HOW TO SUCCESSFULLY MANAGE CONFLICTS AND PREVENT DISPUTE ADJUDICATION IN INTERNATIONAL TRADE

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Managing WTO Dispute Settlement at Home
A Guide for Developing Countries

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1. INTRODUCTION

The World Trade Organization (WTO) dispute settlement system has made significant contributions to the governance of international trade relations beyond providing effective dispute adjudication. Analysts frequently have specific legal mechanisms in mind when commenting on the performance and repercussions of this system. However, after almost two decades of practice, the benefits of the system run deeper than the very visible and tangible adjudication process. In a quieter and more subtle manner, it has also enabled countries to develop innovative approaches for dealing with every-day problems arising in international trade. This study purports to draw attention to the fact that a myriad of trade related conflicts among WTO Members are solved every day through means other than adjudication.

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

Understanding non-judicial settlement of trade conflicts is important for many reasons. First, in certain circumstances, avoiding formal dispute settlement may be more efficient, less costly and faster. This is particularly important for export-dependent developing countries that need swift, inexpensive and effective means for removing trade barriers. Exploring non-judicial conflict resolution further unveils the fact that rules-based negotiation has developed as a primary means to manage international trade conflict. As this study will explain, the “legalization” of trade relations through the WTO and enforcement through the DSU in the background is why non-judicial conflict management works in practice. Operating in the shadow of the law is what makes informal mechanisms effective and frequently used methods for dealing with everyday international trade problems.

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

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2 Formal consultations under Article 4 of the DSU often represent the last step before a dispute is elevated to adjudication. Once panel proceedings are underway, direct informal negotiations have proven the most frequent method by which parties reach a settlement. As the WTO is inherently a negotiation forum, there is rarely the need for an intermediary to bridge the communication among the parties to the dispute. These points will be further developed in section 3.
In addition to this introduction, this chapter comprises three additional sections. To place the study in its proper context, Section 2 explains the different existing approaches to dispute resolution with the aim of clarifying that adjudication is only one among various alternatives. On the basis of this distinction, the study continues to address the concept of conflict management, assessing how it differs from adjudication. Section 3 describes how international trade disputes evolve in practice and analyses the dynamics of the trade conflict continuum. In particular, this part of the study explains the key factors that determine the chances of successfully managing a conflict as opposed to those that make dispute settlement as the only option likely to succeed. Section 4 presents an overview of the different mechanisms that, in practice, have proved successful to manage conflicts. Further, this part also discusses under which conditions each approach may be more likely to render better results. Section 5 presents some practical recommendations for developing countries to make the management of conflicts work properly. Last but not least, Section 6, by way of conclusion, presents some final remarks.

2. UNDERSTANDING CONFLICT MANAGEMENT: WHY IS IT DIFFERENT FROM DISPUTE SETTLEMENT?

This study applies the concept of conflict management to the field of international trade. Conflict management refers to the different techniques used to attempt resolution of a conflict before it escalates into a formal dispute. In international trade, the concept of conflict management is new and unexplored. Thus, to properly understand the nature, content and implications of conflict management applied to international trade, it is useful to build upon fundamental concepts of Conflict Theory and Dispute System Design (DSD). There are three fundamental concepts of DSD that can act as pillars for understanding the nature and functionality of conflict management techniques in the field of international trade.

First, DSD promotes the notion that there are three basic approaches to resolving disputes. Disputes can be resolved by resorting to a power contest between the parties involved. They can also be remedied according to rules and disciplines previously agreed by the parties. Last, disputes can be decided according to the parties’ interests. Adjudication – like the panel procedures under the DSU – is a rights-based approach to resolve disputes. It is but one among various approaches at the disposal of governments to resolve their differences. It is critical for disputing parties to understand alternative of dispute resolution approaches since some work more effectively than others under different circumstances.

Second, DSD is based on the notion that different situations require different dispute resolution methods and techniques. There is no such a thing as a single “one-size fits all” category of dispute settlement mechanisms which can properly address all the needs of all potential parties or
disputes. For instance, direct negotiation may work in a particular set of circumstances, while mediation or recourse to the establishment of a panel under the DSU may be the most adequate means to solve others. The challenge for concerned parties is to be aware of available options and select the appropriate mechanisms for a given situation.

Third, there is a difference between the notion of “conflict” in the one hand, and “dispute” on the other. A conflict is a process while a dispute is one of the by-products of the conflict process. Furthermore, conflict – understood as a sense of dissatisfaction or clash of interests or priorities among parties involved in a relationship – is inherent to human interaction at an inter-personal, inter-institutional and inter-governmental level. Conflict is unavoidable. Disputes, instead, can be prevented. In the context of international trade relationships, the is key to properly manage conflict and prevent it from escalating into full-blown disputes.

With that objective in mind, this study will develop these three foundational ideas in the context of international trade.

2.1. The Conflict Continuum and the Distinction between “Conflicts” and “Disputes”

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

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

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

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

A conflict should be understood as a state of dissatisfaction or disagreement between parties that has not yet crystallized into a full-blown dispute and can be managed. Since conflict management processes attempt to address the interests of the parties to solve an unattended problem, conflict management tends to use interest-based problem solving techniques. A dispute, on the other hand, should be understood as the concrete materialization of a conflict which has led to a defined and focused disagreement already framed in legal terms. Thus, disputes are often resolved with rights-based adjudication. In the end, both conflict management and dispute resolution mechanisms are different approaches that deal with conflicts at different levels of maturity.

In all levels of human interaction, conflict is unavoidable. Disagreements among human beings, organizations and States happen all the time. Thus, what really matters is not preventing conflicts, but effectively managing them in order to prevent those conflicts from escalating into full-blown disputes. This is the rationale of conflict management techniques.

Furthermore, managed conflicts create opportunities for commercial, social and political innovation and for the development of more efficient and meaningful problem-solving techniques between those involved in international trade on a daily basis. In order to explore how international trade conflicts can be effectively managed to prevent them from escalating into disputes, this chapter will provide a brief overview how, in practice, the conflict continuum usually evolves in the practice of international trade relations.

Determining when a conflict devolves into a dispute is relevant since in the international trade context since the political economy of conflict management is quite different from the political economy of dispute resolution. This point is further developed in the following section.

### 2.2. Different Approaches to Dispute Resolution: Power, Rules and Interests

As said above, the universe of dispute resolution approaches can be grouped into three broad categories, namely: determining who is more powerful or “power-based resolution;” alternatively, determining who is right or “rights-based resolution;” and last, reconciling the parties’ interests or “interest-based resolution.”

From a historical perspective, recourse to power is the oldest approach to solving conflicts and disputes at all levels of human interaction. From the survival of the fittest to wars among states, power-based dispute resolution is based on the idea that the interests of the most powerful subject in a given relationship will prevail if there are any differences to solve with others.

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Solving conflicts by power contests typically means imposing costs on one's opposition or threatening to do so. Costs can be imposed through physical, social, economic or political methods.

With the development of international law, at least in international economic relations, certain types of power-oriented behaviour have become less acceptable in the international setting. This is certainly the case in international trade where power-based dispute resolution has gradually ceded significant space to international adjudication. In the WTO system, unilateral dispute resolution is restricted thanks to the inverted consensus rule negotiated in the Uruguay Round. The DSU makes all the findings of WTO dispute settlement panels and the Appellate Body legally binding international law. However, such trend has not prevented that, even today, power remains vividly present in all levels of human interaction, albeit in more sophisticated ways.

Rights-based resolution is a dispute resolution approach that relies on an independent standard with perceived legitimacy or fairness to determine which party is correct. The rights that act as the standard to judge disputes under this approach usually derive from contracts or law, either at national or international level. However, some rights can also derive from socially accepted standards of behaviour. Contractual or legal rights are often defined in generalities and dispute situations are also frequently subject to different – and sometimes contradictory – standards. This fact generates the need for a third party to examine the rights applicable to a given dispute, determine the extent of these rights and decide on an outcome between the parties. Thus, adjudication is the prototypical rights-based dispute resolution approach in which disputants present evidence and arguments to a neutral third party who has the power to impose a binding decision on the parties.\(^8\) The dispute settlement system under the DSU – which entails the establishment of an impartial panel of experts, subjects findings to appellate review and ultimately determines whether Members actions are consistent with WTO law – is the main rights-based dispute resolution approach for international trade relations.

Lastly, an interest-based approach can also be taken toward solving disputes. As this denomination suggests, interest-based dispute resolution processes solve disputes on the basis of reconciling interests of the parties involved. Interests can be defined as the “needs, fears, concerns and desires people want.”\(^9\) Reconciling interests is not an easy task. “It entails identifying and revealing deep-rooted concerns, devising creative solutions and making trade-offs and concessions where interests are opposed.”\(^10\) Interest-based dispute resolution processes have to promote constant and interactive communication among the parties in order to let the latter reach an agreement. Such processes could be direct negotiations or entail the intervention of a third party which intervenes as a facilitator, either through conciliation, mediation or other techniques.


Most DSD experts tend to agree that interest-based dispute resolution methods have an advantage over rights and power based ones. Focusing on who is right, such as in litigation, or on who is more powerful, such as in diplomatic threats, usually leaves at least one party perceiving itself as the loser. Such situation is seldom conducive to developing and nurturing long-term relationships.

Furthermore, power-based or even rights-based dispute resolution processes often entail significant economic and political costs – time, money and energy spend in disputing, resources consumed or destroyed and opportunities lost – which can hamper the long-term relationship between the parties. The importance of long-term satisfaction in a relationship is particularly important in the international trade context, where all the parties share the interest of fostering long-term economic activity. Productive business requires long-term certainty and predictability, and, for achieving such objective, it is essential to generate satisfactory relationships among States and between States and the business sector.

Contrary to power-based or rights-based dispute resolution, reconciling interests tends to generate a higher level of mutual satisfaction with outcomes. Certainly, reconciling interests to solve disputes can require much time and effort. However, these costs pale in comparison with the transaction costs of rights determination and power contests such as trials, hostile diplomatic measures or wars.¹¹

In practice, interest-based processes such as negotiations, conciliations or mediations, rarely focus exclusively on the interests of the parties involved. Interest-based negotiations do not take place in a vacuum. Rather, they often occur in the shadow of the law or of power. Thus, some interest-based negotiations focus on determining who is right, such as when the negotiating parties compete to prove whose position has greater merit. This is what is called “rules-based negotiation.” Other negotiations take place in the shadow of determining who is more powerful, such as when nations exchange threats and counter-threats – “power-based negotiation.” Other negotiations involve a mix of all these variables.¹² Thus, in the process of resolving a dispute, frequently the focus may shift from interests to rights to power and back again to interests.

Figure 1: Interrelationships among Interests, Rights and Power

No party will ever agree to voluntarily settle a particular conflict if, in the end, a negotiated agreement entails higher costs and less favourable conditions than would otherwise be obtained through adjudication. In this regard, the more predictable the outcome of a rights-based dispute resolution process becomes, the easier it will be for the parties to ponder the benefits of using rules-based negotiation instead. For negotiations in the shadow of the law, it is necessary that the parties involved can properly assess the relative strengths and weaknesses of their positions as well as the eventual result of adjudication. The clearer the likely outcome of the potential dispute, the more realistic the expectations of the parties will be, and the easier it will be for them to resolve the conflict.

The use of the DSU over almost two decades has enabled the development of a significant body of case law. To a great extent, such jurisprudence has clarified the breadth and content of numerous provisions of WTO Agreements which makes it easier for the Members to anticipate the likely outcome of a dispute in the eventuality it was submitted to the WTO dispute settlement system. In this sense, today the WTO dispute settlement system has facilitated Members the use rules-based negotiation as a means to prevent formal litigation more than ever before. It is precisely because this evolution that developing countries might reap the benefits of the WTO dispute settlement system to solve trade problems without even having to submit a claim to adjudication under the DSU.

3. THE DYNAMICS OF THE CONFLICT CONTINUUM IN INTERNATIONAL TRADE

Often analysts think that a dispute in the WTO starts when a Member requests consultations under Article 4 of the DSU. However most of the time, when a State makes the political decision to invoke the dispute settlement procedures of the WTO, the underlying conflict has already been lingering unresolved for a long period. The request for consultations under Article 4 of the DSU, which initiates formal dispute settlement, represents the last opportunity for the parties to prevent adjudication and resolve the matter through rule-based negotiation.

As illustrated by Figure 2 below, conflicts that become trade disputes submitted to the WTO dispute settlement system rarely start at the State-to-State level. Rather, they begin as problems affecting the relationship between exporters and/or importers of goods or services of one country and the regulatory authorities of the importing country. If not resolved, the affected business may seek the assistance of its home government which may initially attempt to amicably solve the matter with the government of the importing country. At this stage, the matter is an international conflict, that is, a general disagreement between two or more States that may be dealt with through a solution mutually acceptable to the parties. Finding such a solution would be tantamount to a successful management of the conflict.
Figure 2: The conflict continuum of a trade dispute under the WTO DSU

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

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

However, the previous description and illustration of the conflict continuum in the context of international trade does not explain why some conflicts may be successfully managed without ever reaching the dispute resolution phase. This question requires a focus on the political
economy of international trade conflict. For such purposes it is possible to distinguish between two different sequential stages of conflict management as depicted in Figure 2 above.

First, one or various exporters affected by the trade restriction will request the assistance of their home government to elevate the matter to the government-to-government level. Here the home governmental authorities may have to decide whether and how to espouse such grievance. However, as explained in section 3.1 below, many factors might prevent a problem affecting exporters from being elevated to State-to-State conflict management. A problem that affects providers of goods or services that is not taken over by the competent national authorities may remain a mere private problem overlooked by the authorities of the importing country.

The second stage of conflict management is the moment when the home government opts to sponsor the request of its export sector. The private trade-related problem is then elevated to the State-to-State level giving rise to an international trade conflict. Once governments become involved it is possible to manage the conflict through amicable and informal consultations.

It is important to note that at this stage the home government has not yet decided to submit a claim to international adjudication which represents the dispute resolution phase. Indeed, it is one situation for the government to assist the private sector in the conflict management phase but a totally different matter for a State to accuse another sovereign State of acting inconsistently with its international trade obligations in an international forum.\(^{13}\)

3.1. Determinants for Elevating a Private Problem into an International Conflict

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

For any international State-to-State action to take place, an affected business needs to communicate and convince its home government authorities to provide assistance. This means that governments must have a minimum degree of political empathy to intercede in favour of the private sector, the resources and legal knowledge to efficiently process the request and a mastery of the institutional procedures provided for in international trade agreements to deal with these matters. In numerous developing countries, these three basic conditions are not always present. Thus, enabling the use of conflict management techniques in international trade requires the development of key domestic factors.

\(^{13}\) For a detailed analysis on the political economy affecting the decision of a developing countries whether to submit a claim under the WTO dispute settlement procedures, see Gregory, S. C. & Meléndez-Ortiz, R. (eds.) (2010) *Dispute Settlement at the WTO, International Centre for Trade and Sustainable Development ICTSD*, Cambridge University Press.
In many developing countries domestic political environments are quite volatile and polarized. Ideological differences and conflicting interests between ruling regimes and the private sector often means these two sectors are adversaries rather than in allies. In contexts of a fragmented relationship between the government and private sector, it is unlikely that the private sector will seek any support from public authorities to defend their interests in the international trade arena. Political relations between the private sector and government may be harmonious, but the former may nevertheless be prevented from communicating its problems due to lack of appropriate internal administrative structures. Governments may not have designated a lead Ministry or agency to administer international trade agreements. Even if such a lead agency exists, it may lack clear competences or resources to properly perform its functions. A lack of information, communication and consultation regarding the private sector often explains the limited interaction and lack of credibility among in some country agencies in charge of managing trade agreements.

Last but not least, governments must have the legal capacities to properly take advantage of the negotiating avenues that international trade agreements open for addressing trade-related conflicts. State-to-State trade conflict tends to be framed within the parameters of a legal instrument that may be used as reference for bargaining in the shadow of the law. Thus, in the background of preliminary and amicable consultations, subtle allusion to the rights of obligations under WTO or other applicable trade treaties are common, and such references act as subtle threats to implement adjudication if the conflict is not amicably solved at an earlier stage. Thus, direct rules-based negotiation between States is the conflict management technique *par excellence* in international trade. If public officials do not know how to bargain in the shadow of the law, it will be very difficult for them to manage conflicts successfully.

### 3.2. From an International Conflict to an International Dispute: Factors of Escalation

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

#### 3.2.1. Political Cost in Solving the Problem

Like any law, regulation or act of government, the adoption of trade restrictive measures rarely takes place in a political vacuum. Trade-restrictive measures tend to respond to complex political dynamics that should be unveiled in order to fully understand a problem between an exporter of one country and a government authority in the importing country before attempting State-to-State international trade dispute.
Most of the time, an international trade dispute is the manifestation of a clash of interests between two groups opposed about the challenged measure at the base of the conflict. Usually there are the sectors in both the exporting and importing country that benefit economically from fostering free trade of the good or service concerned. Providers of these goods or services of the exporting country, as well as importers and consumers in the importing country may fall within this category. These sectors will argue that the measure challenged is a trade restriction inconsistent with the WTO or other applicable trade agreement.

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

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

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

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

A third determinant of the political space of a government to amicably deal with a conflict is the degree of political visibility of the controversy. Conflicts involving very relative small amounts of trade in the importing country may remain undetected from the political radar, providing the importing government with significant leeway to deal with matter through amicable informal consultations.

An example case illustrating this trend may be found in the administration of the various PTIAs that Mexico has negotiated with several countries in Central America. For instance, the bilateral trade flows between Mexico and Costa Rica have grown significantly after the entry into force of their PTIA in 1995. The dynamism in trade flows has also resulted in numerous trade conflicts. However, after almost two decades of operation, there has not been a single conflict which has escalated into formal dispute settlement procedures. It is true that the governments of both countries have diligently used the institutional channels provided for in their bilateral agreement to foster a smooth flow of their reciprocal trade. However, the relatively lower weight of Costa Rican imports in the Mexican market partly explains why Mexican authorities have had enough political leeway to solve conflicts at an early stage.

Lastly, the most important variable determining the political space that any government of an importing country may have in managing a conflict is the political clout of the interest-groups backing the challenged measure. In this regard, the dynamics can be explained by a political equation; the possibility for an importing country to successfully manage a conflict and prevent it from escalating into a full-blown trade dispute is inversely proportional to the political power of the interest groups supporting the challenged measure. The more powerful the interest groups are, the less chance there will be for the government to successfully manage the conflict and prevent it from reaching the dispute resolution phase. Further, in some situations, the power and the degree of influence of certain interested groups over the government may be such that public authorities have become their de facto proxy, frustrating any chance to prevent international adjudication.

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15 Paradoxically, the little relative weight of the exporting country may also make the conflict invisible or irrelevant for the authorities in the importing country, preventing engagement of the latter in the management of the conflict.
17 It might be the case that the challenged measures is decades old and had been enacted in a very different historical context. In this situation, the interest groups that generated the promulgation of the measure no longer exist. Clearly,
The explanation of these four variables evidences the critical political role that adjudication – either actual litigation or a threat to use it – plays in international trade governance. International dispute settlement may act as a shield for the government of the importing party to foster compliance with its international obligations, even against the opposition from domestic interest groups, an obligatory measure being challenged, or any domestic political considerations.

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

The political environment of trade disputes summarized above also helps explain why, in the history of the WTO, non-litigious forms of dispute resolution envisaged in Article 5 of the DSU such as conciliation, mediation or good offices, are rarely used. Indeed, by the time a conflict has devolved into a dispute, the importing country already lacks enough political space to successfully manage the conflict and avoid adjudication. In this sense, the impossibility of reaching a mutually agreed solution during the conflict phase is a clear signal that the importing country needs the pressure of international adjudication to comply with its commitments.

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

### 3.2.2. Attracting the Level of Attention of the Importing Country

There may be situations where managing an international trade conflict may not entail any significant political cost for the government in the importing country, but the possibility to solve
a conflict before it escalates to litigation may be frustrated by the low level of attention that the importing country may devote to address the conflict.

Frequently, smaller developing countries might have difficulties in getting their developed country counterparts to sit down and listen to their complaints. Understandably, the bureaucracy of major global trading countries tends to devote its time and resources to managing trade with main partners that account for exponentially higher amounts of commerce and investment than small developing exporters. Thus, when a problem arises between a small exporter and a big importer, the former has to compete to attract the attention of the importing authorities which usually have many priorities. Such a situation explains why many conflicts may escalate to the level of disputes. Once a WTO Member is requested consultations under Article 4 of the DSU, the responding party is forced to react if they wish to avoid the establishment of a panel.

Within this context, if the successful management of trade conflicts is to be promoted, smaller developing countries need to explore effective ways to get the same results of a consultations request under Article 4 of the DSU but at a much earlier stage. In some cases, in particular those concerning small claims and/or smaller developing countries trading with more powerful economies, negotiating specialized rules may support efforts to be heard. One of the more novel structures to address this imbalance might be mechanisms that force the respondent country to listen to the complaining country’s grievances. An example of this can be found in the Association Agreement between the European Union and the Central American countries – see Box No.2 below.

4. ALTERNATIVE APPROACHES FOR CONFLICT MANAGEMENT: LESSONS FROM EXPERIENCE

There are various ways to deal with a trade conflict before opting to invoke the dispute settlement procedures of an international trade agreement. Each conflict is different, and depending on its context and features, following a particular approach over another may be critical to enable a faster and cheaper solution. Section 2 above explained the advantages of interest-based approaches to manage conflicts. The previous section also explained the variables that can factor into the success or failure of attempts to manage a trade conflict. Here, the focus is on which specific approaches and techniques have been used in practice by developing countries to successfully manage trade-related conflicts. Furthermore, the following sections discuss the particular contexts in which each approach and technique may be more effective.

In broad terms, the alternative approaches to manage a trade conflict can be grouped into three categories. First, one can explore the different alternatives available within the domestic jurisdiction of the importing country. Second is the option to pursue informal direct negotiation at a State-to-State level. Third, a party can invoke preventive alternative dispute resolution (ADR) procedures which entails the participation of a third party in facilitating the management of the conflict.
4.1. Exploring the Domestic Front in the Importing Market: Forging Alliances with the Private Sector

The option to explore the domestic front in the importing country may be a useful approach for managing trade conflicts. This alternative would require one to forge a working relationship between the affected exporters and the local business community in the importing market in order to solve the problem. This approach may be particularly useful in at least two situations. First, it may be clear that attempting to resolve the matter in domestic instances is politically or legally easier than pursuing negotiation or adjudication at the international level. Second, there might be situations where international negotiation or adjudication is not a viable option because of the lack of any applicable international trade agreement.\(^\text{18}\)

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

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

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

To seek alliances with the domestic private sector, and manage the conflict from within may be particularly useful in big and highly regulated markets where local players may master the

\(^{18}\) This might be the case where the country implementing the measure is not a member of the WTO and there is not any other applicable international trade agreement. It might also be the case when the measure that is causing the conflict is clearly compatible with the applicable agreement, the matter under conflict is not well-suited to be submitted as a complaint under the DSU, or when it is also clear that the matter would fall beyond the jurisdiction of any applicable dispute settlement procedures.
political and legal intricacies of the internal market better than anyone else. It might be very convenient for developing country exporters to establish a close cooperative relationship, including joint production ventures, with business entities that are nationals of the exporting market and know well how to navigate in its political and legal waters.

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

4.2. Direct Government-to-Government Bargaining

In international trade, informal but direct government-to-government negotiations is the most frequently used problem-solving technique for conflict management and the prevention of escalation into international disputes. As explained in section 3, government-to-government bargaining usually entails rules-based negotiation, and thus the dynamics of the processes will vary depending on whether or not the countries involved are members to international trade agreements containing dispute settlement procedures. Indeed, the effectiveness of rules-based negotiation depends to a great extent on the implicit underlying threat of resorting to adjudication in the event the parties do not reach an agreement.

Depending on the rules that provide a framework for intra-governmental rules-based bargaining, three scenarios can be envisaged. First would be a situation where an importing country is not a member of the WTO nor another trade agreement. In the second situation, the importing member is a WTO Member. In the third, the importing country is a WTO Member and also party to a PTIA. The dynamics of the conflict management vary significantly among these different scenarios, and each deserves a separate explanation.

In those situations where the importing country is not a member to the WTO, nor a party to a PTIA to which the exporting country is a party, the management of a trade conflict becomes complicated since negotiations depend completely on the goodwill of the importing party. Without any legal framework serving as reference to the conflict, rules-based negotiation is difficult to envisage. Furthermore, in such a scenario, there is not pressure of the possibility of having a conflict elevated to international adjudication. Within these circumstances, conflict management is very unlikely to succeed. The good news is that most countries in the world are now members of the WTO, so the possibilities of a developing country facing this scenario are slim.

When the importing country is a member of the WTO but not any applicable PTIA, the exporting country has the advantage of relying on useful conflict management at an early stage to prevent a dispute. From the outset, if the importing country is a member of the WTO, there is ample opportunity to foster rule-based bargaining in different modalities.

The countries’ permanent missions to the WTO in Geneva would be a first channel for fostering direct government-to-government talks to address the conflict. Although several small
developing countries may not have a strong presence there, the major importing countries do, and most conflicts arise with the latter. Thus, it is always possible for missions from one’s capital to travel to Geneva to address a matter preliminarily with the permanent trade representative of another Member. The WTO provides ample opportunities for informal exchanges between the parties at different levels, and a particular problem may be addressed at an informal meeting among technical officials or at a higher ambassadorial level.

If informal bilateral consultations turn out to be unsuccessful, the WTO also provides a useful institutional framework for managing the conflict. One of the key advantages of a multilateral forum like the WTO is the possibility for small countries to forge alliances with others – including major trade heavyweights – to balance out the power asymmetries of acting individually. In particular, the affected government may raise the matter in one of the many specialized committees that regularly hold sessions in the WTO. This alternative may be particularly useful for smaller developing countries seeking potential alliances with other WTO Members who might be affected by the same measure or even countries that may not be directly affected but have a systemic interest and are keen to set a precedent against certain types of measures or practices.

The third approach for fostering rule-based bargaining in the WTO context is to request formal consultations under Article 4 of the DSU. Technically, by the time formal consultations are requested, a conflict has already crystallised into a dispute; however, as explained in section 3 above, formal consultations are actually the last chance for the parties to prevent adjudication.

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

A dispute brought to the WTO by a small country entails the possibility for the claim to be seconded by one or more members as either co-complainants or third parties. Such a result may have the effect of increasing the potential opportunity cost of non-compliance in the event of an adverse ruling. Indeed, retaliation measures undertaken by a small developing country may have a negligible effect on a relatively bigger trade partner, but that power imbalance can be significantly reduced when one or more countries join the dispute.

Another reason why the threat of submitting a dispute at the WTO entails a greater cost for the potential transgressor is that an adverse ruling goes beyond potential retaliatory measures. An adverse ruling in the WTO becomes de facto, an important precedent for the international trade system. Thus, when a member of the WTO does not comply with an adverse ruling that member will lack legitimacy to invoke WTO compliance when affected by another country’s transgression.
A third scenario for trade conflict management based on direct government-to-government bargaining is when in addition to the WTO, the parties involved in the conflict are also signatories to a PTIA. Of the three potential scenarios addressed in this section, this may be the most favourable for a small country to foster a swift management of a conflict and prevent an international trade dispute. In addition to all the advantages of being a WTO member, being a member of a PTIA provides the opportunity to foster effective non-judicial conflict management stemming from the institutional structures set up under those other agreements and the politics involved in their implementation.

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

Most PTIAs have a relatively simple institutional structure. The highest decision making instance is usually an Administrative Commission which is comprised of political representatives of the governments of the signatory States. Most often, such political authorities are Ministers of Trade, who meet periodically to oversee the progress of the Agreement.

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

Each national section of the Secretariat coordinates and oversees compliance with the tasks assigned to the diverse committees established by the Treaty. Usually there are committees to deal with each of the major areas governed by the Agreement, and they meet at least once a year to monitor the implementation of their respective chapter of the PTIA.
The implementation of PTIAs generates political dynamics which are conducive to early management of trade conflicts. This is because the political authorities of the parties meet on a periodical basis either at Ministerial or Presidential level to monitor the progress of bilateral relations. This situation generates a dynamic in which the performance of the agreement is assessed regularly at summits. Political authorities need good news when they meet, and there is nothing worse than an unresolved conflict to dampen the goodwill spirit that summits attempt to portray. These dynamics generate annual or biannual cycles of opportunity to solve problems related to the administration of the agreements.

To maximize the potential role of summits as catalysts to solve problems, government officials should take advantage of the administrative structures set up under the institutional framework of PTIAs. Well before the annual or biannual summit takes place, the committees and the meetings of directors of trade take care of ironing out all the issues which will be dealt with by political authorities, making these processes very efficient conflict management mechanisms.

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

Furthermore, some PTIAs also provide institutional avenues for the private sector to become involved in the administration of the agreement. There are two main channels through which private sector gets involved. First, prior to the meeting of each committee of the PTIA, governments may consult with interested private sector representatives in order to prepare the agendas. Second, although not originally designed to handle conflicts or disputes, some committees do provide a platform where the private sector has a voice regarding the implementation of the PTIA. For instance, some agreements have committees on Small and Medium Enterprises and others incorporate dispute settlement among businesses and professional services. Furthermore, other PTIAs, in particular the Association Agreement between the European Union and the Central American countries also establish consultative committees for civil society and members of Parliament in order to provide these latter constituencies with a formal platform where they can express their views and dialogue with governments on matters relevant to the implementation of the Agreement.
4.3. **Preventive Alternative Dispute Resolution: Managing Conflict with Facilitators**

In addition to exploring the domestic front in the importing market and direct government-to-government bargaining, another possible approach to manage trade-related conflicts is to explore the use of preventive alternative dispute resolution (ADR).

ADR usually involves the intervention of a third party to assist the disputants in negotiating a settlement. The basic role of the third party is to remove the barriers to a negotiated solution. Throughout the ADR procedures, the disputants retain control of the process and preserve their right to approve or refuse a proposed settlement or even to withdraw from the ADR process entirely. The specific methods by which a third party intervenes to facilitate the settlement of a dispute varies widely depending on the nature of the dispute in question, the interests and needs of the disputants, and the mandate, talents and resources of the intervener. As a result, ADR does not offer a single “magic formula” to settle a dispute. ADR techniques are most often used to deal with conflicts that have evolved into disputes. However, that does not always need to be the case.

ADR techniques are processes which could also be used to solve problems at the conflict management stage well before the conflict has evolved into a dispute. Some Dispute System Design Experts recognize that ADR can be used as tools to prevent disputes, and have coined the idea of “preventive methods of ADR.”¹⁹

To date, relatively little attention has been focused on preventive methods of ADR, and most ADR models and charts do not even include them. Furthermore, the role of ADR in international trade, both as a dispute prevention or dispute resolution technique, has been extremely limited. As conflict management systems evolve, preventive methods of ADR may become increasingly important.

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

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

dialogue between the parties to effectively proposing and arranging a workable settlement to the problem.

Early Neutral Evaluation involves an evaluator, usually an attorney or other expert with specific knowledge of the subject matter of a case, who hosts an informal meeting with clients and counsel. At such a meeting, both sides involved in the conflict present their evidence and arguments which the evaluator uses to identify areas of agreement and issues of divergence to focus on. The evaluator then writes a confidential evaluation of the prospects of a case and offers to present it to the disputants. Should parties not be successful in attempting settlement, the evaluator may assist the disputants in devising a plan for expedited exposure, assess realistic adjudication costs and explore the feasibility of a follow-up session in achieving successful settlement of a case.20

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

Fact Finding is procedure in which the parties submit contested facts like technical, scientific, accounting, or economic information to an expert for a neutral evaluation. The key objective of such a procedure is to gain an impartial assessment about the facts of an issue in order to prevent the escalation of disputes. Where it has been used, fact finding proceedings usually end with a report that is limited to the facts at issue and does not offer recommendations to the parties. The parties must then determine what legal and practical effect the report will have. In the international trade context, just as with any other kind of ADR, fact finding has not been frequently used as conflict management tool. However, it is a technique that may be particularly useful in factual-intensive conflict. These situations might be those related to trade remedies where certain factual findings are critical to determine whether a safeguard, a countervailing duty or an antidumping duty can legally proceed or to conflicts arising out of SPS or TBT measures where scientific evidence may be critical to determine the compatibility of a particular measure with the WTO Agreements.

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

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

Through ADR, an external expert may act as an independent referee enabling the parties to have an objective and accurate assessment about the potential outcome of the conflict in the event it is escalated into a full-blown dispute and resolved by adjudication. Thus, external experts play a fundamental role providing “external cover” to government authorities. Indeed, as previously explained, in the context of a trade conflict, government officials may be genuinely interested in solving the matter. However, in practice they may be unwilling or unable to do so because of the potential political cost they face domestically as a result of assuming the decision to solve the conflict.

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

For the external experts to properly provide political cover for the government agencies involved in the conflict, their assessment should provide clarity regarding two particular aspects. First, the assessment would have to clearly indicate the likely existence of a violation of the obligations of the applicable trade agreement. Second, the assessment should also indicate with sufficient clarity the likely legal and economic consequences if the conflict is not solved allowed let to escalate into a dispute with consequent adjudication. In sum, the role of the external expert is to provide a clear and credible assessment of the opportunity cost that the parties –in particular an importing country— may face if an agreement is not reached at the conflict management stage. The higher the opportunity costs for the State to proceed to litigation, the more likely government agencies will be motivated to settle, and the easier it will be for them to sell the mutually-agreed solution to their domestic constituencies.

The inclusion of preventive ADR may also be an effective way for smaller developing countries to engage the authorities of bigger trade partners in trying to solve the conflict at an early stage and overcome the problem of lack of attention to their grievances. Although ADR cannot impose a mutually acceptable solution to the parties because of its voluntary nature, treaties could make the consideration of the use of ADR compulsory and thus force an importing country to pay attention to a request solicited by the exporting country. This approach has recently been incorporated into the Association Agreement between the European Union and the Central American countries, and which is further described in Box No.2 below.
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<th>Box 2: Mediation Mechanism in the Association Agreement Between the European Union and the Central American Countries</th>
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This mediation mechanism is totally independent from the dispute settlement procedures established by the Agreement. The mediation mechanism shall apply to non-tariff measures which adversely affect trade in goods between the Parties. Thus, measures affecting trade in services or dealing with other chapters such as sustainable development, regional economic integration or institutional provisions will not be covered by the mechanism. The justification for limiting the mechanism to conflicts arising from trade in goods derives from the nature of the trade between the Central American countries and the European Union. Most of Central American exports are in primary products, and the typical trade problems affecting the exports to the region derive from the strict sanitary and phytosanitary measures (SPS) or technical regulations and standards required to enter the European market. Thus, the main purpose of the mechanism is to find mechanisms to make European authorities dedicate attention to jointly finding creative solutions to deal with these issues in an expedited manner. That is why the Agreement provides for a compulsory and quasi-automatic procedure, attempting to facilitate the operation of the mediation as much as possible.

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

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

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

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

5. PRACTICAL RECOMMENDATIONS TO MAKE CONFLICT MANAGEMENT A FEASIBLE OPTION FOR DEVELOPING COUNTRIES

This study has examined the dynamics of the conflict continuum in international trade and also summarised the alternative approaches that in practice have been used to manage trade conflicts to prevent them from escalating into full-blown disputes. It now turns to some concrete and basic recommendations to enable developing countries use and reap the benefits of conflict management techniques. In this respect, steps can be taken both at a domestic and international level.
5.1. Measures to be Implemented at a Domestic Level

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

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

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

The establishment of institutional structures enabling the proper administration of trade agreements is a second area that is important for fostering the use of conflict management techniques. This study has reviewed some successful experiences in various developing countries, and again, this is an area where some capacity building has already been undertaken. The important point to stress here is that in addition to capacity building, it is paramount to take action at administrative level and provide governments with specialized authorities legally authorized to properly administer trade agreements.

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

The tasks of the OATAs include maintenance of a fluid and regular channel of communication with the competent authorities in the main export markets where most of the problems are likely
to arise. For this purpose, and to the extent possible, the country’s permanent representation before the WTO could play an important role. Also the OATAs have the key role of implementing information and communication protocols with the domestic private sector so that the latter can receive assistance from their home trade authorities.

A third critical area for fostering the use of conflict management techniques involves creating information and communication protocols with the domestic private sector. Such systems should pursue at least two fundamental objectives. First, the private sector should know and have access to the OATAs and understand the offices’ tasks and the kind of assistance that they can provide in solving their trade-related problems. Second, the private sector should feel that national authorities are capable to defend their interests abroad. This second aspect is particularly critical for various reasons. For instance, a pragmatic advantage of gaining the confidence of the private sector regarding the capacity of the government to deal with a conflict is that it will be easier for businesses and governments to join forces and articulate a coordinated strategy to deal with the matter. Such a strategy may entail exploring the domestic front in the importing country and also getting financial and human resources to contribute to manage the conflict more effectively.

The private sector should be involved in the regular implementation of trade agreements on a routine basis and have independent ability to identify specific problems when they arise. National entrepreneurs should not only understand the normal operation of the administration of the agreements through discussion of annual plans and regular presentations. They should also participate, through previous consultations in capital or in the modality of side rooms, in the regular meetings of committees and other higher administrative meetings of the international agreements.

5.2. Measures to be Implemented at International Level

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

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

Either by acting individually or through a group, smaller developing countries should understand the importance of attracting international attention to positive and constructive ideas rather than exclusively relying on criticism of the status quo, not matter how accurate and fair such criticism may be. In a multilateral setting where so many varied interests interplay and where a myriad of problems have to be dealt with, it is important that smaller developing countries are noticed for the good and innovative ideas and solutions they can provide to bridge the polarized positions
that often paralyze the international trade agenda instead of contributing to the bag of complex problems to be dealt with.

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

A second critical step for developing countries to take on the international front to maximize their chances for the early management of conflicts is to take full advantage of the implementation of PTIAs. In this study we have explained the institutional avenues these agreements provide to channel conflict management as well as the opportunities derived from the periodical political cycles in the implementation of PTIAs.

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

By so doing, the PTIA’s implementation agenda may become an item of interest for the bigger country, and developing countries minimize the risk of larger trader’s public agencies perceiving of PTIA committee meetings and working groups as just a formality or bureaucratic hassle to be dealt with as quickly as possible. Using the press to increase the visibility of the value of the implementation of the PTIAs and taking the initiative to foster an interesting implementation agenda (involving the acceleration of tariff liberalization in some non-sensitive products or services, and/or the promotion of the convergence of PTIAs for instance) are just some ways to create value for the parties and maintain the positive attention and working environment that can contribute to the early and successful management of trade conflicts.

Last but not least, a third step that developing countries should consider undertaking is the active promotion of preventive ADR to manage trade conflicts. For ADR to live up to its potential dispute prevention function, it should have a compulsory element in obliging the responding party to react and provide a justified reaction in the case that an ADR petition is rejected. In this regard, ADR techniques envisaged in Article 5 of the DSU would not necessarily suffice.\footnote{Article 5 of the DSU seems to presuppose that for ADR to apply a dispute must already exist. For the reasons explained in this study, the scenario under which ADR is likely to work is in its preventive function, that is, in the}
Developing countries should consider the inclusion of specific clauses in their PTIAs requiring ADRs like mediation, early neutral evaluation or fact finding, including the previously referred compulsory element. The novel mediation mechanism for trade conflicts included in the Association Agreement between the European Union and the Central American countries is an example illustrating this approach.

6. CONCLUDING REMARKS

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

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

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

Third, the promotion of conflict management techniques strengthens the domestic institutional structures necessary to administer international trade agreements. This is particularly true for developing countries. Such structures foster transparency and better regulatory coherence among the various agencies involved in the direct or indirect implementation of international rules and disciplines. From this perspective, promotion of conflict management not only contributes to solving particular trade-related problems vis-à-vis external trade partners, but it also promotes better trade-related governance at the domestic level.

Fourth, understanding the dynamics of conflict management in international trade helps to illuminate the little use that ADR has traditionally had as a conflict resolution techniques in the field of international trade. In particular, this study helps to illustrate the limited use of ADR methods included in Article 5 of the DSU during its almost two decades of existence. Conflict management phase, rather than as a dispute resolution mechanism. It could be argued, however, that nothing in the DSU precludes the parties to voluntary invoke Article 5, even before requesting consultations under Article 4. Nevertheless, another problem with ADR as provided by Article 5 of the DSU is that it is explicitly stated in its text that conciliation, mediation or good offices are completely voluntary, and thus, there is not any obligation by the responding party to even react to a solicitation by the complainant.
management unveils the conditions under which the use of ADR could become a more effective means to prevent full-blown disputes.

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

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


