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The Challenges of WTO Law:
Strategies for Developing Country Adaptation

by Gregory Shaffer[1]

With the creation of the World Trade Organization ("WTO"), an area of international law may have become more like law as we commonly perceive it. Yet it is not the neutral technocratic process some of its proponents make it to be. Whatever be one's perspective on trade liberalization and its enforcement, developing countries and developing country constituents clearly are at a disadvantage before the WTO's dispute settlement system. If the United States and European Community ("EC") have dozens of well-trained governmental lawyers and still frequently rely on assistance from private law firms, enterprises, and trade associations, how can developing countries manage?

Developing countries vary significantly in terms of the size of their economies and the role of law in their domestic systems. Nonetheless, they generally face three primary challenges if they are to participate effectively in the WTO dispute settlement system. These challenges are: (i) a lack of legal expertise in WTO law and the capacity to organize information concerning trade barriers and opportunities to challenge them; (ii) constrained financial resources, including for the hiring of outside legal counsel to effectively use the WTO legal system, which has become increasingly costly; and (iii) fear of political and economic pressure from the United States and EC, undermining their ability to bring WTO claims. This paper explores various

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strategies for responding to these three challenges, none of which involves a modification of WTO law. This paper does not address the challenges posed by WTO dispute settlement rules themselves, such as the system's weak remedies, nor does it address the impact of WTO jurisprudence on the costs of participation.[2]

1. The Challenge of Internal Capacity: The Need for Bureaucratic and Public-Private Coordination. In order for a WTO member to use the WTO system successfully, it must develop cost-effective mechanisms to perceive injuries to its trading prospects, identify who is responsible, and mobilize resources to bring a legal claim or negotiate a favorable settlement. In the domestic socio-legal literature, these stages of dispute resolution are referred to as "naming, blaming and claiming."[3] In the WTO context, a member's participation in the system will be, in part, a function of its ability to process knowledge of trade injuries, their causes, and their relation to WTO rights. Hiring lawyers to defend WTO claims is of little help if countries lack cost-effective mechanisms to identify and prioritize claims in the first place. Even where countries become aware of actionable injuries, this awareness will not be transformed into legal claims if, based on experience, officials lack confidence that a claim is worth pursuing in light of high litigation costs, weak remedies, and political risks.

The United States and EC have developed formal and informal legal mechanisms to identify foreign trade barriers, to prioritize them according to their impact, and to mobilize resources for WTO complaints.[4] They have mobilized resources through interagency coordination and networking with the private sector, which, in turn, has engaged private law firms. Although many of the larger developing countries have taken significant steps in this direction, all developing countries face considerable internal bureaucratic hurdles. These hurdles include a bureaucratic tradition of foreign affairs ministries assuming the lead on trade dispute

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[2] For a preliminary examination of how WTO remedies could be modified in order to create incentives for developing country use of the system, see Gregory Shaffer, "How to Make the WTO Dispute Settlement System Work for Developing Countries: Some Proactive Developing Country Strategies" (ICTSD, Geneva) 1, _-65 (March 2003), at http://www.ictsd.org/pubs/ictsd_series/resource_papers/DSU_2003.pdf.

[3] *See* William Felstiner et al., *The Emergence and Transformation of Disputes: Naming, Blaming and Claiming*, 15 LAW & SOC'Y REV. 631 (1980-81).

matters in which they have limited background; a lack of support from home capitals; a lack of internal legal expertise; and language barriers.[5]

In contrast to the United States and EC, developing countries have tended to assign a lower importance to trade matters within governmental hierarchies.[6] While the United States Trade Representative (USTR) and the EC Trade Commissioner hold cabinet level positions, most developing countries do not assign a cabinet position for international trade matters. As a result, many developing countries still have a single diplomatic mission for handling matters before the WTO and the United Nations (UN) in Geneva. The mission is led by an official from the foreign affairs ministry since, generally, individuals from that ministry alone may hold the rank of ambassador. Even where a country has created a separate "head of mission" for WTO matters from a department that specializes in trade, such individual generally holds a lower level position in the government hierarchy.

This organizational choice does not mean that trade is invariably given little importance within the foreign ministry. For example, Brazil's past two ambassadors to the WTO (Celso Lafer and Celso de Amorim) became the country's foreign minister immediately following their Geneva posting. These assignments have provided Brazil's mission in Geneva with key support in the capital. In most cases, however, the assignment of WTO representation to the foreign affairs ministry indicates that WTO matters are viewed as traditional diplomatic ones, involving a traditional rotation of personnel to different geographic locations to handle different subject matter as part of a broad-based career path.

Studies of representation in international organizations have found that, "besides the representatives from the key member states [such as the US], the attribute most widely shared among the more influential actors in ... international organizations... was long association with

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[4] See Gregory Shaffer, *Defending Interests: Public-Private Partnerships in WTO Litigation* (2003).
[5] Similarly, in their review of the Argentine system, two Argentine scholars conclude: "In terms of domestic institutional setting, the lack of clear and pre-established mechanisms to handle disputes is detrimental to all actors. One feasible cost-effective solution would be to reallocate public officials to create a permanent and multidisciplinary corps of experts to handle trade disputes." Diana Tussie and Valentina Tussie, "The Political Economy of Dispute Settlement: A Case from Argentina" 13 (August 2004) (paper on file with author).
[6] Interviews in Geneva with a wide range of developing country delegates.

the organization."[7] Yet the career advancement of most developing country representatives in Geneva does not depend on their competence in technical WTO matters, and importantly for our purposes, in trade dispute settlement. Trade dispute settlement is incredibly time-consuming, and as noted by one South American analyst, "out of the range of those who decide promotions within the Ministry [of Foreign Affairs]."[8] Diplomatic success traditionally is not measured in terms of successful international litigation. Moreover, as a result of the diplomatic rotation system, a country's WTO unit in Geneva can suffer from a severe lack of continuity. By the time a replacement becomes versed in WTO matters, the delegate will move onto an unrelated post.[9] These career incentives undermine a country's defense of its trading interests. These bureaucratic traditions can be difficult to change, especially where high level officials in the country's foreign ministry would feel threatened by change.

Developing country missions, in addition, suffer from a lack of support from national capitals. In light of the considerable complexity of WTO rules and of the WTO institutional structure, a developing country delegate cannot possibly follow all WTO developments. It is estimated that there are over seventy different WTO councils, committees, working parties, and other groupings, involving over 2,800 meetings each year.[10] Unlike the US and EC, most developing countries cannot afford to fly in officials from the capital for specific WTO meetings. Developing country delegates often receive little support at all. One former delegate of a developing country confirmed, "During the entire duration of the Uruguay round, our Geneva-

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[7] Robert Cox and Harold Jacobson, *The Anatomy of Influence: Decision-Making in International Organizations* (1974), at 395.

[8] Diana Tussie and Valentina Tussie, "The Political Economy of Dispute Settlement: A Case from Argentina" 9 (August 2004) (paper on file with author).

[9] This tendency was confirmed to me over and over in interviews with developing country representatives.

[10] See Gary Sampson, *Trade, Environment and the WTO: The Post-Seattle Agenda* 24 (2000). As Sampson, the former Director of the WTO's Trade and Environment Division, notes, the Egyptian delegation to the WTO has estimated that there were 2,847 meetings in the WTO in 1997, or an average of 10 meetings per working day. (citing Communication from Egypt, *High Level Symposium on Trade and Development*, mimeo WTO 17 March 1997). Id. at 30. In consequence, many countries' representatives simply do not attend or keep up with developments in most WTO committees. Developing countries may lack the capacity to attend meetings in Geneva scheduled for their express benefit. As reported by a WTO official interviewed by Braithwaite and Drahos, "We set up a Subcommittee with a Chair and a Secretary who turned up for the first meeting on trade needs of LDCs [least developed countries]. No LDCs came. No developed countries came. No one came. Not one country showed up. If it had been telecoms, the chamber would have been packed [with special interests and states pushed by telecom interests]." John Braithwaite and Peter Drahos, *Global Business Regulation* 196 (2000). As of November 1999, twenty-eight WTO

based WTO team received two instructions from our capitol."[11] Interviewed developing country diplomats generally admit that they would benefit from much greater organizational support from home.

The lack of bureaucratic coordination on trade matters can undermine Geneva-based representatives who would otherwise be more active in dispute settlement. Many developing countries require the approval of the attorney general's office in order to file a claim or a third party submission in a WTO case. This process can involve a complex exchange of formal letters between multiple ministries in the home country. These ministries can be subject to external pressure, especially when the United States or EC is a party to a dispute. Such pressure, even if it does not induce a developing country to refrain from joining a complaint, can create so much delay that the Geneva-based official is unable to participate effectively. By the time the Geneva-based representative receives the requisite government approval for the country to participate as a party or third party, the deadline for submissions may have passed. As a consultant who assisted sub-Saharan African countries notes:

> "In most developing countries, particularly those in Africa, all government litigation has to be authorized or undertaken by the offices of the Attorney General (this is functionally more analogous to the US Solicitor General than the Attorney General). Without such clearance, no proceedings can commence. Typically therefore there has to be a complex exchange of letters (literally) between the Ministry of Trade (Geneva office sends this to the Minister in Capital who then endorses and sends to), the Attorney General's office, (that then has to liaise with) the Ministry of Foreign Affairs (for consistency with foreign policy).... The result is that there is extreme delay in delivering instructions to Geneva to proceed, which often is after the deadline." [12]

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members did not even maintain permanent offices in Geneva because of a lack of resources. See "WTO organizes Geneva Week for non-resident delegations," 43 *WTO Focus* 16 (Nov. 1999).

[11] Cited in Michel Kostecki, *Technical Assistance Services in Trade-Policy*, ICTSD Resource Paper No. 2 (Nov. 2001), at 9.

Because of lack of support from home, Geneva-based representatives may become discouraged, reducing their incentive to participate in the dispute settlement system. If a major trade dispute subsequently arises in which the country is on the defensive, the mission may be utterly lacking in dispute settlement experience.

Developing country missions suffer from a lack of national legal expertise. Diplomatic postings have generally been filled by non-lawyers. Most developing countries have only one or two lawyers (if any) to address WTO matters, whether in Geneva or in the home capital. As a representative from a Southeast Asian member stated, "I am the only lawyer here. I handle all DSU matters, as well as matters before other WTO committees."[13] There may, moreover, be few (or no) private lawyers in the country knowledgeable about WTO law. WTO law, as opposed to traditional "public international law," has not traditionally been taught in developing countries, although this is changing in some countries. Many developing countries have, as a result, become dependent on education at law schools in the United States and Europe to develop local talent, provided that talent returns home.[14]

Finally, most developing country officials must work in a foreign language in WTO judicial proceedings within this "Anglophone organization."[15] Although English, French and Spanish are the three official languages of the WTO, English predominates. Even French and Spanish-speaking delegates are at a linguistic disadvantage. As an Argentine representative relates: "it is tiring and time consuming to wait for the translation in panel audiences. But also and perhaps more relevant, is that translation of documents may take 10 days and so it happens that panelists arrive to audiences without having had time to read them. This may be a disadvantage vis-á-vis documents submitted by the other part. Panelists have no clue of what our

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[12] E-mail from an individual who had provided assistance in such a case, Jan. 21, 2003.

[13] DSU refers to the WTO "Dispute Settlement Understanding." Interview with official, in Geneva, Switz. (Sept. 2002).

[14] Confirmed in interviews with developing country representatives in Geneva, Switz. (Sept. 2002, February and June 2003).

arguments are while they know the others', and this is a great disadvantage."[16] The authors of an Argentine case study also note the value of English at panel hearings: "Sessions could be held in any official language, but after the initial presentations in Spanish led to yawning and dozing off by one member of the panel, a decision was taken to continue in English."[17] Delegates speaking other languages are even worse off. To participate effectively, Thais, Malays and Indonesians, to give just three examples, would need to master the legal nuances of multiple three-hundred page WTO judicial decisions, often with limited legal training, and to do so in a foreign tongue.

Yet developing countries need to start somewhere. First, they can try to adapt from models used by larger developing countries for WTO dispute settlement, such as Brazil, which, in turn, have learned from US and EC models. As the United States, EC, and Brazil, developing countries can reorganize and better coordinate their ministries to target more resources at opening foreign markets for their exports. Some developing countries have created specialized trade bureaucracies or created specialized dispute settlement units within the foreign ministry. Some have attempted to adapt career paths to ensure greater continuity in WTO representation. A number of countries have included lawyers in their delegations. Many have developed closer relations with the private export sector. Brazil is arguably the most advanced developing country in this respect, having developed what it terms a "three pillar" structure involving a special WTO dispute settlement division in its capital Brasilia, coordination on WTO legal matters between Brazil's Geneva mission and this unit, and organized relations with the private sector. As part of this third pillar, the Brazilian government has helped facilitate the training of young attorneys in Brazilian law firms in WTO dispute settlement in the hope that they can help supplement constrained governmental resources.[18] As one Brazilian representative notes, through creating

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[15] Interview with Esperanza Duran, Director of the Agency for International Trade Information and Cooperation (AITIC), in Geneva, Switz. (June 20, 2002). AITIC works with least developed organizations from Francophone Africa.

[16] Interview cited in Tussie and Delich, "The Political Economy of Dispute Settlement: A Case from Argentina," at 10-11 supra note…

[17] Id., at 10.

[18] Interviews with Brazilian officials and private sector representatives in Sao Paulo, Brasilia, and Geneva, April and June 2004, as part of a project on the Brazilian model for WTO dispute settlement. Confirmed in presentation of Mr. Celso de Tarso Pereira, Brazil's legal representative at ICTSD's seminar on WTO dispute settlement, Feb. 7, 2003 (Geneva).

internships in Brazil's mission in Geneva, "we are trying to spread knowledge of the system in order to create a critical mass."[19]

Second, developing countries could obtain more technical assistance from development agencies and foundations regarding opportunities for them to exercise their WTO rights. The WTO and UNCTAD are now providing training programs in WTO dispute settlement, which many officials have attended.[20] Training in dispute settlement rules, however, is not sufficient. A central part of any dispute settlement process is the identification of potential legal claims–naming and blaming. As Hoekman and Kostecki write regarding WTO dispute settlement, "The Advisory Centre on WTO Law focuses only on the 'downstream' dimension of enforcement, not on the 'upstream' collection of information."[21] The European Commission realized that it lacked such information after the WTO system was established in 1995. It hired consultants to identify and report on sectoral trade barriers, which reports spurred a number of successful WTO complaints.[22] Developing countries could request assistance from development agencies and foundations to help them identify trade barriers, broken down on a sectoral basis. UNCTAD and the World Bank jointly developed a software program named SMART (Software for Market Analysis and Restrictions on Trade) as a tool to assist developing countries during the Uruguay Round negotiations. The software permits countries to run a simulation of the trade effects of trade barriers so as to inform their negotiating strategies.[23] Similar systems could be

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[19] Discussion with Brazil representative, Feb. 1, 2005, Geneva.

20 See Gregory Shaffer, "Can WTO Technical Assistance Serve Developing Countries," in Preparing the Doha Development Round: Challenges to the Legitimacy and Efficiency of the World Trading System, ed. Ernst-Ulrich Petersmann (Oxford University Press forthcoming 2005). The United Nations Conference on Trade and Development (UNCTAD) has also created a program for WTO dispute settlement training. See Daniel Pruzin, "U.N. Agency Outlines Proposal for WTO Dispute Settlement Training," 17 International Trade Reporter (BNA) 196 (Feb. 3, 2000).

[21] Hoeckman B. and M. Kostecki, *The Political Economy of the World Trading System: the WTO and Beyond*, (2nd edition), (Oxford University Press: 2001) pp. 94-95 (also noting that "One option to deal with the information problem is for the private sector to cooperate and to create mechanisms through which data on trade... barriers are collected and analyzed").

[22] *See* Shaffer, Defending Interests, *supra* note _.

[23] The software has been installed in a large number of developing countries. It has been incorporated into UNCTAD's TRAINS system (Trade Analysis and Information System). *See* http://r0.unctad.org/trains/. *Compare* Shaffer, Defending Interests, *supra* note __ , at 69-70 (concerning the EC's market access database).

developed for the purpose of WTO monitoring and enforcement. Hoekman has proposed that an "independent Special Prosecutor or Advocate" be mandated "to identify potential WTO violations on behalf of developing countries," which he terms an "outsourcing of discovery." Such a move would address "both the resource constraints and the incentive problems (fear of cross-issue linkage) that may impede developing country governments from pursuing cases."[24] These mechanisms could build on, and feed into, WTO reviews of countries' compliance with obligations under the Trade Policy Review Mechanism and through WTO oversight committees.

Such information, however, will only be of use if there is bottom-up demand for them. As Stephen Denning writes, "Organizations that focus completely on collecting information with little or no effort to foster people connections end up with repositories of dead documents."[25] Thus, most importantly, developing countries need to develop routinized relations with the private sector to identify trade barriers and investigate and prioritize them. The private sector in developing countries typically has viewed WTO dispute settlement as the government's job. Yet developing country trade officials have fewer public resources than their US and EC counterparts, and US and EC officials have already increased their advantages through working with the private sector. Developing country officials could strive to foster the development of a reflex within their export sectors to assist them in investigating claims and building factual and legal cases.[26] Developing countries would then have better access to the information necessary to enforce their trading rights through the dispute settlement system and through favorable settlement in its shadow. Because private enterprises do not necessarily have the same interests as the government, public authorities will need to channel and steer these private resources toward public ends. Yet unless public-private networks are formed, the resources may not be

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[24] See Bernard Hoekman, "Strengthening the Global Trade Architecture for Development," 1:1 *World Trade Review*, 1, 36 (2002).

[25] Stephen Denning, "Technical Cooperation and Knowledge Networks," in eds. Sakiko Fukuda-Parr, Carlos Lopes and Khalid Malik, *Capacity for Development: New Solutions to Old Problems* (Stylus: 2002), p. 242.

[26] See Shaffer, Defending Interests, *supra* note __ at 115 (citing Alistair Stewart, head of the Commission's market access unit: "the Commission would like a new reflex to be developed on [business's] part, and considers that this would be very much in their interest").

made available in the first place. As Tussie and Delich conclude regarding their review of Argentina's work with the private sector in dispute settlement, "It would have been impossible to do the groundwork for the case [which involved Chilean duties on vegetable oils] without the provision of factual information, statistical data and financial collaboration from business."[27]

2. The Financial Challenge: Pooling Resources through Regional and International Legal Centers. A second major challenge that developing countries face is that they have fewer resources to spend on legal assistance to defend their WTO rights. Since developing countries participate less frequently in WTO dispute settlement, in large part because their export sectors are smaller, they do not benefit from economies of scale when faced with a WTO case. In consequence, it is not cost-effective for them to develop internal legal expertise to handle WTO complaints on their own. Their best alternative is often to work with private law firms, possibly funded by private enterprises, or through a legal services organization that is autonomous of the WTO. Both private law firms and legal service organizations are more likely to be repeat players, representing multiple parties in WTO litigation over time, so that they develop legal expertise in a more cost-effective manner.[28]

The larger developing countries have increasingly hired private law firms to assist them with the bringing of complaints, typically paid by a national export trade association or enterprise. Brazil hired Sidley Austin Brown & Wood for the cotton and sugar subsidies cases against the United States and EC, and the cases were financed by Brazilian cotton and sugar trade associations. Thailand hired Lalive & Partners in the shrimp-turtle case. Korea hired Marco Bronkers, now with Wilmer Cutler & Pickering, in the Korea-alcohol case. Some smaller countries have followed suit, such as the Caribbean country of Antigua and Barbuda in its challenge to U.S. internet gambling restrictions.[29] U.S. and European law firms actively promote

[27] Diana Tussie and Valentina Tussie, "The Political Economy of Dispute Settlement: A Case from Argentina" 13 (August 2004) (paper on file with author).

[28] Another alternative is for the WTO secretariat or an independent organization to act as a public prosecutor, similar to the role that the European Commission assumes within the EC's legal system. This alternative, however, appears to be politically infeasible at this time, both because of challenges to WTO legitimacy and because the most powerful WTO members would not support it.

[29] See Daniel Pruzin and Christopher Rugaber, "WTO Publishes Final Decision on Internet Gambling; U.S. to Appeal," International Trade Reporter (BNA) vol 21: 46, at 1874 (Nov. 18, 2004).

their skills in Geneva, and are often seen in the WTO building for hearings or simply to make contact with former or potential clients.

Developing countries also have the opportunity to obtain legal assistance through the Advisory Centre on WTO Law in Geneva, an international legal services organization.[30] The Agreement establishing the Advisory Centre on WTO Law was signed by twenty-nine countries on December 1, 1999 at the WTO Ministerial Meeting in Seattle, Washington, and it entered into force on July 15, 2001. The Centre is funded largely by European governments, although developing country members must also pay a membership fee that is determined in relation to their per capita income and share of world trade.[31] By the fall of 2004, the Centre consisted of eight lawyers, under the executive directorship of Frieder Roessler, former head of the legal affairs division of the GATT secretariat.

The Advisory Centre is designed to counsel and represent developing countries so that they may defend their WTO rights at less-than-market rates that vary depending on the country's membership status, share of world trade, and per capita income.[32] By November 2004, the Advisory Centre had represented eight developing countries (Ecuador, Honduras, India, Indonesia, Pakistan, Paraguay, Peru, and Thailand) in twelve WTO cases, in addition to assisting

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[30] *See* Advisory Ctr. WTO Law, *Welcome to the Advisory Centre on WTO Law*, at www.acwl.ch (last visited Nov. 11, 2004). *See also* Kim Van der Borght, *The Advisory Center on WTO Law: Advancing Fairness and Equality*, 1 J. INT'L ECON. L. 723 (1999).

[31] *See* Advisory Ctr. WTO Law, *Report on Operations: July 2001-June 2002* available at www.acwl.ch), at 8. Because of the membership fee, a country may wait to join the Centre until it believes that it can benefit meaningfully from WTO litigation. The United States is not a member of the Centre and provides no funding for this initiative. Canada is the only non-European member of the Centre. The other eight are Denmark, Finland, Ireland, Italy, Netherlands, Norway, Sweden, and the United Kingdom.

[32] Under the annexes to the agreement establishing the Centre, developing countries are divided into three categories, A, B and C, with least developed countries (as defined by UN rules) constituting a fourth category. As of August 2002, hourly rates for the Centre's members for WTO litigation support were set at $200 for category A countries, $150 for category B countries and $100 for category C countries. Least developed countries hourly rates are set at $25. Non-member developing country rates are set at $350 for category A countries, $300 for category B countries, and $250 for category C countries. *See The Agreement Establishing the Advisory Centre on WTO Law*, Annex II, Nov. 13, 1999, *available at* http://www.acwl.ch/Docs/ACWLAgreementEnglish.htm.

countries in the "consultation phase" of disputes and providing general consulting advice.[33] As a repeat player in WTO litigation, the Advisory Centre can provide legal services to developing countries in a manner somewhat analogous to the way in which the European Commission's Legal Services assists EC member states in WTO litigation. By pooling their resources, European countries have enhanced their voice and collective knowledge of WTO law in a cost-effective manner.[34] They have thereby been able to participate more effectively in the shaping of WTO law through the judicial process. The Advisory Centre, although it will operate in a more ad hoc manner for developing countries, can similarly develop a reservoir of WTO expertise into which developing countries can tap. It can thus more effectively provide developing country input into the judicial construction of the law over time.

Developing countries could use the Advisory Centre in different ways, depending on their level of development and the frequency with which they participate in WTO disputes. Larger, more active countries, such as India, may use the Centre to develop their own national expertise in WTO dispute settlement.[35] Smaller countries that rarely engage in WTO disputes may find it less cost-effective to develop their own legal expertise and thus solely rely on the Centre, as did Peru in its case against the EC concerning whether its fish species could be sold in the EC as sardines.[36] Yet even larger developing countries, such as India, will find that the Advisory Centre can provide an important complement to their domestic resources. EC

to even the most sophisticated developing country trade administration. In addition, private enterprises could (indirectly) pay the Centre's fees or hire a law firm to work with the Centre's lawyers. Such collaboration occurred in the WTO case involving EC export subsidies for sugar, when Sidley Austin Brown & Wood represented Brazil and its sugar industry and the Centre represented Thailand as a co-complainant.[37] The Centre, as all participants in WTO litigation, has encountered major challenges in light of WTO jurisprudential developments that require intensive fact-gathering and rely less on presumptions and references to general principles.[38]

The Advisory Centre could also assist groups of like-minded developing countries in preparing third party submissions in WTO disputes to defend their systemic interests. In light of the weakness of the current WTO political system and the resulting importance of individual WTO cases for the interpretation of WTO law, developing countries should consider organizing on a more consistent basis to present their views as third parties. Only the United States and EC have participated as third parties in most WTO cases where they are not a plaintiff or defendant. They do so especially before the Appellate Body where participation has the greatest systemic impact. By preparing joint third party submissions, the Advisory Centre could place dispute settlement panels and the Appellate Body on notice of the views of organized groups of developing countries in individual cases. Yet as of February 2005, the Advisory Centre had never represented a group of developing countries as third parties.[39]

In addition, developing countries may wish to seek funding for legal support centers in Washington and Brussels to complement the Advisory Centre. Much of the legal action for market access takes place before U.S. and EC administrative bodies, in particular in antidumping, subsidy, and safeguard cases. These cases can be extremely expensive, so expensive that many developing country enterprises simply cease exporting to the United States or Europe upon the initiation of a complaint. Statistical evidence reveals that lower income

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[37] Discussion with member of the Advisory Centre, November 2004.

[38] *See e.g.*, *US-Rules of Origin for Textiles and Apparel Products*, in which the Centre unsuccessfully represented India. Some governments may retain private counsel themselves, instead of the Advisory Centre, in light of their determination of the case's relative importance, private counsel's reputation and cost-effectiveness, and the country's past experience. Interview with delegates from Brazil and Chile, among other WTO missions, Geneva, June 2003 and 2004.

developing countries fare far worse in U.S. antidumping proceedings than do developed country defendants. They "are more likely to be targeted, less likely to settle cases, more likely to confront high dumping duties and less likely to bring cases to the WTO."[40] Developing a legal resource center in Washington and Brussels to provide developing countries with subsidized legal support may be difficult, but that does not detract from its importance. One possibility could be to tie such a center to a US law school based in Washington or New York, similar to the way in which the Center for International Environmental Law (CIEL) "directs a joint research and teaching program with the American University Washington College of Law…. [The program includes] on-the-job experience through an extensive internship program… [whose] participants are drawn from the Washington College of Law's Master of Laws program which each year enrolls 180 foreign lawyers from 60 countries from around the world."[41]

WTO cases increasingly involve challenges to U.S. and EC trade remedy procedures.[42] In mid-2004, trade remedy cases comprised slightly over one-half of the twenty-three active panel and Appellate Body proceedings.[43] The U.S. and EC were respectively the two major targets. In these cases, the Appellate Body has sometimes refrained from finding that U.S. and European import relief laws themselves violate WTO obligations, and rather held against U.S. and European administrative practices.[44] Developing countries must thus develop a factual and legal

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[39] Discussion with Leo Palme of the Advisory Centre, Feb. 1, 2005.

[40] See Chad Bown, Bernard Bernard Hoekman & Caglar Ozden, "The Pattern of US Antidumping: The Path from Initial Filing to WTO Dispute." 2:3 *World Trade Review* 349-371 (November 2003).

[41] The quotation is from CIEL's home page at http://www.ciel.org/reciel.html (last visited Feb. 15, 2005).

[42] From the WTO's formation through September 2001, WTO members filed eighteen complaints against the United States in respect of its antidumping and countervailing duty laws and six additional complaints against U.S. application of its import safeguards law. During the first nine months of 2001 alone, WTO members filed seven new requests for consultations and panel formations in respect of U.S. antidumping and countervailing duty laws and measures. In a three week period at the end of the summer of 2001, WTO panels were formed to hear challenges on four separate challenges against U.S. import protection laws and proceedings. *See*, *e.g.*, "U.S. Peppered with WTO Complaints, Criticizes Prior Rulings," 19 *Inside U.S. Trade* 6 (Aug. 24, 2001).

[43] See Rossella Brevetti, "Fewer WTO Cases Filed So Far in 2004, Legal Affairs Director Wilson Says," *International Trade Reporter (BNA),* vol 21: 34, at 1378 (Aug. 19, 2004) ("Wilson said that 53 percent are trade remedy cases and 47 percent are non-trade remedy cases").

[44] *See, e.g.,* Report of the Appellate Body, *United States-Countervailing Measures Concerning Certain Products from the European Communities*, WT/DS212/AB/R (Nov. 22, 2002), para. 161(reversing the panel's decision that certain provisions of U.S. countervailing duty law did not conform with the United States' obligations under the SCM Agreement, but upholding the panel's decision that the U.S. administrative determinations were made in a

record in the U.S. and EC domestic proceeding if they are to successfully pursue a matter before the WTO.

Parties also need to ensure that U.S. and European administrative bodies take account of WTO jurisprudence in applying domestic law. Although WTO law has no direct effect in the United States or Europe, domestic administrative bodies and courts should take account of WTO law in interpreting the relevant domestic statutes on the ground that the statutes were intended to implement WTO law. The European Court of Justice has expressly maintained that it will interpret EC law to conform, where possible, with EC obligations under WTO agreements.[45] The U.S. Supreme Court has similarly maintained that "an Act of Congress ought never to be construed to violate the law of nations, if any other possible construction remains."[46] This jurisprudence was cited with approval in the U.S. domestic litigation following the Appellate Body's shrimp-turtle decision. The U.S. Court of Appeals for the Federal Circuit overruled the lower court and interpreted the U.S. statute in conformity with the Appellate Body's finding of WTO requirements, after taking note of the WTO case.[47] The Federal Circuit took a similar position in overruling a lower court in an antidumping case against steel imports in 2003, citing a WTO decision as support even though noting that it was not bound by WTO jurisprudence.[48]

Developing countries could also pool their resources through regional centers to assist them in defining trade priorities, coordinating negotiating strategies, building public-private networks, identifying trade barriers, and (potentially) providing legal support in WTO

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manner "inconsistent" with the SCM Agreement, and "requesting" the United States to bring its "administrative practice... into conformity with its [WTO] obligations.").

[45] *See e.g.* Case C-53/96, *Hermes Int'l v FHT Mktg. Choice BV*, 1998 ECR I-3603;....

[46] *Murray v Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 188 (1804) (Marshall C.J.) (known as the "Charming Betsy" rule).

[47] *Turtle Island Restoration Network v. Donald Evans*, 284 F.3d 1282, 1289-1290 (2002) (majority). When an environmental group challenged the revised U.S. State Department regulations, the U.S. government argued that the WTO ruling constituted "the law of nations," and that "an act of Congress ought never to be construed to violate the law of nations, if any other possible construction remains. *See Turtle Island Restoration Network v. Donald Evans*, 284 F.3d 1282, 1303 (2002) (dissent).

[48] *See Nippon Steel Corp. v United States*, 337 F.3d 1373 (2003) and *Allegheny Ludlum Corp. V United States*, 367 F.3d 1339. Compare DS 212.

litigation.[49] These regional centers could, for example, assist the Advisory Centre in WTO litigation. A Trade Law Center has been established in southern Africa and countries have explored creating one in Cairo, Egypt as well.[50] States within regions face diverse challenges and their national interests can conflict, so that the development of regional centers faces significant challenges.[51] Nonetheless, taking from the European example, countries increasingly realize the benefits to be gained from coordinating and pooling their resources.[52] The pragmatic challenge of pooling resources at the regional level needs to be compared with the alternative of each developing country working on its own, in which case the trading powers can more easily play developing countries off of each other.[53]

Finally, the Advisory Centre and developing countries could work with academics that specialize in WTO law on a consultancy or *pro bono* basis. National and regional trade law advisory centers on trade law could affiliate with universities in developing countries, as has the Trade Law Center for Southern Africa ("TRALAC") with the University of Stellenbosch.[54] Some U.S. legal scholars have already worked on *amicus curiae* briefs in WTO cases, although they have generally sided with the great powers against developing country complainants, as in the *U.S.-shrimp* and *EC-sardines* cases. Many legal academics, however, might welcome the

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[49] See e.g., Peter Drahos, "When the Weak Bargain with the Strong: Negotiations in the World Trade Organization," 8 *International Negotiation* 79-109 (2003).

[50] *See* Victor Mosoti, *Does Africa Need the WTO Dispute Settlement System?,* (ICTSD, Geneva) 1-28 (2003) available at http://www.ictsd.org/dlogue/2003-02-07/Mosoti.pdf. "

[51] *See, e.g.,* Paul-Henri Bischoff, "How Far, Where To? Regionalism, the Southern African Development Community and Decision-Making into the Millennium," in eds. Korwa Gombe & Adar Rok Ajulu (2002), *Globalization and Emerging Trends in African States' Foreign Policy-Making Process* (Ashgate Pub.) p.299. ("However, the durability of national interests and intensification of transnational influences have not helped the SADC [Southern African Development Community] as a model of regional organization").

[52] *See e.g.* Thomas Catan, "Mercosur seeks to build ties with Mexico," *Financial Times*, July 6, 2002 at 2.

[53] See e.g. Peter Drahos, "When the Weak Bargain with the Strong: Negotiations in the World Trade Organization," 8 *International Negotiation* 79-109 (2003). See also Gregory Shaffer and Yvonne Apea, "Putting the GSP Case in Context: Who Decides the Conditions for Trade Preferences?" in Thomas Cottier and Joost Pauwelyn eds., *Trade and Human Rights* (forthcoming 2005). Developing countries would of course have to monitor and develop trust that the secretariats of regional associations and the lead representatives in regional networks work effectively on their behalf.

[54] *See* Mosoti, *Does Africa Need the WTO Dispute Settlement System?, supra* note _.

possibility of assisting developing countries on a WTO case.[55] Not only would they provide a needed public service, but their own scholarship would benefit.

Most of the legal scholarship read in Geneva by WTO officials is written by U.S. and European scholars who are socialized to think of law from a U.S. or European perspective. As critical and constructivist scholars note, these scholars can exercise power in a diffuse, but important, way.[56] Through their work, they can shape perceptions and the appreciation of alternatives. By working with developing countries on international trade cases, they would learn how the WTO process works in practice. They could write contextualized analyses of WTO jurisprudence that are more informed by a developing country perspective.

3. The Political Challenge: The Need for North-South NGO-Government Alliances. The third major challenge is that developing countries will always face extra-legal pressure from powerful countries, undermining the goal of objective trade dispute resolution through law. The powerful will exploit power imbalances where they can, however they might rhetorically rationalize their actions. Many times, there is little that a small developing country can do to counter U.S. or EC threats to withdraw preferential tariff benefits or foreign aid–even food aid–were the country to challenge a U.S. or European trade measure.[57] Such political tactics can

[55] See e.g., Peter Drahos and Michael Blakeney, Rockefeller Report for Bellagio Conference (2002), cited in Reichman, "Managing the Challenge of a Globalized Intellectual Property Regime" (draft for the second Bellagio meeting on Intellectual Property and Development 2003) (on file) (proposing the formation of an "Academic Resource Group").

[56] *See e.g.* Richard Ashley, "The Powers of Anarchy: Theory, Sovereignty and the Domestication of Global Life," reprinted in James der Derian, ed., *International Theory: Critical Investigations* 101 (1995) ("By contrast, my analysis looks to knowledgeable practices as productive relations of power. It looks to the way in which knowledgeable practices work in history to control ambiguity, privilege some interpretations over others, limit discourse, discipline conduct, and produce subjective agents and the institutional structures of their experience"); Ronen Palen, "The Constuctivist Underpinnings of the New International Political Economy, in Palen, ed, *Global Political Economy: Contemporary Theories* 219 (2000) ("knowledge, then, cannot be divorced from interest and the social position of the knower"); and Clarissa Rile Hayward, *De-Facing Power* (Cambridge University Press: 2000) (viewing power not in terms of "instruments powerful agents use…., but as social boundaries (such as laws, rules, norms, institutional arrangements, and social identities and exclusions) that constrain and enable action for all actors").

[57] Interview with a former member of USTR (concerning U.S. threat to high level officials in the capital of an African country that the U.S. might withdraw food aid were the country's Geneva representatives to press a WTO complaint). Similarly, a trade consultant noted how he was in the office of the trade minister of a country in Africa when the minister received a document from the US embassy, which was the AGOA trade package.

undermine developing country faith in the efficacy of the legal system. Nonetheless, developing countries can adopt more-effective strategies to attempt to constrain this extra-legal pressure. As some recent cases demonstrate, developing countries can forge alliances with constituencies within the global powers. By harnessing domestic political pressure and legal expertise within the United States and Europe, developing countries can curtail, at least somewhat, great power coercion and otherwise offset some of the resource imbalances that they face.

An example of a relatively successful north-south alliance is that between developing countries and northern-based non-governmental organizations (NGOs), such as Doctors Without Borders, concerning the recognition, scope, and enforcement of pharmaceutical patent rights. Together, they helped counter U.S. pressure on developing countries to enforce U.S. pharmaceutical company patents under a strict interpretation of the Agreement on Trade-Related Aspects of Intellectual Property Rights ("TRIPS Agreement"). First, the United States withdrew its threat of initiating a WTO claim against South Africa in response to pressure from AIDS activists on Vice President Gore's presidential campaign.[58] Second, in June 2001, the Bush administration withdrew the United States' claim against Brazil's compulsory licensing provisions under Brazil's patent law in the context of widespread protest against the U.S. action from advocacy groups who maintained that the U.S. government was placing corporate interests above life-and-death medical concerns.[59] This NGO pressure was complemented by prodding

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The document was thousands of pages. The trade minister received the document on a Friday and was to provide a definitive response by the following Wednesday. The consultant asked the minister what would be the consequences if the minister did not reply on Wednesday or said no. The minister responded that they were informed that they would lose funding to combat the AIDS epidemic. Telephone discussion, Nov. 29, 2004. See also Shaffer and Apea, Putting the GSP Case in Context: Who Decides the Conditions, *supra* note_.

[58] *See* Steven Meyers, *South Africa and U.S. End Dispute Over Drugs,* N.Y. TIMES, Sept. 18, 1999, at A8 (stating that 300 protesters gathered in Philadelphia in June 1999 to chant "Gore's greed kills!"); and Doug Ireland, "AIDS Drugs for Africa," *Nation*, Oct. 4, 1999, at 5 (noting ACT UP demonstrators' chants of "Gore's greed kills" to pressure the administration to change its policies toward South Africa). Vice-President Gore was co-chairman of the U.S.-South Africa Bi-national Commission on pharmaceutical issues. Eventually, the U.S. Administration capitulated. *See* Gary Yerkey, "President Orders Easing of IPR Policy For Sub-Saharan Africa to Help Fight AIDS," 17 *International Trade Reporter (BNA)* 792 (May 18, 2000).

[59] *See, e.g.,* "U.S., Brazil End WTO Case on Patents, Split on Bilateral Process," 19 *Inside U.S. Trade* 1, 2 (June 29, 2001) ("Informed sources said the U.S. backpedaling from the WTO panel, which it had requested in February, reflected an unwillingness on the part of U.S. Trade Representative Robert Zoellick to give opponents of trade liberalization a red-hot issue that appeared to give credence to the idea of the WTO interfering with poor countries' health policies."). Doctors Without Borders declared that Brazil's patent policy was key to the success of the

from international health organizations.[60] Third, USTR Robert Zoellick abandoned the U.S. pharmaceutical industry with little consultation in agreeing to the "Declaration on the TRIPS Agreement and Public Health" at Doha.[61] The United States again backed down just before the September 2003 Cancun WTO ministerial meeting concerning the right of developing countries without manufacturing capacity to issue compulsory licenses for the importation of generic drugs.[62] Even though northern activists and developing countries would like to go further in modifying and officially interpreting the TRIPS Agreement, they have countered the United States' aggressive behavior and shifted the terms of debate over the protection of pharmaceutical patents.

Similarly, developing countries can work with northern consumer groups in bringing WTO claims. In the case *EC-Trade Description for Sardines*, the UK Consumers' Association, the largest consumers association in Europe and the second largest in the world, worked with a UK law firm, Clyde & Co, on a *pro bono* basis to prepare an *amicus curiae* brief in support of Peru's submissions to the WTO panel. In this case, Peru challenged an EC regulation that would not permit Peruvian fish to be sold as "sardines" within the EC, even though they could be sold throughout the world as sardines in accordance with an international standard agreed under the

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Brazil's strategy to offer universal access to HIV/AIDS medication in Brazil. Brazil's health program includes free distribution of antiretroviral drugs produced in Brazil. This program has allegedly reduced AIDS deaths by 50 percent since it was introduced and saved the government an estimated $422 million in hospitalization and medical care costs. *See* Daniel Pruzin, "US Responds to Criticisms of Brazilian Patent Law Complaint," 18 *International Trade Reporter (BNA)* 238 (February 8, 2001). Oxfam, a British NGO, backed Brazil's efforts, maintaining that the U.S. complaint was an assault on public health. *See Drug Companies vs. Brazil: The Threat to Public Health*, available at http://www.oxfam.org.uk/policy/papers/brazilctc/ctcbraz.htm.

[60] For example, 52 countries of a 53 member United Nations Commission endorsed Brazil's AIDS policy and backed a resolution sponsored by Brazil that called on all states to promote access to AIDS drugs. *See UN Rights Body Backs Brazil on AIDS Drugs*, NEWS24.COM, Apr. 24, 2001, *available at* http://www.news24.com/contentDisplay/level4Article/0,1113,2-1134_1014970.00.html.

[61] E-mail from Washington insider (June 27, 2002) (concerning the lack of consultation). *See also* Gary Yerkey & Daniel Pruzin, "Agreement on TRIPS/Public Health Reached at WTO Ministerial in Doha," 18 *International Trade Reporter (BNA)* 1817 (Nov. 15, 2001) (noting that "representatives with the pharmaceutical industry were less than enthusiastic," and a Swiss officials, also representing pharmaceutical interests, "expressed fury at being excluded"). *See generally* WTO Secretariat, *Declaration on the TRIPS Agreement and Public Health*, WT/MIN(01)/DEC/2 (Nov. 20, 2001) (recognizing a number of "flexibilities" in the TRIPS Agreement).

[62] See Council for TRIPS, Implementation of paragraph 6 of the Doha Declaration on the TRIPS Agreement and Public Health, WT/L/540 (August 30, 2003).

auspices of the Codex Alimentarius Commission.[63] The ten-page brief of the Consumers' Association addressed how the EC regulation "clearly acts against the economic and information interests of Europe's consumers" and constitutes "base protectionism in favour of a particular industry within the EU," the Spanish fishing industry. Thanks to the Consumers' Association and its law firm, Peru and the Advisory Centre on WTO Law received free legal research and counsel on such issues as the history and application of the EC regulations and the Codex standard-setting procedures,.

The Advisory Centre attached the association's amicus brief to Peru's legal submission and quoted it with approval.[64] The brief had an impact on the WTO panel, which cited it concerning European consumer views.[65] When the EC challenged the panel's use of the Consumers' Association brief during interim review, the panel confirmed that it justifiably considered the brief "in determining whether the European consumers associate the term 'sardines' exclusively with *Sardina pilchardus*," the fish variety swimming in European waters. The panel then found that European consumers did not associate sardines exclusively with this variety, in contradiction of the EC's position. There was thus no reason that the Peruvian species could not be sold as sardines in the EC market. The Appellate Body upheld the panel's central findings in favor of Peru.

The Advisory Centre on WTO Law can assist in the forging of these north-south NGO-government alliances. Since the Centre's lawyers are repeat players in WTO litigation, and since they are based in Geneva, the home of the WTO, they more easily can develop relations with

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[63] *See* Shaffer & Mosoti, *EC-Sardines*, *supra* note _, at 15.

[64] For example, Peru referred to the brief in its submission to the panel to point out how a "wide range of tuna or bonito species can be marketed in the Community under a common standards regime," rendering it "difficult to understand why sardines should be marked out for a particularly restrictive regulatory regime." Second Submission of Peru, *EC–Trade Description of Sardines,* WT/DS231 (Jan. 11, 2002), para. 71, *available at* http://www.acwl.ch/pdf/SecondSubmitPeru.pdf .

[65] *See* Report of the Panel, *EC–Trade Description of Sardines*, WT/DS231/R (May 29, 2002), paras. 6.13-.15, 7.131-.132. The panel refused to review letters from other EC consumer organizations that the EC submitted during the interim review stage, on the grounds that such stage was too late in the process to introduce new evidence. *See id*. at 6.16.

northern groups to provide assistance in specific trade matters.[66] The Advisory Centre's general policy is to post its legal submissions on the Centre's web site, facilitating interaction with NGOs, lawyers, academics, and others.[67] Some developing country NGOs, such as Consumer Unity & Trust Society (CUTS) based in India, are also attempting to help forge north-south alliances.[68] Oxfam, for example, has been a major supporter of Brazil's challenges to U.S. and European cotton and sugar subsidies.[69] As happened for Peru in the sardines case, these alliances can help undermine U.S. and EC factual and legal positions. By shaping the normative and political contexts in which legal challenges occur, they can also countervail industry pressure on U.S. and EC executive departments to take aggressive stances toward developing countries in the first place.

International negotiations involve a two-level game in which national constituencies compete in the formation of national positions and those national positions are then advanced in international negotiations.[70] If developing countries cannot neutralize the clout of U.S. and European firms in the formation of U.S. and European positions, then developing countries will face the full brunt of U.S. and European pressure in regards to pharmaceutical patents and other WTO claims. In a world of asymmetric power, developing countries enhance the prospects of their success if other U.S. and European constituencies can offset industry pressure on U.S. and European trade authorities. Developing countries need to work with these constituencies to alter the U.S. and European domestic political playing fields.

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[66] Largely serendipitously, the Advisory Centre's director, Mr Roessler, met a senior member of the UK Consumers' Association at a conference in London concerning international trade law. Following the conference, the Consumers' Association agreed to support Peru's submissions in the *EC-Sardines* case. Telephone interview with member of the UK Consumer's Association (Sept. 10, 2002).

[67] Interview with member of the Advisory Centre on WTO law, in Geneva, Switz. (June 18, 2002).

[68] Confirmed in e-mail from CUTS representative, Sept. 19, 2002.

[69] See e.g., Oxfam, "Busted: World Trade Watchdog Declares EU and US Farm Subsidies Illegal" (Sept. 8, 2004) available at http://www.maketradefair.com/en/index.php?file=cotton_pr03.htm.

[70] See e.g., Robert Putman, "Diplomacy and Domestic Politics: The Logic of Two-level Games," *International Organization* 427 (1988); and *Double-Edged Diplomacy: International Bargaining and Domestic Politics* (Peter B. Evans et al., eds., 1993).

4. Conclusion.

If developing countries are to participate meaningfully in the WTO dispute settlement system, they will need to continue to increase institutional capacity and coordination of trade policy at multiple levels, from the national to the regional to the global. They will need, in particular, to develop their own coordinative mechanisms to include private sector and civil society representatives. Capacity building endeavors generally will be most sustainable if they permeate broadly throughout institutions and societies.[71]

If developing countries are to deploy WTO law to their advantage, they will need to maintain routine on-going procedures for gathering, processing and prioritizing information from foreign embassies, the private sector, and international trade consultants regarding foreign trade barriers. By working more consistently with the private sector, developing country officials can foster the development of reflexes in firms and trade associations to view the WTO as an opportunity to ensure market access, thereby more effectively using the WTO system to their advantage. Brazil has gone a long way toward institutionalizing this coordination in WTO dispute settlement, and Brazil has become a much more active and successful user of the system as a result.[72] Building requisite developing country public-private networks will take time. Yet it is an essential task if the WTO dispute settlement system is to work for them.

Many developing countries are learning to use the WTO dispute settlement system more effectively. The Advisory Centre, with its growing experience and knowledge of the system, represents a significant advance. Private law firms are likewise dedicating significant resources to WTO dispute settlement into which some developing countries can tap. With time, developing countries should be able to gain a greater strategic sense of how to use the dispute settlement

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[71] If the focus of capacity building remains on individual capacity instead of larger societal and institutional capacity, then countries could simply be training individuals whose objectives and career paths are unpredictable. See Gregory Shaffer, "Can WTO Technical Assistance and Capacity Building Serve Developing Countries?" *supra* note__. Michel Kostecki found in regards to WTO "capacity building" programs, "some of the civil servants attending training events were not primarily involved in trade policy-making. In addition, course participants may move on to jobs that are not trade-related, or quit the government for the private sector." See Michel Kostecki, "Technical Assistance Services in Trade-Policy," *ICTSD Resource Paper No. 2* (Nov. 2001), at 20.

[72] Brazil brought seventeen complaints before the WTO dispute settlement system during the system's first nine years, more than any other developing country. Yet Brazil had litigated no case except where a private company or

system and to work with broader networks of actors to advance their concerns. They will always be at a significant disadvantage because of material and informational resource constraints and political factors that they cannot control. Yet WTO law can also offer opportunities for them.

trade association had hired a law firm to prepare the legal submissions. Interview with officials from the Brazilian Ministry of Foreign Affairs, Brasilia, Brazil, April 19, 2004.