectively and fully utilize the WTO DSU provisions due to lack of required resources and expertise. Insufficient capacity therefore impedes a country's ability to utilize the remedies available under the WTO DSM, be it in litigating or defending a dispute; conducting formal or bilateral consultations with foreign governments; or ensuring proper implementation, monitoring and compliance. This chapter, in the following section, will address a pertinent question: How has India – a developing yet a very reticent player during the GATT days – overcome its capacity-related challenges and enhanced its capacity to resolve disputes at WTO DSM?

Most of the capacity-related challenges faced by developing countries are deeply rooted in the domestic context of these countries and therefore solutions can best be found at the domestic level. For example, a paucity of lawyers and government officials trained and experienced in WTO law has, to some extent, necessitated hiring expensive overseas lawyers. The lack of this capacity could be attributed to the absence of educational or training institutions in the field of trade or investment law. Likewise, lack of information and evidentiary documents with a complaining or responding government could be due to the absence of inter-ministerial coordination and the presence of disengaged private stakeholders. Dispute settlement activity often forces the concerned government agencies go helter-skelter to look for data or evidence which may otherwise either remain uncollected or unnoticed in hidden troves. It is therefore important that these constraints are directly dealt with at the domestic level. In line with this argument, this chapter will focus on how India has built its in-house WTO participation capacity by introducing changes at the domestic level.

4.1 Dispute Settlement Capacity Building: Domestic Strategies

(a) The Evolution of a Trade Law Bar in India

India comes across as a prominent example of a developing country that has increased its trade law expertise at the domestic level. The Government of India has encouraged domestic law firms to develop their international trade law expertise. There was a deliberate effort to enhance the capacity of domestic law firms and other legal institutions. This has especially been the trend since 2011. Sometimes, the capacity of the empanelled law firms to handle complex trade law matters might have appeared somewhat suspect. However, the absence of prior experience was not negatively viewed against any of the chosen law firms in awarding work. A trade lawyer working for an Indian law firm observes the following:

> India has started to build its domestic legal capacity by following a unique approach. The government has hired various local law firms which had some trade law expertise and it has thrown them into a deep end, as if the government was telling them to "learn to swim or sink". We were, and are, being encouraged by the government to gain knowledge and expertise over international trade laws.[34]

[34] Interview with a trade lawyer, Luthra & Luthra [name withheld] (Delhi, India, 21 June 2013). The interviewee further observes the following: "With more numbers of cases being litigated by and against India mainly from the year 2001, the government decided to expand its legal expertise. It was not feasible anymore to hire expensive Geneva based lawyers, especially in the cases where India was challenged. It was also not wise to exclusively rely on a sole trade lawyer in India. The government therefore started to hire other Indian lawyers from different law firms based in India."

The lawyer states that the government had, in the past, hired law firms based in India that had no previous WTO experience, and had asked them to prepare and present a case at the WTO Panel on their own. The same interviewee commented that this strategy "enhances the potential and brings out the best in domestic law firms",[35] which suggests that the selection process works sufficiently well. The Ministry of Commerce in India has started to hire more and more India-based trade lawyers to manage foreign trade disputes on behalf of the government. This practice applies not only in WTO matters, but also in investment treaty arbitrations and trade remedy investigations such as countervailing duty investigations. Until the year 2002, India mainly hired Geneva- or Brussels-based lawyers for litigating WTO cases,[36] and until the year 2005, a single Indian lawyer was repeatedly hired for preparing defences.[37] However, most noticeably from 2006 onwards, the government has started engaging a larger number of domestic trade lawyers.[38] At the same time, whenever additional expertise has been required, the Indian government has not shied away from engaging international law firms or agencies such as the Advisory Centre on WTO Law (ACWL). For example, for the *India – Agricultural products* case, the Indian government engaged the services of the ACWL and a private U.S. based consultant in defending India in an Article 22.6 (of the DSU) proceeding. The ACWL also provides need-based legal advice to the Trade Policy Division of the Ministry of Commerce as well as to India's Permanent Mission in Geneva on various WTO matters.

Over the past few years, the procedure for the selection of trade lawyers has become somewhat "systematic" in nature. The Ministry of Commerce issues a call of interest to the Government of India empanelled law firms that have expertise in the relevant subject matter. The law firms that respond to the call are asked to analyse a given trade matter and make a presentation on their legal analysis. They are simultaneously asked to provide information about their team of trade lawyers and their relevant experience in the subject matter. The Trade Policy Division of the Ministry of Commerce examines their credentials and takes into account the novelty and thoroughness of their oral and written opinions before taking a decision on hiring the law firms.[39]

Despite the remarkable increase in trade law work in India, international trade law is not entirely a stand-alone field of practice for most of the law firms. Most trade lawyers often get involved in tax, competition and commercial arbitration matters. Hitherto, international trade law is a small market with a limited number of professionals, and trade disputes hardly occur outside the WTO dispute settlement system. However, the future looks more promising. There is scope of work for lawyers in areas such as bilateral investment treaty arbitration and disputes relating to regional trade agreements, where Government and industry are increasingly looking for assistance. This has been a drastic shift from the traditionally occasional nature of trade dispute settlement activity.

[35] ibid.

[36] The foreign lawyers hired by India in the years before 2000 were Frieder Roessler, Edwin Vermulst and Folkert Graafsma. Arthur Appleton appeared for the complainants in *United States – Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58. Scott Anderson was also involved on behalf of India in a steel dispute, namely *United States – Anti-Dumping and Countervailing Measures on Steel Plate from India*, WT/DS206.

[37] Krishnan Venugopal was the sole lawyer hired by the Government of India for disputes challenging Indian trade measures from the year 1996 to 2000. Venugopal worked alongside other international lawyers such as Frieder Roessler.

[38] The new generation of trade lawyers hired by the government after 2005–2006 include: ACWL lawyers, Krishnan Venugopal, Lakshmkumaran and Sridharan, Economic Laws Practice, Luthra & Luthra, and Claras Law Firm.

[39] Interview with an official representative, Ministry of Law & Justice, Government of India [name withheld] (Delhi, India, 3 June 2013).

It is pertinent in this context to discuss the statistics on India's trade disputes. Figure 8.1 provides a snapshot of India's trade disputes (as a complainant and respondent) after joining the WTO.

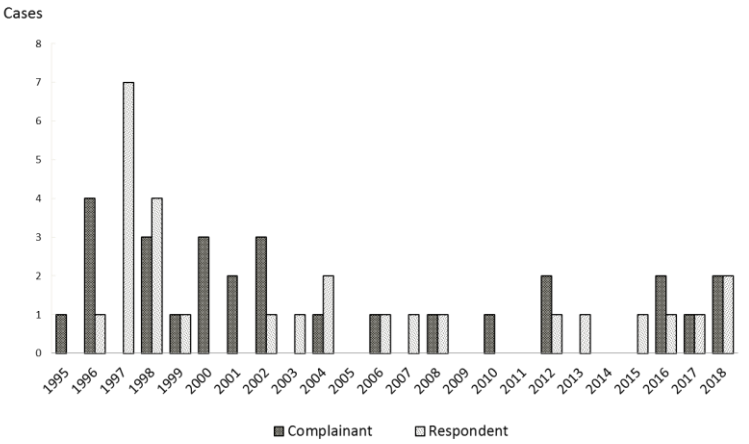

Figure 8.1: India's Trade Disputes
Source: WTO (1995-2017) (Updated as of 31 July 2018)

This chart shows that the high points for India as a complainant as well as respondent were in the years 1995 to 1998. The spike during this time could be in view of the possible double counting of multiple complaints in *India – QR* as separate disputes, but there is no denying the fact that from 2005 until 2012, India had a fairly low dispute settlement activity. As explained by Rajeev Kher, former Commerce Secretary, India was pursuing a "dispute avoidance" strategy during this period.[40] During this period, India had resolved a number of trade issues with its trading partners without escalating these matters to full-fledged WTO disputes. It is clear that India had negotiated for settlement and resolution of issues under the shadows of the WTO framework during this period. The number of WTO disputes involving India has picked up after 2012. More recently, especially in 2017-18, there has been an escalation of disputes in view of global tit-for-tat trade measures. India is involved in at least five cases (compliance or fresh disputes) with the United States as of writing this chapter.[41]

The statistics show that there was a high demand for trade lawyers with expertise and experience in WTO law until 2005. However, that momentum did not continue after 2005-06. As a result, WTO law enthusiasts in India struggled to get roles in law firms exclusively dedicated to WTO law practice or any WTO law related work for that matter. Hence, most lawyers with a specialization in WTO law often find themselves working in anti-dumping

[40] Interview with Rajeev Kher, former Commerce Secretary (New Delhi, India, 15 December 2017).

[41] These cases include, Recourse to Article 21.5 of DSU by India, *India – Measures Concerning the Importation of Certain Agricultural Products*, WT/DS430/21; Recourse to Article 21.5 of DSU by India, *India – Certain Measures Relating to Solar Cells and Solar*, WT/DS456/20; Request for Establishment of Panel, *United States – Certain Measures Relating to the Renewable Energy Sector*, WT/DS510/2; Request for Consultations, *India – Export Subsidies*, WT/DS541/1; Request for Consultations, *United States — Certain Measures on Steel and Aluminum Products*, WT/DS544/1.

investigations or they often migrate to other fields of practice, such as competition law, tax law or commercial arbitration.[42]

The occasional nature of WTO practice serves as a major discouragement for young trade law enthusiasts and lawyers. The law firms focusing on trade remedy work continued to deepen their practice in this area, whereas non-trade remedy focused boutique law firms depended on government work on WTO to remain in this field. These disciplines of trade law are often distinct and demand separate and different type of skill sets. For example, a trade lawyer focusing on anti-dumping is encouraged to learn cost accounting, finance or indirect taxation.

To succeed in the field of international trade law, law firms need more than just legal expertise and familiarity with trade law. They should have skills in business strategy, organizational aspects and marketing, so that they can reach out to their domestic and foreign clients proactively. In our interaction with business firms, it appeared fairly clear that business managers are unlikely to take the lead in initiating trade cases. Either external or in-house lawyers would have to take the lead. For example, a major India company used to regularly organize sessions with business managers and lawyers to discuss the implications of trade agreements on their businesses.[43]

There are still major impediments to the transnational engagement of lawyers and law firms. The closed nature of India's legal profession has not facilitated formal engagements, best friend arrangements or tie-ups between Indian and international law firms dealing with trade law. Several Indian firms formally or informally consult with international law firms or trade lawyers, but the nature of collaboration is limited. As Shaffer and Gao observe, a Chinese company will be at ease to work with a fellow Chinese lawyer working in India in an anti-dumping investigation.[44] However, the lack of liberalization in legal services has served as an impediment to facilitating these arrangements.

International trade law is increasingly becoming multi-disciplinary. It cannot be practiced in isolation from other substantive areas. The multi-disciplinary nature of WTO matters demands familiarly with other areas such as economics, accounting, sociology and political science, to name a few. The following section explores certain ideas on how India can further its dispute settlement capacity through international trade law teaching at university level.

(b) The Changing Landscape of International Trade Law Education in India

International trade law is slowly emerging as an area of interest in Indian law schools. WTO law is not a mandatory course in most of the law schools and is often offered as an elective course.[45] However, several steps have been taken at university and government levels that have impacted the landscape of WTO academia in India. Despite not being designated as a mandatory course, international trade law is increasingly being taught as a core subject in a handful of law schools in India. It has indeed become a trend among some new generation national (e.g., NLSIU, Bangalore; NLU Jodhpur; GNLU Gandhinagar; NLU Delhi) and private (e.g., Jindal Global Law School, Sonipat; Symbiosis Law School, Pune; Amity Law School, Noida) law schools to prescribe international trade law as either a mandatory or an

[42] The co-author of this chapter, Dr Amrita Bahri, who graduated as a trade law specialist from London School of Economics in 2009, spent years working in the field of international commercial arbitration amidst lack of opportunities to practice in the field of trade law.

[43] Interview with [Name Withheld], General Manager [company's name withheld] (Delhi, India, 6 April 2018).

[44] China's experience on law firms with country-desks is discussed in Gregory Shaffer and Henry S Gao, 'China's Rise: How It Took on the U.S. at the WTO' (2018) 1 University of Illinois Law Review 115.

[45] There are many universities in China for example that have made the courses on International Trade Law and WTO law mandatory for law students. More details in ibid.

elective course. In addition to this, several Indian universities offer LL.M. courses with specialization in international trade law and related subjects.[46]

Considering the importance of WTO laws and the influence that they might have on the domestic legal system, the Indian Government in the year 1996 established a WTO chair at the National Law School of India University, Bangalore.[47] A few years later, the Ministry of Human Resource development also established intellectual property right (IPR) chairs in various national law schools and other academic institutions in India.[48] Some of these Chairs are very active in conducting various capacity building activities, brainstorming sessions and national seminars in the field of international trade and IPR law.

In April 2017, the Department of Commerce established a flagship internship program with four leading law schools in India. These law schools include: National Law University, Jodhpur; National Law University, Delhi; National Law Institute University, Bhopal; and Jindal Global Law School. This initiative has been taken by the Department of Commerce to generate interest in international trade and investment law among law students and to create a cadre of young, competent lawyers in this emerging area of law. The paid internship program is run by the Centre for WTO Studies (CWS) and the Centre for Trade and Investment Law (CTIL) established at the Indian Institute of Foreign Trade (IIFT), an agency run by the Ministry of Commerce and Industry. Clearly, the Government of India has taken conscious decisions to develop capacity within academic institutions. However, a lot more needs to be done.

The teaching pedagogy of courses related to international trade law in India is heavily based on theoretical underpinnings. Traditionally in India, academics do not generally come from legal practice and are often discouraged to do both at the same time. A course on WTO law that involves students analysing legal principles in the light of actual WTO cases can prepare practice-ready trade lawyers. The use of case-based explanations can therefore be a very effective classroom technique for international trade law courses.

The lack of practice oriented learning in most Indian law schools stands in the way of India fully utilizing its talent pool and potential in various aspects of law. There are various ways to address this problem. Following lectures, students can be asked to solve hypothetical problems by applying legal principles and jurisprudence. In seminar discussion sessions, students can be presented with factual scenarios based on a trade dispute. In these sessions, they can be required to: (i) understand the facts; (ii) identify the most applicable legal provisions (ideally taught in classes preceding these discussion sessions); (iii) describe and analyse them in light of case laws; (iv) analyse the law to see if its elements are factually satisfied; and (v) and develop a tentative opinion as a panellist deciding this case or convincing arguments as a lawyer representing complainant or respondent.

In an online WTO law course delivered at *Koç* University in Istanbul by one of the authors of this chapter, the students are provided with one lecture for each topic (where they receive an explanation of the legal provisions and case laws), followed by a discussion seminar (where students are presented with a factual scenario that they have to resolve).[49] Students during these seminar discussions are asked to analyse the given factual scenario in three steps: the

[46] Examples of Indian Universities providing LL.M. in International Trade Law include NLU Jodhpur, NALSAR Hyderabad, and Amity University, Noida.

[47] National Law School of Law University, <https://www.nls.ac.in/index.php?option=com_content&view=article&id=95%3Amr-govindraj-g-hegde&catid=8%3Afaculty&Itemid=58> accessed 8 January 2019.

[48] Copyright Office, Government of India, <http://copyright.gov.in/frmlistiprchair.aspx> accessed 9 January 2019.

[49] The course outline and content are on file with the authors.

first step is where they examine the issue as a complainant's lawyer; the *second* step is where they analyse it as a respondent's lawyer; and *finally* they are asked to analyse both sides of the arguments objectively and deliver a decision as a judge. This three-step analysis enables them to appreciate the arguments from different point of views. Students tend to enjoy courses that are taught with such a practice-based approach. A pragmatic approach based on case analysis and problem solving can attract more law students into studying this field.

While India´s elite national law schools have been educating outstanding lawyers, most of these institutions have not been at the forefront in undertaking cutting edge research in the field of trade and investment law. While an increasing focus on national and international ranking is encouraging law schools to devote more resources to research, the conventional focus on teaching is likely to remain unchanged, at least for the near-term future. An international trade law course taught with such a research-led and practically-informed approach can serve to enhance the students' experience, learning and overall interest and enthusiasm in this field of law.

During our interactions with academics in some of the top-rated Indian Law schools, we were surprised to learn the teaching workload of junior faculty members. "Teaching takes a bulk of the time, with teaching load often exceeding sixteen hours a week. This is in addition to the time devoted for student mentoring and other additional University work."[50] Such an exacting teaching schedule may not be conducive for encouraging original and time consuming research initiatives. However, some of the new generation and globally oriented law schools are trying to put a focus on research. For example, Jindal Global Law School founded the Centre on International Trade and Economic Law in 2009. The research centre conducted several studies for the Government of India. One of the studies conducted by the Centre culminated in India filing a dispute against the United States on renewable energy.[51]

It is equally notable that some other Law schools, such as the National Law University, Delhi (NLU Delhi) have undertaken research initiatives with leading global corporations to develop research and capacity in areas such a technology, digital trade and intellectual property rights. NLU Delhi, and especially its Centre for Innovation, Intellectual Property and Competition (CIIPC), has been undertaking a major initiative with Qualcomm in research and technical discussions on the interface between trade, innovation, IPR and competition related issues. CIIPC had also partnered with the Appellate Body of the WTO in organizing the WTO@20 Conference in New Delhi in February, 2017.[52]

In addition to research units, Indian law schools can establish international trade law clinics for imparting substantive knowledge with a problem-solving approach. For example, Jindal Global Law School, to where one of the authors is affiliated, is partnering with the Georgetown University Law Center, in the TradeLab clinics initiative. TradeLab is a global network of students, economists and legal practitioners seeking to empower countries and small stakeholders in effectively participating in and taking the full advantage of the global trading system.[53] The students working in these clinics could also work internationally with other clinics or group of students at foreign universities through the TradeLab clinics initiative.[54] The TradeLab project allowed Jindal students to work in pairs with students from

[50] Interview a professor based in India [name and place withheld] (27 April 2018).

[51] Request for Establishment of Panel, *United States – Certain Measures Relating to the Renewable Energy Sector,* WT/DS510/2.

[52] WTO@20 Conference, Program (New Delhi, 16-18 February 2017) <http://www.law.uci.edu/faculty/full-time/shaffer/WTO-at-20-Delhi-Draft-Program_External.pdf> accessed 8 January 2019.

[53] TradeLab, <https://www.tradelab.org/about>, accessed 8 January 2019.

[54] TradeLab, Pilot Clinics, <https://www.tradelab.org/pilot-clinics> accessed 8 January 2019.

Georgetown University Law Center and the Trade Policy Training Centre in Africa (TRAPCA) on international trade law related projects under the supervision of academic and practising mentors. The project also provides an opportunity for students to learn from the experiences of students from various partner institutions located in other jurisdictions.

The TradeLab clinics initiative enabled the students to work on a range of practical trade law oriented tasks. For example, they can conduct research and analysis for a treaty negotiation or a compliance assessment of existing or proposed foreign trade laws and measures. They can draft advocacy positions and assess legal claims or defence strategies in the context of existing multilateral or bilateral agreements. They can also work on the research and drafting of third party submissions, legal memoranda or amicus curiae briefs for assistance in WTO disputes.

A clinical learning environment can have a sustainable capacity-building impact as it can attract young law enthusiasts in this field of study and students can learn about this area not just by listening but by doing activities or solving problems. These clinics can also help law students develop and sharpen their problem-solving, research, drafting and argumentation skills – all of which are essential traits of a being a successful lawyer. Law schools can also impart international lawyering skills through moot court competitions and debates. Through this skill-based pedagogy, students can be "practice-ready" as they graduate from their universities.

Following the TradeLab clinics' model, these university-level clinics can recruit small groups of students that have already taken an introductory international trade law course. The students in these clinics can be assigned trade disputes and disagreements (from existing WTO cases), and they can be asked to work on a variety of tasks including research, drafting and presentation of arguments. International trade law faculty, in association with trade lawyers and other trade law professionals in India, can design a semester-wise roadmap of projects and supervise the work of students on a regular basis. PhD students and research assistants can run the day-to-day operations of these clinics as instructors or coordinators. In short, the possibilities of these clinical learning programs are immense.

Indian Law schools have been at the vanguard of promoting and supporting moot court activities, at both national and international levels. The moot court competition on international trade law organized by the Gujarat National Law University (GNLU) since 2009 is one such example. This moot court attracts participation from several institutions from India and abroad and is one of the leading moot court competitions in the field of trade law. Previous editions of this moot court have attracted teams from top universities such as Duke University, National University Singapore and George Washington University.[55] As Ashish Chandra, a trade lawyer with a prominent law firm in Delhi confided to us, "This was by and large a student initiative. Nobody realized its potential."[56] Some of the students who have successfully participated in this competition have eventually gone on to work at the WTO Secretariat and in international law firms.

The European Law Students' Association (ELSA) organizes a moot court competition on issues related to international trade law.[57] This event attracts not only law students from all over the world, but also eminent trade law experts, academics and WTO legal officers in the roles of team coaches, judges and mentors. This competition seeks to advance the

[55] For details, see 11th GNLU International Moot Court Competition, <https://gnlu.ac.in/GIMC/Home> accessed 8 January 2019.

[56] Interview with Ashish Chandra, Luthra and Luthra Law Offices (New Delhi, India, 25 May 2018).

[57] For details, see ELSA, <https://johnhjacksonmoot.elsa.org/> accessed 15 January 2019.

understanding of WTO law and its jurisprudence amongst the young academic community of various Member States, and to train young law students and lawyers for future trade disputes and negotiations. In this manner, it contributes to the enhancement of countries' legal capacity through the training of budding trade lawyers and negotiators in a cost-effective manner.

Indian law students, benefitting from the strong legal culture of case law based legal reasoning in India – which is predominantly a common law jurisdiction – tend to perform quite well at mooting competitions. Indian law students have been very active participants in ELSA since 2002. In fact, Indian law schools have outcompeted several leading Asian teams and have often found a berth in the Final Oral Rounds. Teams from the National University of Juridical Sciences, Kolkata (NUJS) have won two ELSA moot court competitions in 2009 and 2014 respectively. Jindal Global Law School was a semi-finalist in the Final round held in 2011. NLU Jodhpur was the runners up in 2015. More recently in 2018, NLSIU Bangalore emerged as the runner up in addition to winning several prizes for individual performances. Only a few other countries have a set of teams that have done better in this leading international moot court competition. Teams from Australia have won this competition on four occasions (in 2005, 2006, 2008 and 2010); teams from the UK have won thrice (in 2002, 2003 and 2004).

A cursory look at the legal background of these winning teams lends credence to the view that a good grounding in common law reasoning and concepts provides a sound footing in the field of public international law. It is also a testimony to the rich traditions of legal culture in India and how investing in law could enable countries such as India to play a leading role in institutions of global governance such as the WTO. With the largest young population in the world, well ahead of China, and the vast number of law schools and universities focused on teaching and researching law in a common law setting, the emerging legal profession in India is poised to make a global impact. With growing opportunities available within India, the new generation of Indian lawyers can play a significant role in ensuring a greater participation in international dispute settlement, especially in economic treaties. The dependence on foreign law firms and lawyers is bound to diminish in the future.

It is a well-known fact that for a law student, learning takes place not only through the classroom instructions but also through practical experience. Internships have become quite popular in the field of international trade law. The Government of India, as explained in the previous section, plays a vital role in this aspect. By outsourcing trade law work to a number of empanelled law firms, the Government has provided avenues for international trade law practice in private law firms. As stated above, several Indian law firms have desks for international trade and investment law. Examples include APJ-SLG Law Offices, Economic Laws Practice, Lakshmikumaran & Sridharan, Seetharaman Associates, PLR Chambers, Clarus Law Asscociates, Cyril Amarchand Mangaldass, Dua Associates, and Luthra and Luthra Law Offices. The increasing trade related work given to the private law firms based in India keeps them busy and motivated. The fact that more than 100 law students work with these law firms as interns during their summer and winter breaks on an annual basis is extremely encouraging and heralds a promising future for trade and investment law in India.[58]

(c) Creating a Demand for Trade Law: Third Party Participation in WTO Disputes

WTO Members with substantial interests in a matter can participate as a third party in the consultation and litigation of that dispute without having to pay the litigation costs. Mere observation of dispute settlement proceedings can help a country's officials, practitioners and academics become more familiar with how the overall dispute settlement process works; how

[58] Careers 360, <https://law.careers360.com/articles/8857-all-about-law-internship> accessed 20 January 2019.

documents are drafted and substantiated with evidence; and how arguments and counterarguments are made and presented during the hearings. Third party participation also enhances a WTO Member's opportunity to influence outcomes in areas in which it has systemic interests. Many developing countries, such as China, Brazil, Mexico and Argentina, have observed these benefits and have hence utilized the third party participation option to build upon their dispute settlement capacity.[59]

In the early years of WTO, India was not a frequent third party participant in WTO disputes. It might be surprising, for example, to notice that India did not participate as a third party in some of the most important cases, such as the *US – Tuna II*[60] case. From 1995-2000, India joined in fewer than ten percent of disputes filed at DSU as a third party. However, that proportion has increased drastically; India has joined in more than fifty percent of disputes filed between the years 2012 and 2017.[61] India has, in most recent years, actively participated and submitted written submissions as a third party in several WTO disputes. By observing the dispute settlement proceedings as a third party, India has enhanced its legal expertise and dispute settlement experience. This "learning by observation" approach has greatly improved the WTO DSU knowledge of government officials and domestic law firms.

A prominent India law firm noted that its involvement in preparing third party submissions for India in disputes such as *US – COOL*[62] and *Canada – Renewable Energy*[63] enabled it to closely track the judicial approach in some of the topical areas of WTO such as TBT and clean energy disputes. This experience shows that handling third party disputes is a way of anchoring in this field before taking up more substantive engagements such as a full-fledged dispute. As noted by a senior official in the Department of Commerce, advisory opinions and third party submissions help the government to "gauge the level of preparedness" of the interested law firms. In a way, working in such less remunerative, yet professionally demanding, work is one way of breaking into this practice.[64] However, there is no denying the fact that preparation of third party briefs is not always financially rewarding for law firms or lawyers in India.

Frequent third party participation could also be used as a sustainable and cost-effective tool to attract young legal professionals and law students in the field of international trade law. This can be done by inviting law students and fresh graduates to join the team that observes and intervenes as a third party at the hearings in Geneva. The prospect of observing multilateral proceedings at one of the most renowned international organizations set in an exciting location can kindle their interest and enthusiasm in this field of practice. This experience of observing dispute settlement proceedings can subsequently strengthen the know-how and understanding of the process at law firms, government offices or trade entities which these students and graduates may eventually join.

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[59] China has participated in 142 cases, Brazil in 114 cases, India in 91 cases, Mexico in 84 cases, and Argentina in 60 cases. For details, see WTO, 'Understanding the WTO: The Organization, Members and Observers' <http://www.wto.org/english/thewto_e/whatis_e/tif_e/org6_e.htm> accessed 8 January 2019.

[60] Appellate Body Report, *United States – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products*, WT/DS381/AB/R (adopted 13 June 2012).

[61] WTO, Disputes by Member, <https://www.wto.org/english/tratop_e/dispu_e/dispu_by_country_e.htm> accessed 8 January 2019.

[62] Appellate Body Report, *United States – Certain Country of Origin Labelling (COOL) Requirements*, WT/DS384/AB/R / WT/DS386/AB/R (adopted 23 July 2012).

[63] Appellate Body Report, *Canada – Certain Measures Affecting the Renewable Energy Generation Sector / Canada – Measures Relating to the Feed-in Tariff Program*, WT/DS412/AB/R / WT/DS426/AB/R (adopted 6 May 2013).

[64] Interview with a Joint Secretary, Government of India [name withheld] (Delhi, India, 7 May 2018).

(d) Developing Monitoring Capacity

International law firms, on their own initiative, have started the practice of monitoring foreign policies and their implications on market access. Without receiving an instruction from a corporate client or a government, these international law firms identify and examine potential barriers, gather information and approach the affected business and government entities with their findings and analysis. The firms carry out this exercise with the hope that they will be able to generate new clients. In this arrangement, they normally propose to share the information concerning market access and violations in exchange for an agreement with the receiving client that the supplying law firm will be hired for further monitoring, investigation or litigation of the potential dispute.[65]

This practice could be a useful tool for developing countries that cannot afford to have their own specialized monitoring institutions. At present, the law firms engaging in "ambulance chasing" are mostly Geneva-, Brussels- or Washington-based international law firms, and hiring their services could be an unaffordable option for many developing countries. Hence, domestic law firms in developing countries can perform these 'ambulance chasing' practices. The practice of 'in-house ambulance chasing', as it could be termed, would enhance domestic legal expertise, provide additional monitoring services, and reduce the overall cost of dispute settlement, all of which would benefit the government and industry of the country concerned.

Engagement at an early stage of a dispute could be a possible route for a law firm to be empanelled at a subsequent stage, essentially in consultation or panel process. Luthra & Luthra, an Indian law firm, was hired by the Government of India in the *India –Agricultural Products*[66] case after the law firm had provided the initial information and legal analysis concerning the measure to the Ministry of Commerce. A trade advisor to the Ministry of Commerce confirms that Luthra & Luthra provided the initial analysis and informational support and that its initial assistance was the main reason for its subsequent engagement in this case.[67] This instance shows that active monitoring and surveillance can help the government, the affected business entities and even the law firms to forge a "win-win" situation.

With such practices in place, the private sector and the governments can have enhanced access to monitoring services and legally marshalled information and evidence at a comparatively affordable rate. Furthermore, domestic law firms in developing countries with small trade law expertise (mainly due to shortage of business and/or lack of professional or internship opportunities) will be able to generate more business and expand their expertise and experience. More international trade law related work for law firms can also increase the enthusiasm and demand for international trade law courses at universities.

(e) Dispute Settlement Partnerships: Engaging Industries for Settlement of Disputes

In the area of international trade, business entities are the frontrunners as cross border transactions of goods and services are mainly carried out by profit-motivated business groups. Hence, some form of coordination between government and industry, in most cases, is embedded in the nature of WTO dispute settlement proceedings as the violation of WTO rules directly affects the business interests of exporters, importers, manufacturers and producers,

[65] Chad P Bown, *Self-Enforcing Trade: Developing Countries and WTO Dispute Settlement* (Brookings Institution Press 2009) 124.

[66] Appellate Body Report, *India – Measures Concerning the Importation of Certain Agricultural Products from the United States*, WT/DS430/AB/R (adopted 19 June 2015).

[67] Interview with an official, Ministry of Commerce, Government of India [name withheld] (Delhi, India, 12 June 2013).

which in most cases are private companies. Moreover, these private companies are a vital source of information and evidential documents.

For the aforementioned reasons, the Indian Ministry of Commerce has coordinated closely with business stakeholders during the settlement of several trade disputes. In various landmark disputes, including *the EC – Bed Linen*, *EC – Tariff Preferences*, and *US – Carbon Steel*, the business entities in India have supplied information and evidence that was required to investigate foreign measures or prepare legal submissions. In certain cases, they have financed the hiring of specialists, including trade lawyers and economic consultants, for the analysis of barriers and preparation of sound arguments. For example, in the case of *US-Carbon Steel (India)*, Essar Steel was the company that was most affected by the imposition of countervailing duties by the United States on imports of certain hot rolled carbon steel flat products from India. To restore their trade interests, Essar Steel provided most of the information and evidential support to the government officials for the successful conduct of this case.[68] This steel giant in India was forthcoming and active in assisting the government during the settlement of disputes as it had high stakes in the matter and was anticipating substantial gains from the removal of the trade barrier.[69]

With the help of this dispute settlement partnership approach, the government has utilized privately-owned resources to successfully protect its WTO rights. It has used the information, evidence, finances and subject-matter expertise provided by the affected industries in investigating trade barriers, launching bilateral discussions and WTO consultations, and litigating formal disputes at the WTO. The constitutional authority of the government has been indirectly invoked by the affected industries (as they do not have any direct rights under the WTO DSU) by virtue of their participation through timely technical inputs, data and possible arguments. Generally, at stake in such arrangements are the exporting and national interests of the industry and the government, and they are dependent on each other's resources for the protection of their respective, overlapping interests. Their respective interests can be protected with the help of a reciprocal exchange of resources through an ad-hoc partnership formed between the two. Such partnership arrangements have enabled the Ministry officials in India to mobilise resources at the domestic level and thereby strengthen their performance and participation at the WTO DSU.[70]

5. Conclusion

The chapter demonstrates how international law shapes domestic laws and practices, and more importantly, the formation of public-private networks in a major emerging economy like India. It also shows how the development of and changes in domestic policies and approaches can mould the performance and participation of a developing country at international institutions such as the WTO. After Brazil and China, India is the most active developing country user of the DSU. India has developed its dispute settlement capacity with the help of various in-house strategies which have proved to be cost-effective. It has formed dispute settlement partnerships as it has worked with institutions and industries for the settlement of trade disputes. In addition to direct participation, India has gained litigation experience through observation as a third party participant in multiple trade disputes. With Indian law firms and think tanks offering information-gathering and consulting services in a cost-effective manner, the government has had wider access to the monitoring of trade barrier and to their investigation and analytics. It has also improved its academic landscape by increasing the focus on international trade law-related courses in Indian law schools. However, a lot

[68] ibid.

[69] See Bahri (n 2) 167.

[70] ibid 147-175.

remains to be done to increase the enthusiasm and interest in WTO related themes amongst young professionals and students in India. This is not going to be an easy task, especially in wake of these challenging times for free trade and multilateralism

The example of India demonstrates the role of the government, law schools, law firms, think tanks and business stakeholders in developing trade law capacity. India's model of legal capacity building is also unique in the sense that the government has relied upon the local capacity to frame development policies and harness domestic talent and resources to defend India's interests, even in high-stake cases. India's dispute settlement journey has shown how developing countries can prepare "lemonade" out of "lemons" through a process of repeat participation and constant engagement.[71] Other developing countries should follow suit.

[71] A maxim used for the first time by writer Elbert Hubbard.

Chapter 9. The Participation of Arab Countries in the World Trade Organization: Using the Multilateral Trading System in the Face of Capacity Constraints

Said El Hachimi

1. Introduction

The World Trade Organization (WTO) appears to be an organization that is largely misunderstood in Arab countries.[1] Riad Al Khouri, a Jordanian scholar, characterises the situation in Arab countries as one in which, the WTO is "at best a complicated irrelevance and at worst a sinister organization."[2] The WTO clearly has less importance than other trade agreements that Arab countries have negotiated. Of the 13 Arab Countries that are members of the WTO, 9 were original GATT members, with four others acceding later under the WTO. These are Oman and Jordan (in 2000), Saudi Arabia (in 2005), and Yemen (in 2015). Eight more are currently negotiating their terms of accession to the WTO.

Arab countries that are members of the WTO are not using the multilateral trading system to its full. Clearly, there is an ample ground to investigate why their engagement with the system is lesser than countries in Latin America or Turkey, for example.[3]

Many reasons could be highlighted to explain the situation, but this chapter looks into the crucial issue of capacity to use the multilateral trading system, focusing on the legal capacities in Arab countries. The legal capacities are examined from the from the dispute settlement perspective, given the notable increase in usage of the dispute settlement mechanisms in WTO. This is especially true for the use of third party submissions by certain Arab countries, particularly Saudi Arabia. This chapter also highlights the "shock therapy" created by the first dispute cases brought by or against Arab countries in 2017. Such cases are forcing these countries to organize their response to the challenge with differing degrees of success in enhancing legal capacity in their country. The chapter ends by comparing the experience of Arab countries in dispute settlements with China's efforts to adapt to the WTO rule book since its accession in 2001.The accession of many Arab countries to the WTO was not accompanied by enough structural arrangements which could enable them to use the dispute settlement system at a certain point. The chapter also raises the complex relationship involving government officials in capitals, Geneva based Missions and the international law firms that are hired to help with disputes or third party submissions. This chapter uses the

[1] The Arab countries are 22 in number, comprising Bahrain, Djibouti, Egypt, Jordan, Kuwait, Mauritania, Morocco, Oman, Qatar, Saudi Arabia, Tunisia, United Arab Emirates, Yemen (Members of the World Trade Organization (hereafter WTO)); Algeria, Comoros, Iraq, Lebanon, Libya, Somalia, Sudan (WTO Observers); and Palestine.

[2] Riad al Khouri, 'The Last Frontier: the WTO, PTAs, and the Arab Region' WTO Research & Analysis <https://www.wto.org/english/forums_e/public_forum12_e/art_pf12_e/art15.htm> accessed 4 January 2019.

[3] As an illustration, during the period 1995-2015, Arab countries never chaired the WTO General Council while Asia Pacific and African countries held this chairpersonship for 9 and 4 times respectively. Furthermore, Turkey has submitted more third-party submissions than all Arab countries taken together.

comparison with China to recommend next steps to enhance legal capacity and to widen the circle of knowledge on WTO issues in Arab countries.

2. Participation of Arab Countries in World Trade from 1995 to 2015

Exports from all Arab countries rose from US$150 billion in 1995 to US$826 billion in 2015. Their share in world exports rose from 3% to 5% in 2015. The increase was mainly due to the increase of export share of Gulf Cooperation Council (GCC) countries in world trade, representing 2.5% in 1995 and 5% in 2015, predominantly because of the constant upward rise in oil prices during the period in review. The share of Agadir Agreement countries[4] (Morocco, Egypt, Tunisia and Jordan) remained stable during the same period.

Table 9.1: Exports of All Arab Countries in US$ millions and their shares in World Exports

Year	World Exports (Billion $)	Total Arab Exports (Billion $)	Share in World Exports	GCC % in World Exports	Agadir % in World Exports	Others[5] % in World Exports
1995	5,166	150	3	2	0.3	0.5
2000	6,459	264	4	3	0.3	1.0
2005	10,509	560	5	4	0.4	1.2
2010	15,283	927	6	4	0.4	1.3
2012	18,401	1,390	8	6	0.4	1.4
2014	19,002	1,289	7	5	0.4	1.0
2015	16,489	826	5	4	0.4	0.6

Source: Author's calculations based on WTO records

One stark difference between GCC and Agadir Agreement countries is the distinction between energy exporting and non-energy exporting countries. GCC economies and trade are dominated by hydrocarbons exports. Agadir countries are energy importers, and their economic and trade performance is impacted by this fact. Similarly, in all countries except the United Arab Emirates (UAE), oil is the main export. Oil accounts for more than 80% of total exports in half of the Arab oil-exporting countries, and more than 60 percent in all of them except the UAE.[6] In the UAE, as in Bahrain, non-oil exports include a large share of re-exports.[7]

The combined share of world import of commercial services of Arab WTO members stood at 4.8% in 2013 and around 2% for exports. When looking individually at countries in both the GCC and the Agadir Agreement Countries, the experiences seem to be similar to the GCC, where countries are trying to move away from oil dominance, to strategically increase foreign direct investment (FDI) outflows and inflows, and to diversify exports. Agadir Agreement

[4] Morocco, Egypt, Tunisia and Jordan are linked by the Agadir Free Trade Agreement within the framework of the so-called Barcelona or Euro-Mediterranean process of integration.

[5] Note: Other Arab countries in column 7 of Table 9.1 include WTO members such as Yemen, Mauritania, and Djibouti as well as some non-WTO members and observers from the region including Algeria, Libya, Sudan, Lebanon, Iraq, and Syria.

[6] Staff of the International Monetary Fund, 'Economic Diversification in Oil-Exporting Arab Countries' (Annual Meeting of Arab Ministers of Finance, Manama, April 2016) <https://www.imf.org/external/np/pp/eng/2016/042916.pdf> accessed 6 January 2019.

[7] ibid fn 6; Re-exports accounted 24 percent of total non-oil exports of the UAE in 2014 according to the UN Comtrade database.

countries are embarking on reforms to strengthen current export sectors and to diversify the export of goods and services, notably in Jordan, Egypt, and Morocco.

3. WTO Commitments of Arab Countries: State of Play

Overall, the situation of Arab countries in terms of notifications to the WTO and/or the implementation and compliance with commitments arising from the Uruguay Round or specific accession packages is quite satisfactory.

Looking at the tariff profiles of Arab countries below, we realise the diverse picture in Arab trade policy, given the different levels of development among the three main groups, which are: (i) oil and gas exporting countries; (ii) oil and gas importing countries; and (iii) least developed countries from the Arab region. Most members have 100% coverage in terms of Most Favoured Nation (MFN) bound rates with notable exceptions of Tunisia (58%), Bahrain (71.8%), Egypt (99.4%), Kuwait (99.9%), and Mauritania (40.5%). GCC countries have relatively low MFN duties compared to the rest of Arab country members of the WTO. Table 9.2 below provides some details.

Table 9.2: Tariff Profiles of Arab Countries

Reporting Economy	Binding %	MFN All	Bound All	MFN AG	Bound AG	MFN NAG	Bound NAG
Bahrain	71.8	4.7	34.9	5.4	39.2	4.6	33.8
Djibouti*	100	21	41.3	14.2	49.6	22	39.9
Egypt	99.4	16.8	36.6	60.5	91.3	9.5	27.4
Jordan	100	9.9	16.3	17	23.5	8.8	15.1
Kuwait	99.9	4.7	97.9	5.1	100	4.6	97.5
Mauritania	40.5	12	20.8	11.1	38.7	12.2	11.1
Morocco	100	11.5	41.3	27.6	54.4	8.9	39.3
Oman	100	5.5	14.1	10.9	27.8	4.7	11.8
Qatar	100	4.7	15.7	5.4	25.5	4.6	14
Saudi Arabia	100	5.1	11.2	6.1	16.5	5	10.4
Tunisia	58	15.5	57.9	33	116	12.6	40.8
UAE	100	4.7	14.6	5.4	25.5	4.6	12.8
Yemen	100	7.5	21.6	10.4	24.9	7	21.1

Source: WTO Data Portal

Notes to Table 9.2: MFN All: simple average applied rates on All goods; Bound All: simple average Bound Rates on All Goods; MFN and Bound AG: simple average rates on Agricultural goods; MFN and Bound NAG: simple average rates on Non Agricultural goods

* Figures for Djibouti MFN Rates are from 2014

As far as services are concerned, WTO data show low coverage in terms of sectors committed to in the General Agreement on Trade in Services (GATS) from Arab members. However, recently acceded Arab members have committed to larger and often deeper commitments. As an illustration, accession packages included commitments in 120 sectors for Saudi Arabia, which became a member of WTO in 2005; 110 sectors for Jordan (membership in 2000); and 97 sectors for Oman (membership in 2000).

Accession packages for the GCC countries Oman and Saudi Arabia, as well as Jordan, contain commitments to join WTO plurilateral agreements, such as the Information

Technology Agreement (ITA) and the Government Procurement Agreement (GPA). All three countries have been observers to both agreements since their accessions to the WTO.

4. Participation of Arab Countries in the Main Functions of the WTO

4.1 Chairpersonship of Regular WTO Bodies

Within the institutional structure of the WTO are 78 bodies, including regular councils and committees as well as interim and ad hoc structures. The share of chair positions held by members from different regions reflects the level of participation and engagement and their ability to steer the system.

In 1995-2015, the data collected from WTO internal sources shows that the share of Arab countries in chairing WTO committees remains very minimal. However, one ministerial conference was chaired by an Arab country, Qatar, when the WTO's biennial ministerial meeting was hosted by Qatar and held in Doha in 2001.

The WTO's three main bodies are the (i) General Council (GC), (ii) Dispute Settlement Body (DSB), and (iii) Trade Policy Review Body (TPRB). Arab countries managed to chair only once and only one of these three most important Councils, when the Tunisian Ambassador to the WTO chaired the DSB in 1998. Table 9.3 below illustrates how Arab chairpersonship is minimal compared to other developing countries from Latin America, Asia, or Africa.

Table 9.3: Chairpersonship of Main WTO Bodies, 1995-2015

	GC	DSB	TPRB
Asia Pacific (excluding Arab countries)	6	9	4
Europe	3	5	9
Latin America	4	4	4
North America	4	2	1
Africa (excluding Arab countries)	4	3	3
Arab	0	1	0
Total	**21**	**24**	**21**

Source: Author's calculations based on WTO records

The General Council of the WTO is the key structural pillar for the work of the organization. It is the authority running the day-to-day business of the WTO. It has numerous subsidiary bodies that ensure compliance with commitments and provide a venue for discussions among members on various implementation issues.

Arab countries chairing of various subsidiary bodies of the General Council is again quite minimal; with 9 chairpersonships, the region surpasses only the North American region during 1995-2015. Europe chaired 59 subsidiary bodies of the General Council over the same period. Asia-Pacific ranks second with 44 chairpersonships followed by Africa (34) and Latin America and the Caribbean (32). Traditionally, North American countries, particularly the United States refrain from seeking Chairpersonship of WTO bodies. Canada filled up the two positions cited.

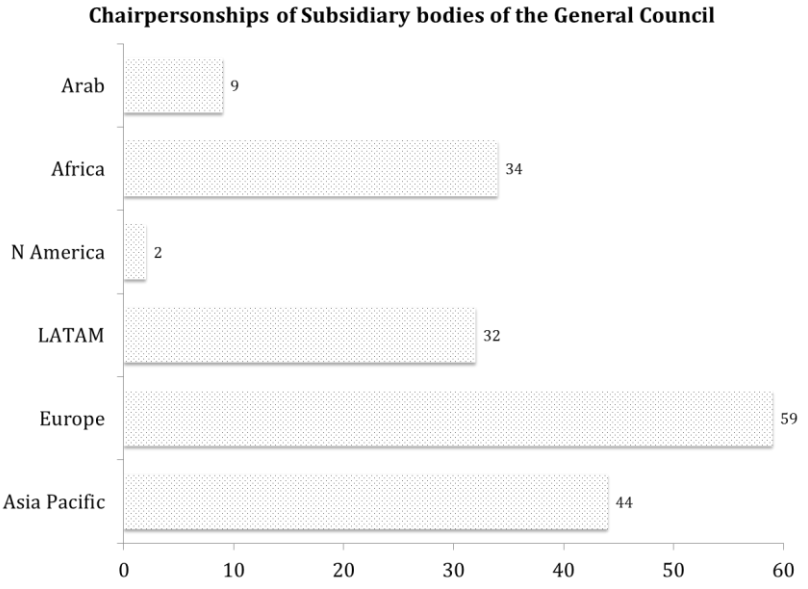

Figure 9.1: Chairpersonships of Subsidiary Bodies of the WTO General Council

Source: Author's calculations based on WTO records

The Arab involvement with the chairpersonship of these subsidiary committees is also small, in the range of 4% to 9%. The 9% reflects the chairpersonship of the Committee on Trade and Development (CTD), a committee where developing country ambassadors are often elected as chairs. African Ambassadors represent 50% of the CTD chairpersonships, Latin America & the Caribbean region holds 23%, and Asia - Pacific, 18 %.

Overall, Arab countries have held 30 chairpersonships of various WTO Regular Committees. Egyptian ambassadors and delegates represented 60% of the total Arab cohort of chairs. Saudi Arabia and Tunisia have equal shares at 22% while Moroccan chairs represented 10% of the total for the Arab region. It is worth noting that the Moroccan chairpersonships all date back to the early years of WTO creation in Marrakech, Morocco. Since 1998 no Moroccan official has chaired a WTO Committee. Saudi Arabia is a latecomer but has been very active in chairing various committees both at the ambassadorial and technical levels. Jordan chaired a WTO committee, the Committee on Trade-Related Investment Measures, for the first time in 2015.

In 2017, the interest of Arab countries in chairing WTO regular bodies was confirmed through the chairpersonship of six committees by the representatives of Tunisia, Oman, Saudi Arabia, Egypt, Qatar, and Bahrain.[8]

[8] Committee on Regional Trade Agreements: Ambassador Walid Doudech (Tunisia); Committee on Anti-Dumping Practices: Mr Faisal Saud Sulaiman Al-Nabhani (Oman); Committee on Import Licensing: Mr Fawaz Almuballi (Kingdom of Saudi Arabia); Committee on Market Access: Mr Ahmed El Libedy (Egypt); Committee on Trade-Related Investment Measures: Mr Ali Alwaleed Al-Thani (Qatar); Committee on Trade in Financial Services: Mr Khalid Jamal Alaamer (Kingdom of Bahrain). See <https://www.wto.org/english/thewto_e/secre_e/current_chairs_e.htm> accessed 24 November 2017.

4.2 Participation of Arab Members in WTO Negotiations

The involvement of Arab delegations as chairs of negotiating bodies of the WTO in the Doha Development Agenda is simply non-existent. So far, not a single Arab country has presided over a negotiating body of the WTO.

The participation of Arab countries in the substance of the negotiations in the framework of the Doha Development Agenda (DDA) has focused on very few issues and has been general in its formulation. For example, the statements by Arab countries in the Trade Negotiations Committee of the WTO highlight the "centrality of the Doha Round" or the "importance of Special and Differential Treatment". Most Arab countries associate their positions with the Recently Acceded Members group, the WTO Arab Group, small and vulnerable economies, and net food-importing developing countries. Some Arab countries have made some proposals in the negotiations, but those are still fewer than proposals from other developing countries.

The UAE has been an active player in the Doha Development Agenda, presenting proposals to eliminate tariffs and non-tariff barriers (NTBs) on raw materials and submitting an initial offer in trade in services. Qatar has made proposals in the non-agricultural market access and environmental goods negotiations on gas-related goods.[9] It has also made an initial offer in the services negotiations covering five subsectors.[10] Morocco has submitted a proposal in the framework of the rules negotiations on fisheries subsidies, in which it argues that special and differential treatment should permit developing country members to be exempt from any ban on subsidies.[11]

The Arab Group at the WTO is a coalition of all Arab countries that are WTO members. It also operates under the auspices of the League of Arab States.[12] This coalition represents divergent trade interests in the negotiations among Arab countries. Thus, very often the action and statements of the WTO Arab Group focuses on issues of broad and easy consensus among Arab countries, such as introducing Arabic as a WTO official language.[13]

Other issues in the focus of the Arab Group are mostly political in nature, such as the observer status of the League of Arab States (LAS) in WTO work, which has been a contentious issue for almost two decades. The other issue is related to granting the "State of Palestine" an observer status in WTO Ministerial Conferences.

As an illustration, the Arab Group submitted a communiqué[14] during the 10th Ministerial Conference of the WTO held in Nairobi, Kenya in December 2015 where many of the issues and observations mentioned above were raised. Unlike other coalitions formed around specific topics or on the basis of geographical groupings, the Arab Group does not have a decisive impact on the negotiations at the WTO.

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[9] WTO, Committee on Trade and Environment Special Session, Negotiating Group on Market Access, Submissions by the State of Qatar: 'Negotiations on Environmental Goods: Efficient, Lower-Carbon and Pollutant-Emitting Fuels and Technologies' TN/TE/W/19, TN/MA/W/24 (28 January 2003); 'Harmonized System (HS) Classification Codes of Gas-Related Goods' TN/TE/W/27, TN/MA/W/33 (25 April 2003); 'Environmental Goods' TN/TE/W/14 (9 October 2002).

[10] WTO, Council for Trade in Services – Special Session, Qatar – Initial Offer, TN/S/O/QAT (7 July 2005).

[11] WTO, Trade Policy Review Portal: Morocco, <https://www.wto.org/english/tratop_e/tpr_e/tp429_e.htm> accessed 6 January 2019.

[12] The WTO Arab Group often meets in Geneva at the Headquarters of the Permanent Mission of the League of Arab States to the UN.

[13] Currently, the WTO's official languages are English, French and Spanish.

[14] WTO, Ministerial Conference Nairobi, 'Communiqué – Arab Ministerial Meeting' (Nairobi, 15 December 2015) WT/MIN(15)/33 (18 December 2015).

However, there certainly are capacity issues in terms of the number of diplomats available to deal with WTO issues. In certain cases, the capacity is limited to a single diplomat assigned to WTO issues in a diplomatic mission dealing with all international organizations present in Geneva.

Lately some Arab countries have substantially increased their diplomatic representation dealing with WTO issues in Geneva. Saudi Arabia is the first Arab country to appoint an ambassador solely dealing with WTO issues. Other GCC members have opted to have specific bureaus or teams dedicated to WTO issues under the purview of the ambassador representing their country before all Geneva based inter-governmental organisations. Qatar, UAE, and Oman all have bureau chiefs, often of the rank of deputy permanent representative with small teams dealing with WTO issues.

Egypt has been a precursor in having a Trade Office for WTO issues with specific teams appointed to Geneva from the Trade Ministry and not the Foreign Affairs Ministry. The experience dates to GATT days and has not always been smooth, as reconciling the teams from distinct government authorities from the capital has often been challenging.

5. The Legal Capacity in Arab Countries and Participation in the Dispute Settlement System of the WTO

5.1 Stocktaking of Arab Participation in the Dispute Settlement System of the WTO

Arab countries fail to make significant use of the WTO Dispute Settlement System even though their interest and participation as third parties have increased dramatically in recent years. This is particularly the case for some GCC members of the WTO. However, and until very recently, no Arab country has ever participated as a complainant to a WTO dispute.

Until 2017 Egypt was the only Arab country involved with the DSB proceedings as respondent and was also an early user of the third party status in some disputes. In 2017, Morocco became the second Arab country to be a respondent in a case before the WTO Dispute Settlement System.[15]

Although this is the first case of WTO dispute settlements in Morocco's history as a founding member of the WTO and GATT (Morocco joined in 1987), the country earlier attempted to use the Dispute Settlement System of the newly created WTO. Morocco was the first Member of the WTO to introduce an "amicus curiae" submission in the *EC – Sardines* opposing European Union (EU) and Peru.[16] Following the sardine case and for more than a decade, Morocco did not use the system at all in any capacity, neither as a complainant, nor as a defendant, or as a third party. Table 9.4 below lists the involvement of Arab countries with the Dispute Settlement System of the WTO.

[15] *Morocco – Anti-Dumping Measures on Certain Hot-Rolled Steel from Turkey*, DS513 <https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds513_e.htm> accessed 6 January 2019.

[16] *European Communities — Trade Description of Sardines*, DS231 <https://www.wto.org/english/tratop_e/dispu_e/cases_e/1pagesum_e/ds231sum_e.pdf> accessed 6 January 2019.

Table 9.4: Involvement of Arab countries in WTO dispute settlement

	As Complainant (no. of cases)	**As Respondent** (no. of cases)	**As Third Party** (no. of cases)
Bahrain	0	1	4
Egypt	0	4	29
Kuwait	0	0	1
Morocco	0	2	0
Oman	0	0	13
Qatar	4	0	10
Saudi Arabia	0	2	44
Tunisia	1	0	0
UAE	1	1	4
Yemen	0	0	1

Source: Author's calculations based on WTO records

5.2 A Flurry of Third Party Submissions

As far as third party submissions are concerned, Saudi Arabia has become the largest Arab user of the DSB as a third party. As of January 2109, the country has been involved in 44 cases in that capacity. Similarly, Egypt and Oman have participated as third parties in 29 and 13 cases, respectively.

The interest in making third party submissions can be traced to 2008 when Saudi Arabia, Bahrain, and Kuwait decided to be third parties for the first time in the WTO Dispute System. They chose a case involving US and China over a number of US Definitive Anti-Dumping and Countervailing Duties on Certain Products from China.

Saudi Arabia has a large interest in cases related to energy issues, such as the case involving Japan and Canada on Renewable Energy Generation,[17] the EU and Russia[18] or the US and India.[19] The Kingdom is also third party to the case involving Russia and Ukraine.[20] The other issues in the focus of Saudi Arabia third party path involve steel, rare earths, and tobacco packaging. This Saudi interest in the Dispute Settlements is quite focused, as was the case for other developing countries in the cases involving major players of the system such as China, the US, and the EU.

Qatar, the UAE, and Oman later followed this third party path on different cases but along similar lines in terms of issues as well as focusing on cases comprising major players in the WTO such as China, the US, and the EU. The interest in following cases involving the major players is due to the weight of these powers in the WTO and in the bilateral trade with GCC countries. Another reason could relate to the "learning curve" objectives of the third party submissions. The cases by the major players involve a degree of complexity, sophistication and certainly of relevance to many GCC countries.

[17] *Canada — Certain Measures Affecting the Renewable Energy Generation Sector*, DS412 <https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds412_e.htm> accessed 6 January 2019.

[18] *European Union and its Member States — Certain Measures Relating to the Energy Sector*, DS476 <https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds476_e.htm> accessed 6 January 2019.

[19] *United States — Certain Measures Relating to the Renewable Energy Sector*, DS510 <https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds510_e.htm> accessed 6 January 2019.

[20] *Russia — Measures Concerning Traffic in Transit*, DS515 <https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds512_e.htm> accessed 6 January 2019.

While the use of third party status is a welcome step that will certainly help Arab countries to better understand and use the system, it is noteworthy that, compared to immediate neighbouring countries, particularly Turkey, the experience of Arab countries remains quite modest. For example, Turkey has made 75 submissions as a Third Party; this is more than the submissions by all Arab countries taken together. Turkey is a respondent in nine cases and a complainant in four cases. Two of the cases where Turkey is a complainant were against Morocco and Egypt.

5.3 2017 and 2018: the Years of the Dispute Settlement "Shock Therapy" for Many Arab Countries

Despite the Egyptian experience with the system and the encouraging third-party submissions, the year 2017 marked the turning point in Arab countries' participation to the WTO Dispute Settlement System. Saudi Arabia, UAE, Bahrain, and Morocco have been respondents in a WTO Dispute settlement case for the first time. Qatar has also become the first Arab country to file a dispute as a complainant. Qatar did this *vis-à-vis* other Arab countries from the GCC, namely UAE, Saudi Arabia, and Bahrain; another first for the region in its relationship with the WTO.[21]

The trend continued in 2018. In 2018, Tunisia initiated a dispute against Morocco related to provisional anti-dumping measures against Tunisian exports of school books to the Morocco. This is the second time an Arab country uses the WTO dispute settlement to solve a trade conflict with another Arab country. In the same year, in initiating a dispute against Pakistan, the United Arab Emirates became a complainant for the first time since its accession to the WTO. During the same year Yemen made the first third party submission since becoming a WTO Member in 2015.[22]

These cases have highlighted the extreme urgency for these countries to organize themselves to be able to use the system efficiently. In fact, these cases, all in 2017, have acted as some sort of "shock therapies" in the trade policy circles and beyond of these Arab countries.

In general, once Arab countries finished their accession process to the WTO, they often paid less attention to the Dispute Settlement System. They often focused on implementing their commitments and minimising any perceived negative impact of their entry to the WTO on their business communities. Probably the Dispute Settlement System suffered from being a "complicated irrelevance" given its detailed and legally heavy proceedings.

Being challenged at the WTO for the first time in 2017 meant a response was needed to be given through the channels of a highly technical and precise international legal process. Many Arab countries were not ready for the challenge.

GCC members certainly have the financial means to hire international legal experts to deal with the problem. To a large extent this is happening now at an important scale because of the Qatari challenge at the WTO Dispute Settlement System.

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[21] *United Arab Emirates — Measures Relating to Trade in Goods and Services, and Trade-Related Aspects of Intellectual Property Rights*, DS526 <https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds526_e.htm> accessed 6 January 2019; *Bahrain — Measures Relating to Trade in Goods and Services, and Trade-Related Aspects of Intellectual Property Rights*, DS527 <https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds527_e.htm> accessed 6 January 2019; *Saudi Arabia — Measures Relating to Trade in Goods and Services, and Trade-Related Aspects of Intellectual Property Rights*, DS528 <https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds528_e.htm> accessed 6 January 2019.

[22] *United Arab Emirates — Measures Relating to Trade in Goods and Services, and Trade-Related Aspects of Intellectual Property Rights*, DS526 <https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds526_e.htm> accessed 6 January 2019.

However, hiring international legal experts does not respond to all the concerns by these countries *vis-à-vis* the dispute settlement of the WTO, as more pressing questions remain such as the lack of domestic capacity to deal with the system. In other words, the countries still lack the capacity (i) to understand the intricacies of the system and its procedures; (ii) to absorb the many arguments to be used in a case; and (iii) to develop the ability to respond through the system with adequate legal arguments, using adequate legal texts within the rule book of the WTO.

Dealing with hired international experts is the pivotal issue into all these three processes described above because hiring these experts is just a piece of the puzzle; it is only a step in the process. Legal challenge at the WTO is an intergovernmental process and, as such, it involves many sovereign decisions to be taken solely by the authorities upon informed counsel from diverging sources, including international law firms.

One main challenge is the lack of in-house capacity. In fact, one of the interlocutors from a GCC country indicated that the in-house capacity in that country is one civil servant in the capital who is a legal expert, working and following up legal issues at the WTO. He is in charge of filing third-party submissions of that GCC member. This legal expert is not even a national of the country but was hired by the ministry from another Arab country.

Now, with the challenge from Qatar, many GCC countries party to these cases are trying to organize national legal teams. The one legal expert described above is now being supported by a team representing different government agencies. The members of this team are not all aware of the specificities of the WTO rules or the DSB proceedings. However, they all have legal background and/or were managing legal matters in different areas in their respective government agencies.

This pooling of resources representing a wide range of government agencies has two important explanations. First, and given the wide span of the issues involved in Qatar's challenge at the WTO, it is normal to involve many government agencies dealing with transport, custom duties or Intellectual Property for example. Secondly, the pooling of resources and the multi-functional legal teams in capital aim to work in tandem with the diplomatic representatives in Geneva and international law firms involved. The objective is to guide the political masters on the best way to proceed.

Hopefully with these challenges comes a set of perceived positive outcomes. Many interlocutors do not hide their satisfaction of finally seeing WTO issues or the DSB proceedings "taking centre stage in the politics of the region" and bringing the WTO issues and its cohort of capacity issues onto the radar screen" of political masters.

Another interlocutor said capacity transfer on WTO law and DSB procedures is occurring "at the speed of light" when it used to happen at "turtle's speed" for so many years. This also brings a quality change in terms of heightened perception of the WTO and its DSB amongst political masters and elites in the legal, trade, and diplomatic circles in many Arab countries. Many are finally finding out that the WTO is not really "a complicated irrelevance" nor it is a "sinister organization". It is a system of rules, proceedings, and diplomatic positioning that you need to master to be able to play one's part.

There is a change, albeit slow, in the perceptions of the utility of the system but also of the extent of the "teeth" of the DSB system that can "bite" into vital trade and economic interests in these countries. It should, however, be noted that the dispute between Qatar and its neighbours will most probably not be settled within the WTO. The issues involved are mainly

related to essential national security concerns, a topic many WTO members are wary of and not keen to use in their dispute cases.[23]

In the case of Morocco, the dispute seems to be less politically charged and is more of a pure trade dispute reflecting usual import and export problems related to the steel sector. However, and contrary to the Qatar versus GCC countries, the Moroccan situation is different as the challenge comes from a relatively seasoned user of the system. In fact, Turkey has been a much more active user of the dispute settlement system and had experienced facing other developing countries, very often on issues similar to those raised in the case against Morocco.

Turkey frequently uses the Advisory Centre on WTO Law (ACWL), a Geneva advisory centre helping developing countries to handle their participation in the DSB. They also have a small team of lawyers in Ankara working exclusively on WTO issues. These are full time civil servants that were hired and trained by the government and also through many of the WTO capacity building activities.

6. Concluding Remarks

It is interesting to put the Arab experience with the DSB in the context of other developing countries experiences. To what extent does Arab countries' experience in acquiring legal capacity match that of other Developing Countries in the WTO? The parallel with Turkey, a close neighbour that seems to have anticipated the importance of the system relatively well, was already mentioned in preceding section. However, it looks as if the Chinese experience and the use of third party submissions are a source of inspiration for many Arab countries.

However, a parallel with China's experience is very hard to make. China's accession to the WTO was accompanied by a legal ordering process that was led by the government. In addition to the government agencies, it involved many players, including the legal profession in China. In the case of Arab countries, the interaction with the WTO rules within the domestic policy context is unclear. A true legal ordering process in the Arab countries that joined the WTO was not organised, at least not to the extent of what China did.

In an eye-opening paper on the experience of China joining the WTO, Shaffer and Gao[24] have tried to "unpack" the "black box" of processes and mechanisms through which legal ordering has happened in China following the accession to and since its membership of the WTO in 2001. Their robust study, notably through qualitative empirical studies, provides an original and thorough analysis of China's development of legal capacity in trade, its implications within China and for the international trade legal order.[25]

One strong takeaway message from their article is that China made a concerted effort to focus on institutional arrangements and to build a strong knowledge base on WTO law across the government, the legal profession and academia They describe how the Ministry of Commerce

[23] This is the case for multiple reasons. First, because the majority of WTO members are wary of the essential security concerns as they are all fearful of the Pandora Box effect of resorting to the national security exceptions under Article XXI of the General Agreement on Tariffs and Trade (GATT), Article XIV bis of the General Agreement on Trade in Services, and Article 73 of the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPs). Second, in the DSB meetings where the dispute case involving Qatar and the UAE was discussed, a large group of WTO members have asked parties to refrain from using the essential security arguments and to rather opt for an "out of court" type of settlement and/or request the good offices of the Director General to settle the case. Third, the GCC countries themselves might be using the DSB as a tool in a broad political feud, to exert pressure and to have leverage on what remains basically a political dispute, according to many observers of these proceedings.

[24] Gregory Shaffer and Henry S Gao, 'China's Rise: How It Took on the U.S. at the WTO' (2018) 1 University of Illinois Law Review 115.

[25] ibid 124.

(MOFCOM) first created a dedicated Department of Treaty and Law and then dedicated divisions to WTO law to keep up with the increasing importance of the WTO and its DSB after the Chinese accession. The team dealing with China's litigation and third-party participation in the WTO doubled in size, with a dozen officials in the capital and additional staff in the Chinese diplomatic mission in Geneva. The Chinese government did this despite an overall trend of cutting spending and a downsizing in the central government.[26]

Within five years of its accession, China emerged from being a reluctant participant that tried to avoid WTO litigation to become an active and formidable player that uses the system to defend its interests.[27]

Such an organization of work is rarely present in Arab countries, where dedicated legal teams dealing with the WTO are a rare commodity to say the least. The difference is not only the amount of resources that are devoted to WTO issues, but is much deeper. In fact, the accession of many Arab countries did not factor in institutional arrangements on the legal capacity front. Building on the author's own experience as well as conversations with officials involved in accession processes, the WTO litigation function was often not perceived to be a priority. Another reason, in the case of some GCC countries, is that the accession process itself relied heavily on hiring international legal expertise. Thus, it was just natural that in the case of a legal challenge, the response would be to go back to hiring international legal experts to deal with it.

Arab accessions to the WTO happened certainly within concerted efforts among government agencies and the private sector. But the reach to other players, such as local law firms and academic institutions, did not really happen.

The Chinese experience differs in many fundamental ways from the Arab experience with the WTO Dispute Settlement System. First is in terms of in-house capacity because China emphasized on securing enough resources to deal with legal issues at the WTO. Chinese authorities ensured an adequate staffing in both the diplomatic mission in Geneva and in the capital. Chinese diplomats, trade officials, lawyers, and academics were involved in China's gigantic effort to adapt its domestic legal framework to the international system represented by the Marrakech agreements. By contrast, the Arab resources devoted to WTO issues in general are quite limited, as we have seen in earlier sections of this chapter. Furthermore, the legal capacity issues did not receive adequate priority during the accession process to the WTO. In-house capacity to understand and participate in the WTO dispute system is a key component for adequate participation in the multilateral system of the WTO.

Secondly, in terms of dealing with international legal expertise, the Chinese experience seems to have clearer objectives and quite efficient results. As highlighted by Shaffer and Gao, third-party participation to the DSB helped China use the process to learn about WTO law and how to litigate with some depth, using the process to enhance legal capacity in the government and of local law firms as well as to train Chinese lawyers. "Creation starts from imitation", as a famous Chinese saying goes. This probably inspired Chinese officials, lawyers and academics to absorb a lot of DSB issues and proceedings, enabling China to later become a key player within the system. Significantly, local law firms in China worked with international law firms in "all but one of the first twenty-eight cases that China faced before WTO Panels".[28]

[26] ibid 139.

[27] ibid 132.

[28] ibid 151.

These public-private partnerships were driven by the Chinese government to help build expertise to defend Chinese interests, as well as "to bring international trade law home".[29]

In Arab countries, such public-private partnerships have not been used in the context of WTO legal capacity enhancement. Whilst some large GCC countries have used international legal expertise to make third party submissions, they have not involved local law firms in the process. Very often the interlocutors of international law firms are government officials only. Naturally, it is hard to imagine a learning curve where local Arab law firms would finally be able to take the lead or participate in WTO litigation, as has happened in China.

Thirdly, and in association with the above argument, there are stark differences between China and the Arab countries regarding efforts to widen the circle of WTO knowledge among stakeholders. In Arab countries, WTO issues are very often dealt with almost exclusively by a handful of government officials from the trade ministry. By contrast, widening the circle of knowledge on WTO rules has been a key element of China's accession process. Yet in Arab countries, it is hard to trace significant outreach to academics or even the private sector on WTO issues.

It is, however, encouraging to see wide legal teams being formed in some GCC governments to respond to the Qatari challenge at the WTO Dispute Settlement. It is certainly a good and encouraging step in the right direction. However, more needs to be done to engage local law firms in this process. Some authors have raised the important issue of the low numbers of lawyers in Arab countries, both in overall terms and those specializing in trade law. For example, Bashar Malkawi argues that there is probably a link between the number of lawyers in a country and its ability to be more "litigious" than others.[30] This is the case, for example, for the US which has probably the highest number of lawyers in the planet and is the number one user of the WTO Dispute Settlement Body.[31] In the case of Arab countries, the number of lawyers is extremely low and might explain their reluctance to have a "litigious" profile. According to Omar Zain, cited by Malkawi, and as an illustration, Lebanon had approximately 8,000 lawyers in 2004; Morocco had 9,190; Tunisia had 2,800; and Yemen had just 250 lawyers.[32]

Additionally, even though some Arab countries have strong academic institutions, they often lack dedicated courses on WTO law and dispute settlement. In this regard, it is interesting to note the quasi absence of participation of Arab universities in ELSA Moot Court Competition on WTO Law, an activity that is very popular with young scholars from different parts of the world, including from developing countries such as South Africa and many Asian and Latin American countries.[33]

However, some Arab countries have pursued encouraging initiatives in cooperation with WTO Technical Cooperation services, hosting the Trade Policy Courses of the WTO, which have a strong DSB component. This is the case for Morocco, Tunisia, and Oman. Likewise, the WTO Chairs Programme is way to involve Arab academia in WTO issues as it is the case in Jordan, Morocco and Tunisia. In Jordan, the experience led to the creation of a Master's degree on WTO and International Trade in the Faculty of Law in the University of Rabat.

[29] ibid.

[30] Bashar H Malkawi, 'Arab Countries' (under) Participation in the WTO Dispute Settlement Mechanism' (2012) 14 Flinders Law Journal 1, 20.

[31] Ji Li, 'From "See You in Court!" to "See You in Geneva!": An Empirical Study of the Role of Social Norms in International Trade Dispute Resolution' (2007) 32 Yale Journal of International Law 485, 496-499, 507.

[32] Omar Zain, *Study into the Status and Tools Used by Lawyers in Arab Countries* (2004) 34-35.

[33] WTO, ELSA Moot Court Competition on WTO Law <https://www.wto.org/english/tratop_e/dispu_e/emc2_maps_e.htm> accessed 10 January 2019.

Many graduates of this course have been hired by the Government in both the Ministry of Foreign Affairs and the Ministry of Trade. The co-operation between Qatar and Georgetown University to establish the Trade Lab in Doha since 2016 is also worth noting.[34]

Finally, there is probably a need for a cultural shift to normalize the use of Dispute Settlement as a tool of trade policy in Arab countries. This shift needs to demystify the strong culture of *Sulh*[35] which embodies the concepts of settlement and reconciliation over formal litigation and is above all favourable to non-confrontation.[36] After all, Chinese culture carries also a strong non-confrontational element, but this has not detered Chinese authorities from using the dispute settlement mechanism as a tool for their trade policy. In the same vein, Arab countries need to go beyond geopolitical or power imbalance calculations, or what Magda Shahin[37] describes as the disbelief in the ability to force potential large economy respondents into compliance, which is a concern shared by many developing countries.

[34] 'Qatar and The Arab World in the Global Trade and Investment System: Launch of 'TradeLab' in Qatar to Build Awareness and Legal Capacity on Trade & Investment Agreements' (Qatar, 31 May 2016) <http://graduateinstitute.ch/files/live/sites/iheid/files/sites/ctei/users/Mattia/TradeLab%20Doha%2031%20May%20Programme-revised.pdf> accessed 10 January 2019.

[35] For more in depth reading about the concept of *Sulh*; see Walid Iqbal, 'Courts, Lawyering, and ADR: Glimpses into the Islamic Tradition' (2000) 28 Fordham Urban Law Journal 1035, 1037.

[36] Malkawi (n 30) citing multiple authors who investigated the impact of Islamic precepts on the disfavour for litigation, notes that the preference for *Sulh* is often a reflection of larger social and cultural perceptions of conflict generally. In Arab countries, the notion of conflict typically carries a highly negative connotation. Viewed as disruptive and dangerous to social cohesion, conflict represents something to be avoided. Understandably, this mind-set makes formal litigation an unpopular dispute resolution mechanism in Arab countries, given its inherent adversarial elements.

[37] Magda Shahin, 'Egypt's Challenges and Future Options for Participating in the WTO Dispute Settlement System' (ICTSD Africa Dialogue on WTO Settlement and Sustainable Development, Mombasa, 2-3 November 2006) 7-8.

Chapter 10. Trade Related Capacity Building Measures in African LDCs and the Paradox of the Efficiency–Effectiveness Dichotomy

Tsotetsi Makong and Thokozani Ngwira

1. Introduction

According to the United Nations Development Programme (UNDP), capacity development is the process through which individuals, organizations and societies obtain, strengthen and maintain the capabilities to set and achieve their own development objectives over time. It starts from the principle that people are best empowered to realize their full potential when the means of development are sustainable – home-grown, long-term, and generated and managed collectively by those who stand to benefit.[1] It can therefore be summarized as the ability of individuals and organizations to perform their self-defined activities effectively, efficiently, and sustainably. This definition renders capacity development an evolving process that involves various levels of interventions and entities as well as performance of specific activities and functions. Therefore, analysis of the efficiency and effectiveness of trade and trade related capacity-building measures should be multidimensional.

Trade and trade related capacity building is an area of importance and interest to both least developed countries (LDCs) and the international community. It is well-known that LDCs have huge trade and trade related capacity gaps. Since the establishment of the LDCs category of countries in 1971, one of the key objectives has been to enable them benefit from international support measures which covered the following elements: official development assistance as well as development financing and technical cooperation; preferential market access and World Trade Organization (WTO) measures on special and differential treatment; and other forms of support. However, the United Nations Committee for Development Policy (CDP) lamented the fact that there has been lack of success in LDCs development due to factors such as inability to take sufficient advantage of the specific benefits associated with LDCs status. The main reason for this lack of success was attributed to LDCs' lack of knowledge about the availability international support measures and a series of constraints in accessing and making use of such measures.[2] This perspective by CDP clearly highlights that LDCs trade and trade related needs remain largely unaddressed and the main question, why is this so?

[1] United Nations Development Programme, *Capacity Development: A UNDP Primer* (United Nations Development Programme, 2009) <http://www.undp.org/content/dam/aplaws/publication/en/publications/capacity-development/capacity-development-a-undp-primer/CDG_PrimerReport_final_web.pdf> accessed 6 January 2009.

[2] United Nations Committee for Development Policy, 'Capacity building experiences in LDCs - Building on existing mechanisms and harnessing innovative ideas' (6 April 2016) <https://www.un.org/ecosoc/sites/www.un.org.ecosoc/files/files/en/dcf/workshop-ii-capacity-building-experiences-in-ldcs.pdf> accessed 6 January 2019.

The CDP seems to place the onus on LDCs for this lack of success. This determination appears to be an oversimplification of issues that relate to the rationale behind, and the design and eventual provision, as well as absorption, of capacity building measures. The processes that lead to the design and provision of capacity building measures by government under the auspices of various international organizations may perhaps be considered efficient. However, it is a fact that these governments negotiate and agree on what they consider well-designed capacity building measures. This nonetheless leaves an open question as to whether efficiency in such measures necessarily means that they are also effective. The CDP determination above could be interpreted to mean that since 1971 capacity building measures targeted at LDCs have largely failed to reach the required level of effectiveness.

This chapter analyses trade and trade related capacity building as it relates to African LDCs. It assesses the merits and demerits of rationale behind the design and eventual provision of capacity building measures to African LDCs. In particular, it looks into whether such measures are designed and provided in a way that renders them not only efficient but also effective and beneficial to LDCs. It further looks into responsibilities of LDCs in the area of capacity building.

This chapter is divided into six sections. This introductory section has provided the overall context for the chapter. Section 2 is a typology of trade and trade related capacity needs in African LDCs, which explores the nature and scope of trade and trade related capacity building. Section 3 discusses types of capacity building interventions and the perspectives of African LDCs. Section 4 reviews the forms of trade related capacity-building measures provided to African LDCs. Section 5 analyses the efficiency-effectiveness dichotomy of trade related capacity building. Section 6 concludes.

2. Typology of Trade and Trade Related Capacity Needs in African LDCs

The nature and scope of trade and trade related capacity building has been defined at various levels. As an example, United Nations (UN) agencies in their numbers, World Trade Organization (WTO), African Regional Economic Communities (RECs), individual and consortium of countries as well as private sector and civil y organisations have identified LDCs trade and trade related capacity building needs, albeit from their own unique perspectives. This implies that there are self-identified needs by African LDCs and those that are determined at intergovernmental level. The latter suggests that there are both self-assessed needs identified by LDCs as well as LDCs' needs identified through a process of intergovernmental negotiations. The latter needs are normally recorded in policy documents of international organizations and RECs.[3] As a result, there are obligations that arise out of negotiated outcomes on the best ways to meet the LDCs trade and trade related needs. Those obligations that fall squarely on LDCs are based on a presumption that LDCs have the capacity to fulfil them. Impliedly, there are capacity building measures that can only be implemented subject to specific actions by LDCs. The question here is whether LDCs are endowed with the requisite capacity to trigger the overall implementation of capacity building measures. There are also capacity gaps identified through LDCs self-assessed needs, as noted above. In order for such needs to be met, LDCs must source providers of capacity building measures who may have their own conditions for provision of assistance. Of course, LDCs may identify capacity deficiencies that they may fund from their own resources. There can

[3] As an example, LDCs needs recorded under the Istanbul Program of Action, under the World Trade Organization (hereafter WTO) Agreements and decisions, and under United Nations Framework Convention on Climate Change are largely subjected to a negotiations process.

also be another set of needs that LDCs are ill equipped to identify owing to their capacity constraints.

The above account makes it clear that the needs of LDCs may manifest in three key dimensions, namely: LDCs' self-assessed needs; jointly identified and negotiated needs; and needs that LDCs may be ill equipped to identify. Meeting these needs through capacity building interventions in an efficient and effective manner should take into account the unique features of each as described above. This notwithstanding, there are specific trade and trade related capacity building categories that have been developed by the United National Industrial Development Organization (UNIDO). This categorisation represents a model within which LDCs' needs may be observed in a bid to ensuring that capacity building interventions are not only efficient but also effective. These are discussed below.

UNIDO's list of trade capacity building categories include, amongst others: global advocacy; trade policy development; support for developing an appropriate legal and regulatory framework; supply capacity; compliance support; compliance support; infrastructure and services; trade promotion and capacity building; market and trade information; trade facilitation; e-commerce services and digital economy support; physical trade infrastructure; and trade-related financial services.[4] These categories represent areas from which capacity building interventions may derive their operational essence. Successful implementation of capacity building measures implies a need for a conscious effort to give them implementation context, particularly in ensuring that their implementation is not only efficient but effective as well. To establish effectiveness of capacity building interventions would require assessment of their overall impact in their own right as well as their impact in the context of broader trade capacity building categories. A review of UNIDO's trade capacity building categories reveals that no single capacity building measure can be effective without being linked to more than one category. The interrelatedness of these categories means that capacity building interventions must be sequenced in their implementation. This approach will ensure that capacity building intervention are rationalized within a wider spectrum LDCs needs, thereby avoiding duplications and provision of interventions that may not exert expected impact. This could be because such interventions are duplicative or they are provided at a level that is not reconcilable with the institutional arrangements of a given LDC or because of a lack capacity in the human resources that would be required to either implement or sustain the intervention. Therefore, the UNIDO's capacity building categories represent key parameters that will not only guide types of interventions needed for the benefit of LDCs but also those that may be used to assess their effectiveness and efficiency. Importantly, they suggest that capacity-building interventions must be conceptualized in a transactional manner. In this regard, a detailed assessment of the context within which they will be implemented is necessary to determine the chances of their success hence their prospective effectiveness. A description and discussion of some of these categories are provided below.

3. Categories of Trade and Trade Related Capacity Building Measures

The approach to providing trade and trade related capacity building must take into account the nature and purpose of each of the above highlighted categories. One of the glaring aspects of these categories is that they are mutually inclusive and not monolithic. They are supposed to be approached in an interrelated manner in recognition of the fact that, in almost all of them, LDCs are severely under developed. As an example, capacity-building measures targeted at the trade policy development and legal and regulatory framework categories may amount to

[4] United Nations Industrial Development Organization, Trade Capacity Building Resource Guide: Categories <https://tii.unido.org/browse/categories> accessed 6 January 2019.

being ineffective if certain considerations are not given heed to. In this example, if promotion of the use of trade as a development tool and understanding of the relationship between trade and development as well as supporting services are not treated as prerequisites to engaging in trade policy development and legal and regulatory framework categories, capacity building interventions in these areas are bound to fail.

Simply put, laws or regulations may be developed, but their implementation will be challenging if the implementers and enforcers of such laws do not understand them and lack implementation capacity. In retrospect, evidence of this approach can be drawn from the challenges that bedevil African LDCs in the implementation of their WTO obligations. In this context, Zhang lamented the fact that LDCs generally lack capacity to apply WTO Agreements fully.[5] This means entry into force of the WTO agreements preceded cultivation of requisite capacity by African LDCs to implement the agreements. Groome considered this lack of capacity as an antecedent to LDCs' breach of their WTO obligations.[6] This same logic can be extended to regional trade arrangements to which African LDCs belong, given that these arrangements are by their very nature WTO-plus. However, contextualizing capacity needs and attendant interventions within the broad framework of UNIDO's capacity building categories is crucial. This will ensure that capacity building interventions are implemented in a precise and contextual manner, regardless of whether it is prior to LDCs' taking of trade or trade related commitments or after taking such commitments, such as the case with the WTO or Regional Trade Agreement (RTA) level commitments.

One of the dimensions that must be considered in line with an argument in favour of the adoption of UNIDO's category in determining the nature and scope of capacity building interventions is the nature of technical issues targeted. To give an example, in the category of legal and regulatory framework, a number of ministries or agencies in LDCs specialize in legal rules that are specific to their sectors. As a result, any trade related capacity building interventions must ideally have a cross-sectoral or multi agency impact. A measure by a ministry of health to curb smoking among youths will not only affect the ministry of health, but also ministries of finance, agriculture and trade, and any other relevant ministries. In this context, without advocacy-related capacity building measures aimed at highlighting the necessity to balance national trade related obligations and rules at sectoral level as well as reconciling them against international trade and trade related obligations of a country, there is a likelihood that a capacity building intervention may lead a country to taking decisions that are at cross purposes with each other as exemplified below.

Taking Malawi as an example, Douillet noted that analytical capacity constraints of the country have hindered an independent analysis and assessment of the potential implications of multiple policy reforms of this African LDC.[7] A good example of what the said entail constraints can be found in the Malawian tobacco sector. This sector is said to comprise of a value chain, which constitutes, among other elements, tobacco production, transportation of tobacco to the markets, grading of tobacco and the marketing of tobacco on the domestic markets and exports. Bearing this in mind, at policy level, most Malawian tobacco policies are enunciated in agricultural sector wide policies and/or national development strategies;[8] in addition, the policies of other sectors such as health, finance and trade play a huge role in the

[5] Xin Zhang, 'Implementation of the WTO Agreements: Framework and Reform' (2003) 23 Northwestern Journal of International Law & Business 383.

[6] John Croome, *Reshaping the World Trade System: A History of The Uruguay Round* (Diane Publishing 1995) 336.

[7] Mathilde Douillet, 'Trade and Agricultural Policies in Malawi: Not All Policy Reform is Equally Good for the Poor' (2012) MPRA Paper 40948, University Library of Munich, Germany.

[8] Ephraim W Chirwa, 'Competition Issues in the Tobacco Industry of Malawi' (United Nations 2011) <http://unctad.org/en/PublicationsLibrary/ditcclp2011d5_en.pdf> accessed 6 January 2019.

viability and regulation of the tobacco sector. Undoubtedly, capacity building interventions from any of the sectors playing part in the tobacco value chain will inevitable either positively or negatively affect other allied sectors in the chain. In the case of negative impact, failure to rationalize capacity building interventions within their broader implications on other sectors may result in unintended consequences. It is for this reason that the UNIDO's capacity building categories may provide a framework from which the appropriateness of capacity building measures and their potential impact may be assessed before their deployment. This will ensure that the measures are designed and deployed in a manner that takes into account the interrelationships of various sectors and further ensures their effective implementation.

The implications of interrelationships between capacity building categories means that African LDCs, as recipients of capacity building measures, must be conscious of the interrelationships of the categories relative to their needs. In this regard, where appropriate, these countries should demand sequencing of capacity building interventions in line with their self-determined and specific needs. Similarly, in the case of interventions aimed at addressing needs determined through intergovernmental negotiations, it should be ensured that they conform to parameters set out in UNIDO's categories of capacity building measures. This will further ensure that these interventions do not result in unintended consequences. This implies that African LDCs must undertake needs assessments that factor in UNIDO's capacity building parameters as set out in the latter's specific categories. The recognition of UNIDO's categories of capacity building as part of the key indicators that must underpin any needs assessment by LDCs will ensure that capacity building interventions provided to these countries are in line with their national objectives and take into account their own sectoral make up and not just the objectives of providers of assistance. This exercise will have the value of helping African LDCs identify cross-sectoral and sectoral competencies and needs and their interrelationships. In turn, this approach will ward off potential negative impact of capacity building interventions that are implemented out of self-determined competencies and capacity needs framework.

The above notwithstanding, there is no evidence in literature to the effect that any of the African LDCs have adopted a system of indicators that must be satisfied before any request for capacity building measures is made; or even a system that determines whether or not to accept interventions provided by external parties or domestically sourced interventions. This leaves African LDCs prone to accepting capacity building offers and requesting or initiating interventions that may not effectively address their needs. Similarly, none of the reviewed providers of trade and trade related capacity-building interventions base their interventions on systematic consideration of their applicability following the UNIDO categorization model. In both cases, the approaches utilized by African LDCs and other providers of capacity building interventions are synonymous to shadow boxing with a hope that punches thrown will land on the right target.

While there is no single method that may work for each and every African LDC given unique features of these countries, it is nonetheless noteworthy that there are no highly disaggregated parameters that have been adopted at international level for the provision of trade and trade related capacity building. The Paris Declaration on aid effectiveness does not meet this demand due to its broad disciplines on how to treat aid for trade. As an example, there are five key principles provided by the Paris Declaration on Aid Effectiveness. These are: *ownership*, which provides that developing countries set their own strategies for poverty reduction, improve their institutions and tackle corruption; *alignment*, which provides that donor countries align behind these objectives and use local systems; *harmonization*, which provides that donor countries should coordinate, simplify procedures and share information to avoid duplication; *results*, which provides that developing countries and donors shift focus to development results and that results get measured; and lastly

mutual accountability, providing that donors and partners are accountable for development results.[9] These are overly broad parameters that provide macro level guidance on how to treat capacity building measures and less so on the nitty-gritties of the actual implementation of interventions.

Understanding the interrelationships of the above-referred categories is key to having LDCs maximize benefits availed through capacity building initiatives. However, to maximize such benefits, the LDCs and providers of trade and trade related capacity-building interventions must ensure that such interventions are based on assessed needs that in turn will dictate categories in which these interventions must be directed. Table 10.1 below identifies, for selected UNIDO trade and trade related capacity building categories, the activities of individual multilateral organizations. A review of UNIDO's Trade Capacity Building Resource Guide highlights a number of key issues worth noting.

All the multilateral organizations covered by the guide are engaged in one form or other of trade or trade related capacity building activities of benefit to African Countries. In a few instances, these organizations have a longstanding and formal basis for cooperation, such as it is the case concerning the relationship among WTO, UNCTAD and ITC.[10] Other forms of cooperation among these organizations are generally *ad hoc* or issue based. This is exemplified by, for example, WTO's collaboration with other international organizations secretariats.[11] The same is true for WTO constituted Annex D organizations, whose mandate is to cooperate in the provision of technical assistance to and capacity building in LDCs and other developing countries during the negotiation and implementation phases of WTO's trade facilitation agreement.[12] Cooperation among multilateral organizations is therefore existent albeit with some limitations as discussed below.

Table 10.1 further indicates that not all of UNIDO's categories of capacity building feature in the capacity building activities and interventions of all of the multilateral organizations examined. This is reflective of, among other matters, limitations of their trade related mandates, as each organization will tend to provide capacity building in categories relevant to its mandate or from an angle of its objectives and technical preoccupations. Taking the World Health Organization (WHO) as an example under the legal and regulatory framework category, the organization mainly focuses on trade measures that affect health matters as a primary basis of its trade and trade related capacity building interventions. As another example, the International Civil Aviation Organization (ICAO) focuses its effort on civil aviation matters from the prism of its operational mandates and objectives of the organization. Despite snippets of collaborations among the reviewed organizations, such as the case of ITC, UNCTAD and WTO where the collaboration is highly defined and focused on specific activities, some of which are not necessarily targeted at LDCs, there is generally a fragmented approach to the provision of capacity building by the reviewed organizations. This is particularly the case in the context of specific UNIDO's categories. This means most

[9] Organization for Economic Co-operation and Development (hereafter OECD), 'The Paris Declaration on Aid Effectiveness' <http://www.oecd.org/dac/effectiveness/parisdeclarationandaccraagendaforaction.htm> accessed 6 January 2019.

[10] The International Trade Centre (hereafter ITC) operates on the basis of a joint mandate from the WTO and the United Nations (hereafter UN) through the United Nations Conference on Trade and Development (hereafter UNCTAD) to support regulatory, research and policy strategies of the WTO and UNCTAD. The ITC focuses on implementing and delivering practical TRTA projects.

[11] WTO, 'The Doha mandate on multilateral environmental agreements (MEAs) – Collaboration between WTO and MEA secretariats' <https://www.wto.org/english/tratop_e/envir_e/envir_neg_mea_e.htm> accessed 6 January 2019.

[12] WTO, 'Text of the "July package" — the General Council's post-Cancún decision' WT/L/579 (1 August 2004) <https://www.wto.org/english/tratop_e/dda_e/draft_text_gc_dg_31july04_e.htm> accessed 6 January 2019.

international organizations do not consider the potential impact of their interventions from cross-sectoral perspective or how they interrelate with those of other organizations.

Understandably so, each of these organizations frames its capacity building activities based on the rules and mandates governing them. This implies that needed level of cooperation is not clearly defined, particularly at implementation level.

Table 10.1: Capacity building activities by multilateral organizations

Multilateral Organization	Global Advocacy	Trade Policy Development	Legal and Regulatory Framework
AfDB	✓	✓[1]	✓[2]
FAO	✓	✓[3]	✓[4]
ICAO	✓	✓[5]	✓[6]
IAEA	✓		✓[7]
IFAD	✓	✓[8]	
ILO	✓	✓[9]	✓[10]
IMF	✓	✓[11]	
IMO			✓[12]
ITC	✓	✓[13]	✓[14]
ITU	✓		✓[15]
INCITRAL			✓[16]
UNCTAD	✓	✓[17]	✓[18]
UNDESA	✓	✓[19]	
UNDP	✓	✓[20]	✓[21]
UNECA	✓	✓[22]	✓[23]
UNEP		✓[24]	✓[25]
UNIDO	✓	✓[26]	✓[27]
UNWTO	✓	✓[28]	
World Bank Group	✓	✓[29]	✓[30]
WIPO			✓[31]
WHO	✓	✓[32]	
WTO		✓[33]	✓[34]

Source: UNIDO *Trade Capacity Building Resource Guide*

The above account attests to the importance of UNIDO's classification of capacity building categories. It also highlights the fact that approach to implementing activities under specific categories by international organizations is largely fragmented in terms of the scope and focus of their activities. There is general a disconnection between categories in respect of individual and collective capacity building activities of international organizations. This implies the following potential problems:

i. There is a possible duplication of efforts and interventions by these organizations. These duplications and interventions can be both in form and focus area. As an example, FAO training programs on the WTO Agreement on Agriculture can easily duplicate similar programs by the WTO, and vice versa.

ii. Premature implementation of interventions in categories that are at a high level of abstraction, thus undercutting potential success that would only be possible by building on interventions provided at foundational categories. In this connection, interventions under the legal and regulatory framework category presuppose that a basic knowledge of the issues involved at that level has already been cultivated at lower levels. Of necessity, those at the level of advocacy must precede such interventions. This is particularly true in cases where, for example, a sectoral ministry or agency is being provided some trade or trade related capacity building. In this case, the assumption is that technical assistance that is provided to a ministry or agency that is not fully acquainted with trade related matters would need basic and foundational knowledge on the relationship between its sectoral mandates and policies vis-à-vis the country's core trade obligations. Therefore, the first port of entry will be raising the ministry or agency awareness on such dimensions, rather than focusing on either trade policy development or legal and regulatory framework, both of which are at a high level of abstraction.

A certain level of systematic determination of needs by ministries, agencies, and a country as a whole, in as far as sequencing of activities per specific categories is concerned, is therefore key to ensuring that needs of countries, in this case LDCs, are addressed in the most effective way possible.

This will foster interconnections among activities in various categories and therefore highlight sectoral and horizontal technical areas that must be considered and implemented in concert.

4. Types of Capacity Building Interventions and Perspectives of African LDCs

LDCs receive various types of capacity building interventions from a number of stakeholders, including international organizations. These interventions may be provided at the request of LDCs or as an outcome of negotiated outcomes. Self-determined requests for capacity building by LDCs importantly points to the notion of first hand ownership they attribute to such requests. In the case of negotiated outcomes, the ownership therefrom arises out of a compromise reached in negotiations, hence not necessarily fitting the first hand ownership model. This notwithstanding, according to Nuffic, capacity development must be well designed and executed in order to produce sustainable effects. This denotes that the design and execution aspects of capacity development are determinants of how sustainable a capacity intervention may be.[13] It is therefore essential to establish the extent to which capacity building interventions reconcile with perspectives of African LDCs in respect of their expectations.

The capacity building programs of the international organizations are mostly time-bound and often operate on a very short implementation cycle. As an example, the WTO follows a biennial capacity building program, thus implying that the organization's inputs in potential

[13] EP Nuffic, 'The 5 Capabilities Approach in Capacity Development of Organisations' (26 January 2016). <https://www.tapipedia.org/content/5-capabilities-approach-capacity-development-organisations > accessed 20 January 2019.

deep reform processes by LDCs is by design extremely limited.[14] A review of recommendations by external evaluators of the WTO technical assistance programs and WTO's management responses corroborates this point. In this regard, none of the recommendations point to a long-term program and/or the principle of sustainability of expertise acquired as a result of WTO interventions, particularly from the perspective of LDCs. This is not to say WTO programs are not useful or to suggest that WTO does not have interventions that are relatively longer in duration. An example is the Enhanced Integrated Framework (EIF) program, which may provide capacity building interventions that last a number of years. However, even in this case, the focus of the project is not reforms centred. On the contrary, most projects are concerned with the supply capacity of LDCs. While this project touches on a number of UNIDO's categories, most projects are not informed by the prior cross-sectoral reform agenda of individual LDCs. Therefore, the question is whether WTO interventions fit squarely within a model of long-term reform that by necessity LDCs must undertake if they are to be fully compliant with their obligations and implement them in an economically beneficial manner.

Similar to WTO training programs, the interventions by many other international organizations are limited in terms of their scope of coverage. As an example, UNECA IDEP's training programs, which include both short courses and a masters degree programme, are targeted at individual capacity building as opposed to direct organizational or institutional capacity building in its direct sense.[15] Direct organizational or institutional capacity building means that the interventions provided are directly linked to a specific governmental program or to a planned reform process. Again, this is not to question the usefulness of the program, but its long-term impact and linkage to specific African LDCs reform process or projects. This does not mean UNECA does not have relatively long-term capacity building programs. As an example, from 2013 the organization assisted Lesotho to develop its minerals and mining policy, which was completed in 2015. This was followed by awareness raising events and public consultations on the mining bill, supported by UNECA in 2016.[16] Nonetheless, this does not suggest that the intervention by UNECA followed UNIDO's capacity building model. On the contrary, in the Lesotho's case it was sectoral intervention that did not consider the possibility of a cross-sectoral output.

A review of UNIDO's trade capacity building resource guide on the types of capacity building interventions provided by international organizations along all the given categories highlights the fact that capacity building is generally not provided in a holistic and integrated manner. Most interventions are individualistic or sectoral; where they go beyond individuals and sectors to covering institutions, there is no indication to the effect that such interventions are either sequentially rationalized relative to UNIDO's capacity building categories. There is further no indication that they take multi-institutional and cross sectoral approach. This is not to say there are no successful cases. As already noted EIF is one such successful capacity building intervention, albeit limited in the design and scope of its intervention and not focused on robust cross-sectoral reform.

There are some further successful cases that closely mirror the UNIDO's capacity building categories. Reforms by Uganda provide an example. According to the World Bank, as early as 1980's Uganda realized the need to enhance the performance of the ministry of finance in the collection of revenues. The attempt to achieve this objective amounted to a reform process

[14] WTO, 'Biennial Technical Assistance and Training Plan 2018–19' WT/COMTD/W/227/Rev.1 (23 October 2017).

[15] United Nations Economic Commission for Africa (hereafter UNECA), Africa Institute for Economic Development and Planning, Masters Degree Programme <https://www.uneca.org/idep/pages/masters-degree-programme> accessed 6 January 2019.

[16] UNECA, 'Lesotho Launches New Mining Policy' (12 June 2015) <https://www.uneca.org/stories/lesotho-launches-new-mining-policy> accessed 6 January 2019.

that led to the creation of Uganda Revenue Authority. The process involved administration, customs and legislative reforms and by early 2000s Uganda was successfully implementing the outcomes of these reforms.[17] A case study on Uganda by the World Bank reveals that some key categories of capacity building were addressed in a manner customized to Ugandan needs. Categories such as advocacy, policy development, legal and regulatory framework, compliance and support infrastructure, and services and physical infrastructure were some of the categories addressed during the reform process. It is important to stress that the reforms were not an event but a process that took decades and the capacity building categories were addressed in a manner customized to Ugandan circumstances. This means sequencing of the categories of capacity building is an organic process as opposed to a predetermined process. It is worth noting that, in the Ugandan case, a number of donors facilitated the reform process including DFID, UNCTAD, WCO and the World Bank. Other players include the Ugandan Government.

There are some lessons that can be learned from the Ugandan Case. The first point is that the needs identified by Ugandan government required long-term capacity building interventions across a number of capacity building categories. This morphed into a reform process that took more than two decades. The express needs of Uganda rendered the scope of reforms far reaching in respect of resources needed, activities foreseen, and the time needed to meet such needs. This by no means implies that Ugandan reforms achieved what is being advocated by in this author. While they mirrored the UNIDO's capacity building categories, this was at best limited to a very narrow sector, namely customs. The value of this case is that the Ugandan project took a reform approach and many of its capacity building interventions covered most of UNIDO's categories. On the contrary, a review of the multilateral institutions' interventions pales in comparison, as these interventions are generally not reform centric, but are short lived in terms of their longevity and fall short of addressing multiple categories of capacity building in an integrated and systematic manner. It could be argued that the type of capacity building provided is narrow focused and may not yield results that amount to sustainable reforms. It will take conceptualization of the types of categories involved in the project or how they each and collectively fit within a planned or an ongoing reform process for capacity building interventions to yield tangible benefits to African LDCs.

4.1 Demand Driven Support and the Role of LDCs

A discussion on capacity building is incomplete without consideration of the concept of "demand driven support". Krohwinkel and Sjögren draw a distinction between two forms of manifestation of a demand driven concept, which can manifest as a normative requirement determined through exogenous evaluation; or as a 'felt need' determined endogenously through self-perception.[18] Capacity building measures that are determined by foreign actors and provided to LDCs, such as it is the case in most bilateral capacity building initiatives, fall under the normative demand. Those that are determined by LDCs themselves are clearly endogenous hence fall under the rubric of felt needs. As earlier discussed, some of the LDCs needs are subject to negotiations. These needs are a result of exogenous and endogenous determinations. It is in this context that it is worth discussing the role of LDCs in the capacity building discourse.

One of the key issues of interest to most African LDCs is their bid to preserve their autonomy to dictate the pace and define the necessity of any potential reform. Normative based support can easily be interpreted as encroaching on their policy space, particularly if it is not attached

[17] Luc De Wulf and José B Sokol (eds), *Customs Modernization Initiatives: Case Studies* (World Bank 2004).

[18] Anna Krohwinkel-Karlsson and Ebba Sjögren, 'Identifying Need through Expressions of Demand: Deciding on Public Financial Intervention within the Fields of Healthcare and Development Aid' (2008) 10 Public Management Review 197.

to their existing international obligations. Therefore, externally determined needs of LDCs may face an uphill battle at implementation level capacity building interventions due to potential lack of buy-in to the reforms that must follow such interventions. On the contrary, when it comes to endogenously determined needs, the assumption is that the buy-in by LDCs given an appropriate level of capacity building support will increase the chances of successful implementation of capacity building reforms and hence the overall success of premeditated reforms. The assumption in cases where LDCs identify their needs is that they would have also conceptualized and sequenced categories of capacity building interventions relative to their needs. For this to be the case, a further assumption is that they would have drawn a clear-cut reform process into which the capacity building interventions will fit. Nevertheless, not in all cases do LDCs have the expertise and capacity to endogenously define and identify their needs.

It is nonetheless known that most LDCs, and in this case all African LDCs, have not proven to have such capacity. Taking the WTO's trade facilitation agreement as an example, the African LDCs could not individually determine their needs. These countries had to be assisted to identify and determine their needs as well as how they should sequence measures to be notified as their legally binding obligations. This was done through a needs assessment process, which was facilitated by, amongst others, the WTO, UNCTAD and the World Bank. The similar approach was adopted under the WTO's Enhanced Integrated Framework program, where the majority of LDCs could not draw a credible business case that was meant to trigger funding of their self-determined projects. The point being made here is that the well sounding principle of "demand driven support" is not always straightforward for the LDCs. Therefore, expecting this set of countries to clearly define their needs at disaggregated level may not be feasible in all cases. This therefore makes the case that capacity building interventions directed at African LDCs must be rationalized against specific categories whose implementation would be viable in LDCs. As an example, training legal experts in areas not foreseen in the reform process of a given government may not result in value creation in the institutions to which the trainees belong. In this example, if an international organization provides training in this manner, whilst they would have trained individuals from the relevant ministry or agency, that in itself does not amount to institutional capacity building in the sense of the mandate of such institution and the reform process. There is therefore a clear case of a need for trade-off between the LDCs' bid to preserve their autonomy to identify their needs and the need to allow external parties to assist in that effort owing to their incapacities. This process must be fully owned by the LDCs.

The categories discussed above are clearly interdependent rather than monolithic. Their treatment should therefore be based on a sound assessment of the capacity needs of beneficiary LDCs and they must be demand driven. The capacity of LDCs to conceptualize their needs should not be taken for granted, nor should the longevity of expected interventions. It is therefore important that LDCs and providers of capacity building support undertake a robust assessment of the formers needs and categories under which interventions must be adapted. This is important because in LDCs there is generally an opportunity to carry out reforms that are based on these countries' identified needs as well as those based on their rights and obligations under international agreements. As far as LDCs' rights under the international agreements are concerned, the extent to which they fail to exercise these rights may be considered synonymous to their express lack of capacity, hence amounting to their trade and trade related needs. LDCs' rights and their inability to institute trade remedies systems represents such an example: due to capacity constraints, none of the African LDCs have functional trade remedies systems. In order for these countries to exercise their rights in this area, capacity building interventions by various entities must be underpinned by an assessment that will identify areas and categories of intervention, which will be in line with the needs of LDCs or their reform processes. It could be that although they have some

specific rights, there may be no urgency for them to exercise them or vice versa. For what is worth, the assessments will ensure that capacity building interventions yield tangible results and not just a mere head count of individuals trained or projects undertaken without an assessment of their impact and the sustainability of their inputs. On the contrary, the assessments will determine whether an immediate action is needed or not.

5. Forms of Trade Related Capacity Building Measures Provided to African LDCs – A Review

According to Nuffic, capacity development takes place at three levels, namely, professional development of individuals; at organizational level;[19] and lastly, at institutional level.[20] These levels are said to be interdependent, thus requiring individual development combined with organizational reforms and institutional changes so as to effectively employ newly acquired knowledge and skills. This combination of capacity development levels requires long-term capacity building investments and interventions. In this context, UNCTAD concluded in its analysis that African LDCs run deficits in all the basic trade related capacities that are synonymous to Nuffic's three levels, namely, the enabling environment level,[21] building institutional frameworks and human resource capacities levels.[22] These three levels are discussed below.

5.1 Enabling Environment

While taking good note of the fact that some African LDCs have mainstreamed trade in their national development policies, generally these countries are still lacking in trade and trade related strategies, policies, laws, and regulations. In this regard, these LDCs have made diagnostic trade integration studies, written poverty reduction strategy papers and in some instances drawn up sectoral and cross-sectoral documents identifying actions that must be taken. However, a WTO–OECD study established that, notwithstanding general awareness of the role of trade in development, transforming trade objectives into action is a challenge for LDCs. Some key factors to this end relate to the incapacity of LDCs to adequately cost their strategies and link them to their national budgets and donor financing.[23] This corroborates a point discussed above on the LDCs inability to determine all of their trade and trade related needs.

5.2 Institutional Frameworks

Effective implementation of national trade and trade related policies requires strong institutions that are well coordinated and involve key entities, namely, the public and private sectors as well as civil society. Nevertheless, the African LDCs' institutional frameworks are said to be generally weak. To this end, UNCTAD established that few African LDCs have higher learning institutions with capacity to design and deliver trade related capacity building. This implies that provision of capacity building is exogenously driven in most LDCs. In countries where institutions are in place, they are often ill equipped to meet and address the demands and needs of the country. In a similar vein, research capacities of LDCs were assessed as low relative to the analytical capacities they need to assess the impact of

[19] This is about development and strengthening the capabilities of organizations. See Nuffic (n 13).

[20] This involves development of rules and conditions which allow organization to function properly. See Nuffic (n 13).

[21] This level entails strategies, policies and laws and regulations. See Nuffic (n 13).

[22] UNCTAD, *Trade-Related Capacity Building for Academia in African Least Developed Countries: Development of Human Resources and Policy Support* (United Nations 2010) 8.

[23] OECD and WTO (eds), *Aid for Trade at a Glance 2009: Maintaining Momentum* (OECD and WTO 2009) 33-37.

negotiations provisions relative to their needs in various sectors of their economies. The weakness of institutions is further registered in trade and industrial development promotion institutions, trade data and information management institutions, as well as that of trade negotiation mechanisms. Again, this highlights a general challenge facing LDCs when it comes to determining their needs.

5.3 Human Resources

UNCTAD arrived at a conclusion that, across all African LDCs, there has not been a systematic assessment of human resource needs. This conclusion followed a determination that human resources needs of LDCs span a variety of areas, ranging from negotiation capacities, to policy formulation and implementation, and to identification of national interests. In this context, assessments carried out in relation to African LDCs, such as one on aid for trade by the Organisation for Economic Co-operation and Development (OECD) and the WTO under the auspices of their trade monitoring exercise, were all considered simply anecdotal on account of being too generic.[24] Nevertheless, the OECD-WTO research had some important findings, which should inform any capacity building initiatives in African LDCs. In this regard, 19 African LDCs, or 88% of those that participated in OECD-WTO aid for trade survey, considered institutional and human capacities key in the formulation and implementation trade strategies. They considered capacity development a priority and ranked trade policy analysis, negotiation and implementation among their top three priorities. [25] The paradox here is that these identified areas represent a need for deep reforms that are generally not foreseen by capacity building interventions current availed by international organizations. At the same time, the openness of LDCs to undertake such reforms through express and endogenously stated needs is lacking. The issue here is the fact that the needs and incapacities of LDCs in respect of human resources are well established, hence any capacity building intervention must consider them in a wider context of reforms necessary to see them achieve their development aspirations.

5.4 Forms of Capacity Building Measures Provided to African LDCs and LDCs Perspectives

Before delving into generalized forms of capacity building measures provided to LDCs, it is important to consider the nature of the needs of these countries. A few examples will be given with a view to illustrating the scope of needs of the LDCs. The UN Istanbul program of action (IPoA) is a negotiated instrument that identifies collectively and negotiated needs of LDCs and means to address them. These needs are considered as negotiated because they do not reflect original drafts of LDCs demands. For the most part, the drafts by LDCs and the final IPoA document were informed in some instances by research undertaken by international organisations rather than by individual LDCs. Of course, individual inputs were provided by LDCs, even though these were not individually determined through domestic research by each LDC. Therefore, reports that informed the IPoA tended to be generic in nature and were not based economy wide assessments of individual LDCs or their specific development objectives and capacity challenges. The point here is that though these reports are useful, they were not disaggregated to a point where they can apply to individual LDCs in the context of the latters deliberate reform process. Consequently, the outcome of IPoA document tends to be more generic as well thus becomes more symbolic of the intentions of the international community as opposed to being an instrument that can be adapted to individual LDCs needs and inform the type of capacity building these countries require. The assumption here is that LDCs already have capacity challenges to tailor make interventions to the meet their

[24] UNCTAD, *Trade-Related Capacity Building* (n 22) 12.

[25] OECD and WTO, *Aid for Trade at a Glance 2009* (n 23) 35.

individual needs. Therefore, a much more country specific approach could go a long way to helping the LDCs.

The above notwithstanding, IPoA aims to enable half of the LDCs to meet the criteria for graduation.[26] However, as noted above the question is whether drawing such aim was informed by critical assessment of its implementation viability or whether it was yet another tug of war of words between LDCs and other UN members is mute. This is because this aim was not based on scientific evidence determinative of their close to guaranteed viability. This does not mean LDCs specific research is not in abundance. As an example, the World Bank and IMF undertake country specific research. The point here is that the outcomes of such research are generally not reduced to a reform process adopted by each LDC thus ensuring that LDCs have buy in in eventual documents that prescribe actions and initiatives considered potentially beneficial to them. Reflecting back on previous UN LDCs programs of action, they have so far not been based on any predetermined country specific and realistic parameters and targets that will allow for subsequent objective assessment of their achievement. On the contrary reviews of LDCs programs of action reveal a tendency to generalize the targets and goals, which may not necessarily be achievable, at least by the African LDCs. This is true with LDCs program of action as reflected in IPoA's lessons learnt from Brussels program of action.

Capacity building interventions provided to African LDCs have been dubbed stopgap measures. These represent short lived interventions aimed at imparting basic knowledge on trade as opposed to advanced knowledge that may have the effect of providing skills necessary for sustained and beneficial development and implementation of policies. Focus has been placed on compliance with trade rules and regulations as opposed to trade management skills, ad hoc arrangements of trade and trade related capacity building programs and limited funding of specialized trade related programs.[27]

5.5 Approaches to Monitoring Capacity Building Interventions

It is obvious that the nature of capacity building interventions in African LDCs is not reconcilable to the above description of the needs of African LDCs. Therefore, interventions of most organisations are a little afar from adhering sound strategic management principles. These principles prescribe baselines as the foundations that must inform the nature of interventions proposed and their starting points so as to address well defined challenges, in this case, trade and trade related capacity and performance challenges of African LDCs. However, the current practice by providers of capacity building interventions makes it difficult to situate their short-term/stopgap capacity interventions in the broader context of cross-sectoral needs of LDC, which by their very nature require well conceptualized and defined long term interventions. Capacity building interventions that are appropriate to meeting the needs of African LDCs should therefore enable LDCs to:

iii. Secure capacity to act on trade and trade related matters and commit to implementation of such matters;

iv. Secure capability to deliver on development objectives of their country programs, policies and laws;

v. Adapt and reinvent themselves in line with their evolving trade and trade related needs; and

[26] United Nations Office of the High Representative for the Least Developed Countries, 'Istanbul Declaration and Program of Action – 2011' <http://unohrlls.org/about-ldcs/istanbul-programme-of-action/> accessed 6 January 2019.

[27] UNCTAD, *Trade-Related Capacity Building* (n 22) 18.

vi. Achieve coherence in their dealings with trade and trade related issues at institutional and sectoral levels.

The four elements listed above are measurable and key to ensuring efficient and effective deployment of capacity building resources. These elements have key features that in a nutshell ensure that interventions meet critical needs of LDCs. In this regard, they must ensure that: LDCs acquire capacity to act and not just knowledge that is divorced from specific area of activity; acquire capacity to deliver on cross sectoral development objectives in a manner that takes into account the diversity of policies, regulations and laws that are housed under diverse sectors; acquire the ability to innovatively address their evolving needs on the basis of acquired capacity; and further acquire capacity to coherently implement trade and trade related matters taking into account various institutional mandates and the needs and requirements of various sectors.

Contrary to the elements highlighted above, a review of capacity building interventions provided by international organizations covered by UNIDO resource guide seems to be generally devoid meeting standards set out by these elements. To this end, most interventions are targeted at specific sectors to the neglect of interrelationships between sectors and institutions. Consequently, capacity building provided to LDCs is sectorally limited and does not go far enough to ensure long term and sustainable outcomes and monitoring an evaluation founded on broader LDCs reform agenda or process. This does not insinuate that there is an easy way out or there is a predetermined formula on how reforms through capacity building of LDC can be carried out. On the contrary, it is an indication of limitations of the current system on the provision of capacity building support. Short term financial cycle of capacity building programs by international organizations clearly fall short of meeting standards set by the elements above. This implies that the forms of capacity building provided to African LDCs fall short of helping them make head way to achieve their development objectives through trade in the broader context of LDCs wider reforms.

The shortcomings related to the forms of trade and trade related capacity building do not imply that LDCs do not have responsibilities. Investment in identifying their needs and priorities is a call African LDCs must make. This will allow these countries to direct and redirect available capacity building interventions to areas that are action oriented and in line with their development objectives. However, the tendency is to follow the proverbial "tail that wags the dog." This means that African LDCs have to scrounge around for predetermined capacity building opportunities and adapt their needs to such opportunities contrary to accepting capacity building interventions on the basis of established criteria spelling out their needs and requirements. This is an important point which touches on "demand driven" principle that is normally the driving force of capacity building interventions availed to LDCs.

Concerning "demand driven principle" discussed above, most organisations draw parameters that must be conformed to by LDCs before these LDCs can have access to these organizations' assistance. These parameters may include the amount of funds that may be spent on a country, duration, inputs and outputs of the program. Indication of an interest to abide by such parameters by a LDC is considered their demand for the program. While there is sound rationale behind the setting up of such parameters, it is nonetheless noteworthy that "demand" is normally not defined in based on critical assessments done in individual LDCs. This implies that the needs addressed may not attach to specific programs of LDCs governments and of course such programs are hardly followed up in respect of their long-term impact. For such programs, weak indicators such as number of participants trained or legislation drafted etc. normally suffice. This may not apply to all projects. However, the

point being made here is that lack of indicators based on individual LDCs development objectives and reform targets may not serve these countries well.

IPoA identified specific areas of action by LDCs albeit some are dependent on capacity building support that will be provided by developed UN Members. There are eight IPoA priority areas namely, productive capacity, Agriculture, food security and rural development, trade, commodities, human and social development, multiple crises and other merging challenges, mobilizing financial resources for development and capacity building and good governance at all levels. For those areas that are not dependent on assistance from other UN members, the question is whether LDCs posses the capacity to action them.

On whether LDCs possess requisite capacity to meet their obligations under IPoA, taking priority area A on productive capacity as an example, LDCs are expected to ensure that a productive-capacity development agenda is mainstreamed into national development policies and strategies. They are further expected to establish or upgrade quality assurance and standards of products and services to meet international standards.[28] As established by UNCTAD, LDCs lack capacity in many areas including that of human resources as well as institutional capacity characterize sub-Saharan LDCs. It is therefore highly questionable that LDCs posses the capacity to implement most of actions tied to them by the IPoA. This is made even more questionable by the LDCs IPoA implementation, follow up and monitoring obligations, which require that, at the national level, each LDC government must integrate the provisions of IPoA into its national policies and development framework. They are further obliged to conduct regular reviews with the full involvement of all key stakeholders.[29] These requirements by IPoA are far reaching relative to capacities of LDCs; hence it is not a surprise that none of the LDCs have mainstreamed IPoA into their national development plans, policies and development frameworks. It could therefore be argued that IPoA is oversimplifies the capacity required by LDCs to implement its provisions. In fact, it can further be argued that it runs contrary to an appraisal of its predecessor the Brussels Programme of Action for the Least Developed Countries for the Decade 2001-2010 which confirmed "…that a more strategic, comprehensive, and sustained approach based on ambitious, focused and realistic commitments is required to bring about structural transformation in least developed countries that fosters accelerated, sustained, inclusive and equitable economic growth and sustainable development and helps least developed countries meet long-standing as well as emerging challenges."[30] One observation worth making in this context is a glaring disjuncture between approaches to the provision of capacity building interventions by international organization in comparison to IPoA. As earlier discussed, for the most part the international organisations do not necessarily consider the provision of capacity building interventions from specific LDCs endogenous needs or reform processes. On the contrary, IPoA seeks endogenous needs of and specific actions by LDCs to become triggers of capacity building support provided by developed members of the UN.

The above notwithstanding, the scope of LDCs needs is highlighted by IPoA. As noted above, there are eight priority areas identified by the LDCs and the international community under IPoA. The scope of LDCs needs is underpinned by specific actions relating to the eight areas as well as horizontal requirement/activities that apply to all these areas as well as the functioning of the IPoA instrument as a whole. An observation worth making here is the fact that while IPoA speaks of a need to mainstream its provisions into national development

[28] UN, 'Report of the Fourth United National Conference on the Least Developed Countries' (Istanbul, 9-13 May 2011) <http://unohrlls.org/UserFiles/File/A-CONF_219-7%20report%20of%20the%20conference.pdf> accessed 6 January 2019.

[29] ibid.

[30] ibid.

plans and policies of the LDCs, it nonetheless treats the eight priority areas for action by LDCs monolithically. This runs contrary to the point raised above, namely that treatment of trade related capacity building support requires a holistic and cross-sectoral approach. Therefore, treatment of priority areas as isolated items indivisible from each other is an approach that may not meet requirements for a successful reform process and good use of capacity building interventions. All in all, the scope of needs of LDCs is extremely wide as provided for by IPoA. The key, therefore, is whether such assessment has been done with a view to customizing capacity building interventions to individual circumstances and needs of African LDC. Failure of African LDCs to mainstream IPoA into their development plans and policies highlights their overall incapacities to fully implement the instrument and meet the end of their bargain in as far as their obligations are concerned.

6. The Efficiency-Effectiveness Dichotomy of Trade Related Capacity Building

The above account highlights a number of key issues that are important to consider in the context of the provision of trade and trade related capacity building. There is a perceptible efficiency-effectiveness dichotomy in the provision of capacity building interventions. This dichotomy seems to be rooted in uncertainties that plague states relations, particularly, between providers of capacity building interventions, on the one hand, and the recipients of these interventions on the other hand. The extent to which providers of capacity building can do so in both efficient and effective manner is in large part a function of the willingness of recipients to play their part in ensuring that such interventions bear fruits. This is a point well made by IPoA, which would otherwise be an ideal thing to do. However, such an approach may be considered as blurring the line that marks sovereignty of recipients of capacity building interventions.

Rights and obligations of African LDCs, for example, under the WTO agreements necessitate commensurate reforms at the national level. Therefore, the above rationale may not apply per se. However, if the conceptualization of such reforms and their viability require a cross-sectoral approach that is not necessarily spelled out in the specific obligations, the above rationale may apply. As an example, exercise of LDCs rights under the WTO's Agreement's Article IX: 3[31] on waiver such as the African Growth and Opportunity Act (AGOA) implies that in order for them to take advantage of the US market access preferences they must put measures that will allow them to acquire capacity to supply the US market. As an example, a glance at Lesotho's AGOA strategy implies that the country must carry out internal reforms in order to take advantage of AGOA. These include review of Lesotho's institutional framework and consideration of a new one, developing a comprehensive strategy for increase of US investments in Lesotho and development of strategic support programs for identified priority sectors.[32] The implication of this point is that where countries assume some rights under trade agreements, there are implied obligations that they must fulfill in order to activate such rights. Such obligations are far reaching and mostly involve internal reforms which otherwise are not subject to international commitments. Capacity building interventions directed at internal reforms, while necessary, imply that the recipient LDCs will have to determine how far reaching they should be, fully knowing that the depth of such internal reforms will likely determine the nature and modicum of capacity building interventions. There must therefore be a clear understanding to the effect that preservation of sovereignty by

[31] Marrakesh Agreement Establishing the World Trade Organization, 15 April 1994, 1867 UNTS 14, 13 ILM 1144 (1994), Article IX.

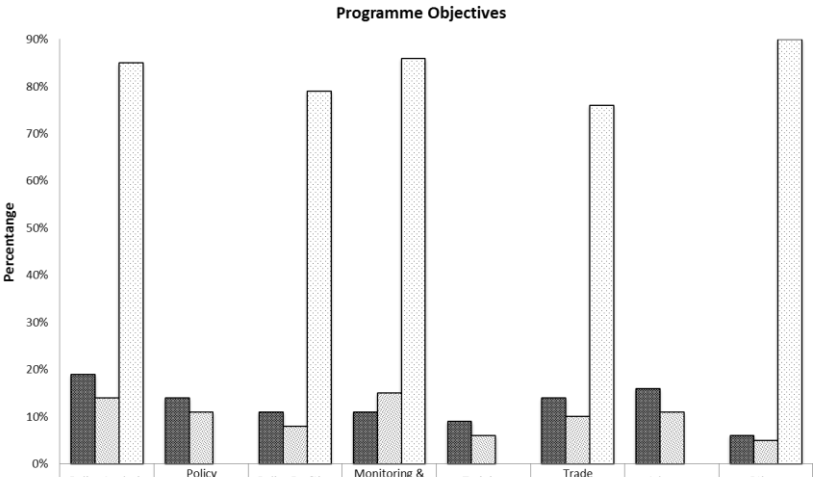
[32] Government of Lesotho, 'The AGOA Response Strategy for Lesotho' (2016) <https://agoa.info/images/documents/6186/agoa-response-strategy-report-for-lesotho-2016.pdf> accessed 6 January 2019.

a way of limiting the extent of internal reforms will likely attract limited capacity building interventions and vice versa.

A key point that must be taken note of is the necessity to base requests for or acceptance of the provision of capacity interventions on LDC's self-determined needs. A fallacy normally committed is an assumption that LDCs are a homogeneous group of countries from an economic and development standpoint. The truth though is that no countries are exactly the same if perhaps we go beyond some parameters set by international organizations. Lesotho is quite different from Liberia despite the two countries being in the same LDCs category of countries. Implementation of commitments by these countries under IPoA will most certainly be highly differentiated. This may be due to their administrative and institutional system, their endowments and geographical locations. It is for this reason that generalization of the needs of LDCs will fall short on meeting individual countries needs and interests. Capacity building interventions that are offered at highly aggregated levels will certainly fall short of meeting effectiveness threshold. Individual country's trade and trade related capacity building needs assessments must therefore be established with a view to moderating capacity building interventions needed by such a country. What this means is that acceptance of capacity building interventions that are not informed by scientifically proven needs of a given LDCs will be a thing of the past. The needs of LDCs will not be externally established. On the contrary African LDCs will be directly involved in the determination of their needs implied by IPoA.

There is no doubt that African LDCs have a long way to go. Self-initiated investment in their human resources, rationalizing and developing the institutional infrastructure, and developing legal and regulatory frameworks are key areas that they must concentrate on. Cross-sectoral approach to trade and trade related matters will be key to ensuring that capacity building initiatives yield robust dividends. This approach will assist in establishing which of the categories of capacity building support apply to which sectors. These will certainly require far reaching reforms on the part of LDCs that will include mainstreaming of trade at its most disaggregated levels into their national development plans and policies.

There is a need to review intergovernmental approach to the provision of capacity building. Understandably so, commitments to provide capacity building interventions will be limited by requirement of the providers' administrative and financial systems as well as in some instances political circumstance of their countries. This notwithstanding, it is useful to review the current models used in the provision of capacity building interventions by international organizations. Most of these are not anchored on highly disaggregated needs of LDCs. To give an idea of this notion, Trade Policy Training Centre in Africa's (TRAPCA) biennial tracer surveys administered to beneficiary LDCs in the area of training provide a good example disaggregated assessment of African LDCs needs as highlighted by figure 10.1 below.



	Policy Analysis	Policy Implementation	Policy Drafting	Monitoring & Evaluation	Training	Trade Negotiations	Advocacy	Others
2010	19%	14%	11%	11%	9%	14%	16%	6%
2012	14%	11%	8%	15%	6%	10%	11%	5%
2015	85%	0%	79%	86%	0%	76%	0%	90%

Figure 10.1: Survey of Alumni and Employers

Source: TRAPCA's 2010, 2012 and 2015 tracer surveys

Figure 10.1 summarises the outcome of a survey administered to TRAPCA's alumni and employers, most of which are from the public sector. The results thereto highlight priorities of surveyed African LDCs relative to the TRAPCA's program objectives. These results highlight changing priorities of countries in a period of five years. Within this period, it can be observed that there were visible changes in countries' priorities with more of them highlighting their growing appetite for capacity building interventions across a number of indicators highlighted in figure 10.1. As opposed to general surveys which tend to generalize indicators, the TRAPCA survey indicators provide an opportunity to secure disaggregated responses that are related to identifiable gaps in various ministries and agencies surveyed. This implies that, once these ministries or agencies have secured a capacity building intervention, the secured competencies are readily deployable to meet specific needs. This example highlights the importance of disaggregated analysis that has the potential to highlight specific areas where capacity building interventions are required by countries. Clearly, a much robust assessment of needs would be needed if LDCs were to establish specific areas where they require capacity building interventions that are readily deployable.

One area that negatively affects efforts of capacity building providers relative to the needs of LDCs is the weak monitoring and evaluation tools used to assess the effectiveness of such efforts. The threshold used is generally very low. As an example, if one was to take training interventions of international organizations to African LDCs in the trade and trade related areas, the measurement of their impact usually leaves a lot to be desired. As an example, impact of capacity building interventions directed human resources is hardly evaluated on a multi-year basis to establish their effectiveness. Where this is done, it is hardly adjudged relative to long term impact of such interventions. The point here is that long-term impact of capacity building measure is normally not the main preoccupation of most international organizations. This approach should change with a view to ensuring lasting interventions in respect of their impact.

7. Conclusion

Trade and trade related capacity building is one area that came to prominence following the adoption of the WTO agreements. However, for over two decades, African LDCs have been grappling with this issue while at the same time finding it difficult to implement their trade and trade related obligations and the international and regional levels. They have also found it difficult to seize and beneficially make use of their rights arising from international trade and trade related agreements. The underestimation of reforms that must be undertaken by African LDCs in order to activate beneficial operation of capacity building interventions is one of the persistent challenges facing these countries. This can be characterized as a challenge of ownership of needed reforms if these countries were to sustainably benefit from capacity building interventions. While a model of self-determined needs by LDCs is the most ideal on as partly acknowledged by IPoA, the reality is that African LDCs are ill-equipped to carry out this task without external assistance. This will also require that LDCs must be open to exploring reforms with partners that have their interests at heart. An outcome of such an exercise will constitute both endogenously and exogenously determined outputs.

The international organizations' approach to trade and trade related capacity building is generally highly aggregated and not specified to individual LDCs unique needs. It is also limited in terms of time and scope of coverage. Capacity building interventions at this level are subject to negotiations and may not entirely address specific needs of African LDCs. There is therefore need to re-conceptualize the approach to the provision of capacity building interventions to African LDCs with a view to making them yield substantial and sustained impact.

Capacity building interventions must be based on four-step test. Firstly, it should enable LDCs to act on trade and trade related matters and commit to implementation of such matters. Secondly, it must lead to delivery of development objectives of LDCs country programs, policies and laws. Thirdly, the interventions must help LDCs adapt and reinvent themselves in line with their evolving trade and trade related needs. Lastly, LDCs must be enabled to achieve coherence in their dealings with trade and trade related issues at institutional and sectoral levels.

In conclusion, the efficiency-effectiveness dichotomy in the area of capacity building lies in two main areas. One is the model used by providers of capacity building interventions whereby they generally do not base intervention on self-identified needs of LDCs thus rendering their intervention devoid of LDCs buy in. This renders their interventions efficient but ineffective in the long run. The second area is incapacities of LDCs to determine their individual needs and possible solutions to meeting such needs with their bid to preserve their sovereign right to determine reforms they deem necessary and the pace of such reforms. Therefore, the trigger of effective capacity building interventions lies in the balance between adapting capacity building initiatives to LDCs individual needs and African LDCs open up to assistance that goes beyond their international obligations. This will certainly be a long-term process and will require high level of ownership and participation of LDCs at each level of intervention.

Notes to Table 10.1

[1] Trade policy training, regional integration strategy.

[2] Launched "The African Legal Support Facility" with the aim of helping highly indebted poor countries (HIPCs) resolve problems caused by vulture funds. The facility could assist regional member countries with highly technical international trade negotiations and complex commercial transactions with multi-national companies, for example the mining sector.

[3] Generating evidence on the possible consequences of trade policies and levels of regional integration on food security and development, improve understanding of international rules and their implications and prepare stakeholders for negotiations and implementation, strengthening the evidence on the consequences of different trade policies and strategies for food security and encourage greater alignment between national agricultural policies and trade/investment priorities and programmes.

[4] The Development Law Branch (LEGN) of the FAO Legal Office provides assistance to countries and regional organizations on matters related to: implementation of the WTO agreements related to agriculture; development of SPS-related legislation in the areas of food safety, plant protection and animal health; awareness of WTO and regional trade agreements, and implementation of TRIPS in the agricultural sector (protection of IPR resulting from new plant and animal varieties). LEGN's assists members in drafting regulatory frameworks in several areas relating to agriculture and agricultural trade, including the SPS, TBT, and TRIPS Agreements.

[5] Seeks to harmonize the air transport framework focused on economic policies and supporting activities. Enhancing civil aviation system's economic efficiency and transparency while facilitating access to funding for aviation infrastructure and other investment needs, technology transfer and capacity building to support the growth of air transport and for the benefit of all stakeholders.

[6] Deals with significant matters relating to the economic policy and regulation of international air transport and its liberalization with, among others, an objective to contributing to the sustainable economic development and to the expansion of trade and tourism, create more competitive business opportunities in the marketplace and reduce the State's costs in performing its economic regulatory functions.

[7] Provides legislative assistance to the Member States in the establishment of adequate and comprehensive national legal frameworks for the safe, secure and peaceful uses of nuclear energy and ionizing radiation under regional projects in Africa.

[8] Helps smallholders adapt to climate change and improve natural resource management, supporting agricultural research and rural financial services, and market-assisted agrarian reform.

[9] Through Assessing and Addressing the Effects of Trade on Employment ('ETE'), the ILO: aims to strengthen the employment dimension in policies and programmes related to international trade with better analysis, more coherent policy-making, and enhanced programmes that are designed to encourage employment creation and upgrading; enable the design of effective and coherent trade, sectoral and labour-market policies that maximize employment-related opportunities created by trade and minimize the adjustment costs of trade-induced economic restructuring.

[10] Offers technical cooperation and advisory services to the Member States, assists them in assessing and framing or revising their labour laws. This entails development of national laws and regulations to allow ratification of Conventions and/or the implementation of International Labour Standards and the corresponding principles.

[11] Trade issues feature prominently in IMF's surveillance consultations with member countries, policy discussions surrounding IMF programmes, and research. This includes consultations under bilateral and multilateral surveillance that cover members' own trade reforms, multilateral trade negotiations, trade policy spillovers from actions of other economies, and the appropriate adjustment of a range of policies to the trade policy environment.

[12] Through its Integrated Technical Cooperation Programme (ITCP), the IMO provides technical assistance including field missions and support in drafting domestic maritime legislation as well as national and regional seminars on maritime legislation. This is attached to IMO global regulations and conventions that provide indispensable technical framework for vital trade activities related to the carriage of goods and passengers on board commercial vessels.

[13] ITC supports developing country policymakers to integrate the business sector into the global economy through improved policy effectiveness for export development and trade promotion.

[14] Assists policymakers in harmonizing and implementing legal and regulatory framework reforms at national, regional and multilateral levels. The ITC has developed a multilingual web-based system on multilateral trade treaties and instruments, the 'Trade Treaties Map' or LegaCarta tool, to assist TISIs and policymakers in optimizing their country's legal framework vis-à-vis more than 300 treaties and conventions that have an impact on trade.

[15] The ICT "eye" website is a one-stop-shop for ICT information and provides telecommunication/ICT indicators and statistics, regulatory and policy profiles, national tariff policies and scientific institutions.

[16] Technical cooperation and assistance activities include providing advice to States considering signature, ratification or accession to UNCITRAL conventions, adoption of an UNCITRAL model law or use of an UNCITRAL legislative guide. They also include guidance on the uniform interpretation of those texts.

[17] Activities aimed at monitoring and assessing the evolution of the trading system from a development perspective, formulating national trade policies and analyses in relation to poverty reduction, and developing trade and trade-related capacities. Its work consists of a balanced mix of analysis, policy advice and direct assistance in response to the needs of the public and private sectors and civil society in commodity-dependent countries.

[18] Training of government officials and other relevant stakeholders on particular WTO agreements and assisting countries in the preparation of memorandums of foreign trade regime and other key accession documents, as well as the exchange of experiences and lessons learned. Implementation and administration of the Agreement on the Global System of Trade Preferences among Developing Countries (GSTP) and Technical cooperation in the area of competition and consumer protection law and policy.

[19] Improving the capacity of LDCs to access and benefit from the special support measures adopted by the international development community, including trade-related support measures

[20] Works with national stakeholders to design and implement strategies for mainstreaming trade in order to enhance policy coherence and the development impact of trade policies.

[21] Supports Development of capacity for legal and policy formulation and its implementation, and national coordination for the governance of extractive industries, works in the sphere concerning the ways IP rights affect innovation incentives, as well as other layers of innovation – from access to scientific publications, the norms for data and material sharing, and the practices relating to patenting and licensing of inventions. Trains and enhances capacity of countries the area of intellectual property and innovations and monitors and analyses inclusion of intellectual property provision in bilateral agreement through regional observatories and advocates for impact assessments of bilateral trade agreements with specific focus on intellectual property.

[22] Provides on-demand technical support to African policymakers on trade policy development and conducts research into how African countries can adapt their trade policies to meet the challenges posed by climate change.

[23] Assists Member States in the development of common positions towards international negotiations as well as in enhancing the skills of African negotiators to get optimal deals for their countries and region from bilateral and international negotiations that strengthen the process of African economic integration. Organizes workshops for Member States on how to best protect their national interests from being undermined through international agreements. The workshops create opportunities for lead national negotiators from all African countries to convene and exchange experiences, explore options and strategies for possible coordination of positions, and listen to and interact with global thinkers and

practitioners in the field of economic negotiations in general and the four specific sectors (trade, investment, trade and natural resources) in particular. Provides support to the African Union Commission in its support for the CFTA negotiations. Trains officials from African Member States on how to formulate suitable evidence-based trade policies as countries seek to structurally transform their economies.

[24] Engages in a range of activities including the development of tailored technical trainings supporting the design and implementation of sustainable trade and investment policies and assists developing countries in understanding and assessing the opportunities, benefits, and challenges of EGA participation. It also supports the future implementation and potential expansion of the agreement, into areas such as services and non-tariff barriers and falls under the Environment.

[25] The Environment and Trade Hub aims to build capacity for countries to pursue environmental management and sustainable development through trade and investment agreements and global economic and environmental governance mechanisms. The 'Trade and Green Economy: A Handbook', produced in collaboration with IISD, aims to increase coordination and reduce tension between the international trade and environment agenda.

[26] Builds the capacities of governments and industry-related institutions to improve their knowledge and the analytical skills required to formulate, implement and monitor export-oriented quality strategies and policies. Undertakes Sectoral trade development studies are prepared on the globalization and localization of value chains in industries of key importance for developing countries, such as food processing, textiles and garments, leather, furniture, biotechnology, automotive components and electronics. Helps policy-makers and other stakeholders to improve the industrial governance system and the formulation, implementation, and monitoring of strategies, policies and programmes to enhance exports, productivity, innovation and learning.

[27] Provides assistance to governments for the development of the legal and regulatory framework for the implementation of, in particular, the WTO agreements on Technical Barriers to Trade (TBT), and on Sanitary and Phytosanitary (SPS) measures, and their effective application in the area of standard setting and harmonization, metrology/calibration, food safety, product testing, accreditation, inspection, enterprise management system certification, and quality.

[28] Technical assistance covers many areas of contemporary interest and concern to Member States and includes, inter alia, strengthening of institutional capacities of national tourism administrations.

[29] Works to help policymakers to identify the main trade-related constraints to achieving sustainable poverty reduction and shared prosperity.

[30] Provides technical assistance to developing countries to help them reduce the costs of international trade through streamlined trade regulations and procedures.

[31] Provides tailored advice on the design of laws on patents, trademarks, industrial designs and geographical indications (GIs), as well as on provisions on IP enforcement, taking into account specific country needs and situations.

[32] In line with The WHA Resolution 59.26 on International trade and health, the WHO is developing a book on trade and public health and a companion assessment tool that will guide national policymakers building public policies and strategies related to trade and health.

[33] Prepares biennial Technical Assistance and Training Plans ('TA Plans'), which provide the WTO Secretariat's framework for the delivery of all TA activities. The TA Plan gives priority to LDCs and African countries. The WTO delivers the TA through three main modes of delivery: online courses, face-to-face seminars or workshops, and internships.

[34] Approximately 85% of the TA provided by the WTO (i.e. under Key Result 1) is designed to improve participants' understanding of this legal and regulatory framework, to facilitate its implementation and help WTO Members defend their rights.

Part IV

Concluding Remarks

Chapter 11. In Search of a More Balanced International Economic Order – Lessons from International Investment Law

Sergio Puig

International economic law has the potential to enhance fairness and promote efficiency, providing existing imbalances in access to information, resources, influence, and capabilities are mitigated. But the rules are difficult to enforce and easy to evade: dominant actors apparently disfavoured by rules appear to be able to avoid them. The enforcement of rules is transaction-costly and requires the development of several capabilities, including: independent technical expertise; skilled experience in negotiating business transactions; and developed standardized procedures for community empowerment, decision-making, and monitoring.

In particular, international trade and investment laws tend to create exceptions, carve-outs and reservations that can be used by developing countries. International trade and investment regimes are able to limit governmental actions and guard against possible exceptions' abuse, but less able to actively enforce mandates to support specific countries. Hence, both regimes struggle to define the limits of state intervention in markets in affirmative terms. One probable consequence of this difficulty is that addressing the indirect yet concrete negative effects of globalization, including tackling economic inequality by lessening market-driven disparities in income, wealth, and access to services such as health care and education, is left mostly to domestic policy, not international agreements per se.

Institutionalization by exception is not always undesirable. However, it imposes additional challenges and hardships for, and demands different capabilities of, developing countries. To advance their interests, developing nations must sustain an active role in setting international standards, safeguarding regulatory autonomy, and maintaining constant representation before international institutions. In addition, with the judicialization of these two fields, participation in dispute settlement procedures as well as the initiation of strategic litigation to test the limits of legal obligations, promoting a sensible relationship between treaties, and positively expanding the flexibilities included in treaties is much more relevant. Access to legal and policy-making expertise is therefore critical in those regimes that incorporate developing nations' concerns by expanding exceptions.

The TradeLab network of Law Clinics has been focusing on the second type of capacity building. Through pro bono legal clinics and practica, TradeLab connects students and experienced legal professionals to public officials especially in developing countries, small and medium-sized enterprises and civil society to build lasting legal capacity. Through "learning by doing", TradeLab has helped train the next generation of trade and investment lawyers. By providing information and support on negotiations, compliance and litigation, TradeLab has strived to lessen the capacity imbalances within the international economic order.

While our projects show an incredible success, challenges remain. For example, in a recent project, students set out to identify forms of termination of bilateral investment treaties (BITs). BITs have proliferated dramatically as one of the main instruments to shield foreign investments. However, their operation has generated discontent in a number of states, including least developed countries (LDCs), and caused discussions about their termination. LDCs might have specific reasons for terminating their BITs, including not only the rapid recent growth in investment disputes (which also includes disputes against LDCs), but also limited legal capacity and lack of bargaining power at the time of the conclusion of their BITs. By creating a roadmap for effective termination, the TradeLab-IELPO project was able to help multiple stakeholders to assess their options in the process of terminating or renegotiating BITs. Nevertheless, the effectiveness of this project depends in part on the possibility to be able to negotiate effectively with stronger, more capable partners.

Other salient challenges are also elaborated upon in this book. VanDuzer in 0 discusses systematic capacity barriers that developing countries face in navigating international investment agreements. The author first provides an overview of the historical development of the field and the lasting structural challenges for developing countries that stem from fragmentation, incoherence, and the broad nature of obligations established in investment agreements, which are enforced via *ad hoc* tribunals of party-appointed arbitrators. This is indeed a big challenge in international investment law, as this allows the constant litigation of the meaning of different obligations and prevents the development of settled law. This makes the need for lawyers even more crucial – capacity that is expensive and hard to build. Luckily, VanDuzer discusses available resources and innovations in approaches to international investment agreements (IIAs) and their impact on the systemic challenges, including examples from South Africa and Brazil. There are important lessons, including improving the corrosive aspects of investment agreements. VanDuzer uses these examples to provide insights into the integration of IIAs within a state's overall strategies of foreign investment and sustainable development. Such capacity can help to limit the exposure of developing states to investment claims.

The fragmentation of the international investment system may well call for a centralized approached. In fact, drawing from the precedent of the Advisory Centre on WTO Law (ACWL) in the field of WTO law, Joubin-Bret makes the case for an International Advisory Centre for Investment Disputes (I-CID), an advisory and defence centre for states involved in investor-state disputes. Such an institution could help developing states to consolidate their legal capacity and create synergies that prevent costly investment claims. In fact, as she explains, many of the traditional and recent challenges facing defendant states could be overcome with the existing ISDS initiatives in Latin America.

What TradeLab has done over its ten-year history is to reveal the systemic challenges posed by global economic interdependence to emerging nations and to demonstrate the relative success that legal capacity may produce in confronting those challenges. The specific nature of these challenges and successes derives from each distinct context. Yet, in understanding them, it is also possible to draw generalizable lessons for international economic lawyers and glean global strategies for a more inclusive world. Taken together, these lessons suggest that international economic lawyers amply benefit from an early engagement with legal practice. Moreover, that capacity can be fragile, hard to earn and easy to lose; it requires not only an understanding of international law, but also of disciplines that are connected with international economic law: from social sciences such as economics or sociology to the role of psychology and environmental management in order to understand how other disciplines impact law creation processes. Overall, to fulfil the promises of experiential learning, TradeLab also shows the need for a more interdisciplinary approach.

Chapter 12. Building Legal Capacity: Opportunities, Challenges and Constraints

Marc L. Busch and Inu Manak

In a "rules-based" global economy, governments need to be able to interpret and use international law. This capacity, defined as legal, political, and economic resources, is scarce across the developing world, limiting the ability of these countries to participate in the dispute settlement system of the World Trade Organization (WTO), in particular. The contributors to this book take up the question of how to build capacity with limited resources. The good news is that external help is available, such as the legal services of the Advisory Centre on WTO Law. The bad news is that the usefulness of this external help is a function of a country's internal capacity. This mixed news poses a balancing act, whereby WTO Members have to invest enough of their own resources in order to benefit from external ones. The chapters of this book provide insights into striking this balance.

There are several important functions that external capacity can deliver. First, Members need a basic understanding of their legal rights and obligations. Without this, a country would be hard-pressed to define its market access problem, let alone craft a remedy. The WTO extends impartial expertise on a pro bono basis under Article 27.2 of the Dispute Settlement Understanding, and the World Bank, among many other institutions, offers training on everything from the mechanics of litigation to best practices on trade facilitation. But translating this information into a negotiating item or a "good case," or recognizing the promise of negotiating with a good case in hand, requires internal capacity.

This point is driven home by Bohanes and Vidal-Leon in Chapter 4, who urge that the Advisory Centre on WTO Law has been more successful transferring narrow technical, rather than broad legal expertise. They define the latter as the "more general ability of a government to be aware of, and to promote, its national economic interest in the WTO system by making use of WTO legal norms." This suggests that internal capacity is a perquisite to making the most of the Advisory Centre's assistance.

Second, and relatedly, external resources can connect developing countries to multiple providers of assistance, giving them a fuller understanding of the challenges they face and the various ways in which they might respond. For example, outside experts could reframe a trade issue as an investment issue, expanding the network of external capacity to be tapped. Yet, the problem remains that, without internal capacity, it may be unclear where to turn for help, let alone how to use the help on offer.

The authors in this book point to a number of obstacles in this regard. Pauwelyn and Carpenter in 0 explain that developing countries struggle when relying on external resources to help them identify market access problems, including the WTO's Trade Policy Reviews, for example. These resources, while valuable, do not answer the crucial question of how these challenges map on to domestic priorities. Nedumpara and Bahri note in Chapter 1 that there is no lack of monitoring available from law firms and others, or what they call "ambulance

chasing". But without internal capacity, it is hard for developing countries to act on this information. Nedumpara and Bahri thus call for building a domestic monitoring mechanism, a theme echoed throughout this book.

The other side of the capacity problem, however, is the lack of *demand* for it: developing countries often lack the desire to invest in these resources. Nedumpara and Bahri in Chapter 1 point to the correlation between a country's stake in trade and its participation in dispute settlement. So while India has spent substantial resources building internal capacity, its trade volume made this make sense. Along the same lines, Gao and Shaffer in Chapter 7 report that China's capacity building was especially vigorous and centrally coordinated, given the country's trade priorities. Indeed, Gao and Shaffer note that this effort originally started as "paternalistic initiatives by the government", which slowly expanded to private law firms. Part of the reason for this was that the Chinese government began by hiring foreign law firms, but saw the benefit of having these outside experts train domestic firms. This "learning by doing" appears to have been a major factor in China's success, the caveat being that, for Gao and Shaffer, this strategy was largely possible because of the country's unique political system, limiting the robustness of any conclusions that may be drawn from the case.

The book, more generally, suggests two lessons. First, governments need to take the lead on capacity building, not only because the state is more likely to invest in a public good of this sort, but because firms often lack the knowledge about which market access problems are actionable. Even in China, Gao and Shaffer note that, when companies face barriers abroad, they often prefer to work around them by shifting export locations, for example, rather than complaining to government agencies. This may owe more to a lack of trust than a lack of knowledge of the appropriate channels to pursue these concerns. While external capacity cannot overcome challenges of domestic governance, these resources can bridge the gap between industry and government in countries where political trust is low.

Governments cannot do this alone. Public-private partnerships are key. Wang and Lin make this point in 0, insisting that regular interaction between government officials and corporate managers is crucial in using WTO dispute settlement. El Hachimi, in Chapter 9, explains that Arab countries, in particular, have struggled in this regard, as knowledge of WTO rules has been slow to diffuse to academia and the private sector. This leaves governments at a disadvantage, since firms have unique information on the way in which foreign trade measures impact their business. While governments strive to be fluent in the axioms of non-discrimination, the application of these rules depends on the mechanics of a firm's business model.

One of the most obvious obstacles to capacity building, in this regard, is the perception in many developing countries that contact between government and business is tantamount to corruption. Overcoming this perception through formalized institutional channels is vital. Mexico's experience negotiating the North American Free Trade Agreement (NAFTA) is a case in point. Business was organized to provide expert information by chapter to government negotiators. The U.S. maintains a formal structure of advisory councils that include business, labour and other stakeholders who share insights with government negotiators and litigators on a full-time basis. Interestingly, as Britain prepares for "Brexit", the U.S.'s system is being studied closely in anticipation of London's many upcoming negotiations. The challenges of customizing such a system in developing countries should not be underestimated, but neither should the returns to getting this right.

Second, capacity building needs to rest on a theory of learning. The authors in this book rightly avoid the truism that more capacity is better. The question, though, is where to begin? Is the key "learning by doing" or "learning by watching"? Would reserving third-party rights

in others' disputes help build capacity? While there is no one-size fits all strategy, we argue that TradeLab and the many other purveyors of external capacity customize training as a series of modules to be mixed and matched in light of the beneficiary's preferences. There are certain modules that are foundational, along the lines of how Bohanes and Vidal-Leon in Chapter 4 define broad versus narrow legal capacity. The key in designing these foundational modules is that they have to open doors to any of a number of more specialized ones. Our preference would be to start with public-private partnerships, and institutionalize mechanisms to act on the offerings of external monitoring resources.

In 2009, Busch, Reinhardt and Shaffer used survey data to argue that capacity is more nuanced than simply the resources correlated with wealth.[1] This theme resonated loudly with observers, but a key finding was lost in plain sight: developing countries that undervalue their Foreign Service officers pursuing a career in trade cannot come close to matching the experience that truly distinguishes a handful of wealthy countries from all other WTO members. As a closing thought, this bears repeating, since, like so many other facets of capacity discussed in this book, there is no external substitute for getting this cultural norm right at home.

[1] Marc L Busch, Eric Reinhardt, and Gregory Shaffer, 'Does Legal Capacity Matter? A Survey of WTO Members' (2009) 8 World Trade Review 559.