Public Private Partnership in WTO Dispute Settlement: Enabling Developing Countries

By

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ABSTRACT

The doctoral research investigates the nature and elements of domestic mechanisms, including public private partnership (PPP) procedures, devised for the management of WTO disputes in selected developed and developing countries. With China, Brazil and India as its case-studies, the research explores various strategies to devise an effective PPP mechanism for handling international trade disputes in developing countries.

The research objective is to explore the benefits of engaging the private sector in the intergovernmental process of WTO dispute settlement, and to identify the reforms that will be needed for devising a workable domestic framework for handling foreign trade disputes through PPP arrangements. The research highlights important issues and concerns that need consideration before any legal, institutional, regulatory and procedural reforms are carried out. Moreover, the research seeks to enable developing countries to critically evaluate a diverse range of PPP strategies employed so far, and to determine their individual approaches towards PPP and dispute management.

The thesis constitutes a practical guidebook for policymakers in those developing countries which have the motivation to strengthen their WTO dispute settlement capacities. The topical area of research and pragmatic approach towards research questions, together with an empirical research methodology makes this study an original contribution to existing literature and knowledge.

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EC – Export Subsidies on Sugar (Australia)	Panel Report, European Communities – Export Subsidies on Sugar, Complaint by Australia, WT/DS265/R, adopted 19 May 2005, as modified by Appellate Body Report WT/DS265/AB/R, WT/DS266/AB/R, WT/DS283/AB/R, DSR 2005:XIII, 6499
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List of Abbreviations

Abbreviation	Description
AB	Appellate Body
ABEF	Brazilian Poultry Producers and Exporters Association
ACWL	Advisory Centre on WTO Law
ADR	Alternative Dispute Resolution
BIC	Brazil, India and China
BOFT	Bureau of Fair Trade for Import and Export
BTC	Bangladesh Tariff Commission
CAMEX	Inter-Ministerial Foreign Trade Chamber
CEB	Brazilian Business Coalition
CGC	Unit for General Coordination of Disputes
CNI	National Confederation of Industry
CONEX	Private Sector Consultative Council
DSM	Dispute Settlement Mechanism
DSU	Dispute Settlement Understanding
GATT	General Agreement on Tariff and Trade
GDP	Gross Domestic Product
GNI	Gross National Income
ICTSD	International Centre for Trade and Sustainable Development
IIFT	Indian Institute of Foreign Trade
IMF	International Monetary Fund
ITAC	Industry Trade Advisory Center
ITEC	Interagency Trade Enforcement Center
MIC	Middle Income Country
MOFCOM	Ministry of Commerce
MPEDA	Marine Products Export Development Authority
OECD	Organization for Economic Cooperation and Development
PIL	Public interest litigation
PMI	Permanent Mission of India
PPP	Public Private Partnership
RTI	Right to Information
SCM	Subsidies and Countervailing Measures
SEAI	Seafood Exporters Association of India
SPS	Sanitary and Phytosanitary Measures
TBI	Trade Barrier Investigation
TBIM	Trade Barrier Investigation Mechanism
TBR	Trade Barrier Regulation

TBT	Technical Barriers to Trade
TEXPROCIL	Cotton Textiles Export Promotion Council of India
TPD	Trade Policy Division
USTR	United States Trade Representative
UN	United Nations
WTO	World Trade Organization

1. INTRODUCTION

1.1 Introducing Remarks

The World Trade Organisation (WTO) has been a subject of criticism since its inception. The central points of its criticism have been directed at its long-standing ineffectiveness in conducting multilateral negotiations, the possible impact of multilateralism on the economic, social and environmental conditions of its Member States, the poor enforcement mechanisms provided under the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU), lack of transparency in decision-making, the ambiguous special and differential treatment provisions, the institution's alleged bias towards rich and powerful countries, and the asymmetrical use of WTO DSU provisions by developed and developing Member States.[1] The present research is concerned with the last mentioned point of criticism, i.e., the utilisation of WTO Dispute Settlement Mechanism (DSM) by the developing Member States of WTO.

In particular, four characteristics of WTO DSU introduce and define the focus of this research. *First*, the WTO DSM is a costly avenue for dispute resolution and it is therefore not equally affordable by all WTO Member States.[2] In contrast to developed country Members, developing countries have faced considerable problems while invoking WTO DSU provisions because they

[1] For details, see Robert R Baldwin, *Doha and Beyond: The Future of the Multilateral Trading System* (Cambridge University Press 2004) 46; Ricardo Melendez-Ortiz, Christophe Bellman and Miguel Rodriguez Mendoza (eds), *The Future and the WTO: Confronting the Challenges* (ICTSD Programme on Global Economic Policy and Institutions, July 2012) <http://www.ictsd.org/downloads/2012/07/the-future-and-the-wto-confronting-the-challenges.pdf> accessed 15 September 2014; Panagiotis Delimatsis, 'Transparency in the WTO's Decision-Making' (2014) 27(3) Leiden Journal of International Law 701; Andrew D Mitchell, 'A Legal Principle of Special and Differential Treatment for WTO Disputes' (2006) 5(3) World Trade Review 445; Christina L Davis and Sarah Blodgett Bermeo, 'Who Files? Developing Country Participation in GATT/WTO Adjudication' (2009) 71(3) The Journal of Politics 1033.

[2] Constantine Michalopoulos, *Developing Countries in the WTO* (Palgrave 2001) 3; Marc Busch & Eric Reinhardt, 'Testing International Trade Law: Empirical Studies of GATT/WTO Dispute Settlement', in Daniel L M Kennedy and James D Southwick, *The Political Economy of International Trade Law: Essays in Honor of Robert E. Hudec* (Cambridge University Press 2002) 457, 467.

do not possess sufficient resources to monitor and enforce their international trade rights. Due to resource constraints, they have faced problems in monitoring foreign trade practices and identifying or investigating trade barriers. They have also struggled in negotiating a settlement, challenging trade barriers, defending trade interests or ensuring compliance even after a favourable ruling is given by the Panel or Appellate Body (AB).[3] This thesis, in the following chapter, discusses these challenges as the present research is broadly concerned with how developing countries can overcome the participation challenges they currently face at WTO DSU.

The *second* characteristic is that, in practice, WTO DSM is a two-tier mechanism. The *first* tier is international adjudication and the *second* tier is domestic handling of trade disputes. Both tiers are interdependent and interconnected. A case that is poorly handled (perhaps because the impugned trade barrier is insufficiently investigated or the arguments are not examined by experienced litigators or the claims are poorly substantiated) at the domestic level will stand a relatively lower chance of success at the international level.[4] Hence, in practice, the future of WTO litigation is partially predetermined by the manner in which it is handled at the domestic level. With this ethos in mind, the present research centres its focus on the second tier, i.e., how can the disputes be effectively handled at the domestic level in order to improve the performance and participation of developing countries at the first tier, i.e., at WTO DSU.

The *third* feature of the dispute settlement system is that every trade disagreement which grows into a formal legal action at WTO DSU (if not resolved or diffused by way of negotiations or

[3] The problems faced by developing countries at WTO DSU are discussed in chapter two (page 43).

[4] Marie Wilke, 'Practical Considerations in Managing Trade Disputes' (December 2012) ICTSD Information Note 11, at 1 <http://ictsd.org/downloads/2013/02/practical-considerations-in-managing-trade-disputes.pdf> accessed 27 September 2013. [The author notes that '…countries can take advantage of the rule of law only if they can effectively pursue their rights in this complex legal regime, which largely depends on having an adequate number of experienced legal, economic, and diplomatic staff and a well informed and active private sector.']

consultations) generally emanates from cross-border commercial relationships between exporters and importers or business entities and public sector authorities.[5] Violation of WTO rules, in essence, directly affects business interests of exporters, importers, manufacturers and producers. Moreover, business entities are suitably placed to identify trade barriers and provide the required information to investigate a foreign measure or prepare a legal case.[6] Exporters and importers can gather information, evidence and documents concerning foreign trade measures and their impact during the course of conducting their everyday business activities.[7] In light of these observations, read together with the *first* and *second* characteristics mentioned above, the research argues that the engagement of affected industries during the management of trade disputes is a 'crucial enabling element' for any government action that is undertaken to safeguard or expand business interests.

The *fourth* characteristic is that WTO dispute settlement is an inter-governmental process and the exclusive authority to file or respond to WTO litigations is conferred to the governments of Member States. Hence, this characteristic of WTO dispute settlement positions the government as the key participant of WTO DSM, and when it is read together with the *third* characteristic, it lends further support to the argument that the governments should handle WTO disputes in close coordination with the affected industries. The thesis accordingly focuses on how governments can manage disputes by engaging the affected private stakeholders and what problems, if any, can the governments face in doing the same.

[5] Robert Echandi, 'How to Successfully Manage Conflicts and Prevent Dispute Adjudication in International Trade' (2013) ICTSD Issue Paper No 11, at 2, 3 <http://www.ictsd.org/downloads/2013/04/how-to-successfully-manage-conflicts-and-prevent-dispute-adjudication-in-international-trade.pdf> accessed 22 September 2014.
[6] The argument is explained in chapter two (text to n 101-102).
[7] Gene M Grossman and Elhanan Helpman, *Special Interest Politics* (The MIT Press 2001) 4.

Since the establishment of WTO in 1995, developing countries have sought to achieve a level playing field at WTO DSU. The present research argues that a level playing field can, to a large extent, be established by enabling developing countries to cost-effectively manage foreign trade disputes at domestic level through PPP approach. The claim is based on the fundamental premise that the PPP approach has a capacity-building function as it can enable the public sector to access the private resources (including information, finance, expertise and human resource) during the domestic management of WTO disputes and its subsequent conduct at international level.

In light of the above elucidation, the underlying argument of this thesis is two-fold: *First*, the participation problems that developing countries face at WTO DSU should be addressed at domestic level, and *second*, an effective arrangement of public private partnership (PPP) can enable developing countries to mobilise resources at domestic level and thereby better enable them to utilise the provisions of WTO DSU. Effective utilisation of the provisions of WTO DSU can further lead to better protection and enforcement of WTO rights, improved market access conditions for the developing world, and enhanced integration of developing countries into the world trading system.[8] These arguments, read together with the above-mentioned characteristics of WTO DSU, define the hypothesis of this research.

1.2 Research Question

A plethora of scholarly works have argued that developing country Members of WTO should enhance their dispute settlement capacity to successfully and cost-effectively navigate the complex and costly system of WTO DSU.[9] It is *one* thing to be a part of WTO agreements and know the WTO rules, and the *other* is to know how to use and take advantage of those

[8] For more details, see chapter two (pages 31-32).
[9] See n 2 and 3.

agreements and rules in practice. The present research seeks to conduct a detailed examination of the latter, i.e., it seeks to identify and examine different strategies that can enable developing countries to effectively utilise the provisions of WTO DSU. To achieve this purpose, the thesis examines how the most active DSU users among developing countries have strengthened their DSU participation. This is done by provoking reflection on the dispute settlement partnership experiences of the top three middle income country users of DSU among developing country Members of WTO. With the help of their case studies, the research seeks to enable developing countries to consider and critically evaluate a diverse range of PPP strategies employed so far by the most active developing country users of WTO DSU. The identification and evaluation of different PPP strategies may prompt other developing countries to determine their individual approaches towards PPP and dispute management. In light of this research background, the thesis seeks to answer the following research question:

How can a public private partnership arrangement enhance the WTO dispute settlement capacity of developing countries?

An attempt to answer this question will offer original insights to the existing literature on the areas concerning the domestic handling of WTO disputes, government-industry coordination and developing countries. The topical area of research, a pragmatic approach towards answering the research question with the help of multiple case studies, and an empirical research methodology makes this study an original contribution to the existing literature.

1.3 State of Literature and Scope for Originality

The notable scholars who have produced most of the existing literature on the intersecting areas of WTO dispute settlement, developing countries and public private interaction are Shaffer,

Bown and Gao.[10] However, the existing literature is uneven, and it does not sufficiently investigate some of the important issues which are addressed in this thesis.

For example, Shaffer has extensively researched and analysed the dispute settlement and PPP issues for the United States and the European Union.[11] But the existing literature has not examined the problems that public and private sector entities have faced in utilising the dispute settlement partnership provisions in the US and the EU. This task is taken up in the present research work.

Shaffer, Melendez-Ortiz and Gao have produced book chapters and articles on the management of disputes and PPPs in Brazil and China, and their works have laid down the foundation of the Brazilian case study (Chapter five) and the Chinese case study (Chapter four).[12] The present research has developed this literature further by examining, in detail, the manner in which the WTO disputes are handled and the challenges which are faced by the governments and industries in jointly managing the WTO disputes in Brazil and China.

The literature has also briefly examined some of these issues for the middle-income and least developed countries including Thailand and Bangladesh.[13] However, the literature has left out an

[10] Their main works in this area are as follows: Gregory C Shaffer, *Defending Interests: Public-Private Partnerships in WTO Litigation* (Brookings Institution Press 2003); Gregory C Shaffer and Ricardo Melendez-Ortiz (eds), *Dispute Settlement at the WTO: The Developing Countries Experience* (Cambridge University Press 2010); Gregory C Shaffer, Michelle Raton Sanchez Badin and Barbara Rosenberg, 'The Trials of Winning at the WTO: What Lies Behind Brazil's Success' (2008) 41(2) Cornell International Law Journal 383; Chad P Bown, *Self Enforcing Trade: Developing Countries and WTO Dispute Settlement* (Brookings Institution Press 2009); Henry Gao, 'China's Participation in the WTO: A Lawyer's Perspective' (2007) 11 Singapore Year Book of International Law 72; Henry Gao, 'Taking Justice into Your Own Hand: The TBI Mechanism in China' (2010) 44 Journal of World Trade 633; Henry Gao, 'Public-Private Partnership: The Chinese Dilemma' (2014) 48(5) Journal of World Trade 983.

[11] See, for example, Shaffer, *Defending Interests* (n 10).

[12] Some of these significant works are as follows: Shaffer and Melendez-Ortiz (n 10); Shaffer, Badin and Rosenberg (n 10); Gao, 'China's Participation in the WTO' (n 10); Gao, 'Taking Justice into Your Own Hand' (n 10); Gao, 'Public-Private Partnership' (n 10).

[13] Pornchai Danvivathana, 'Thailand's experience in the WTO dispute settlement system: challenging the EC sugar regime' in Gregory C Shaffer and Ricardo Melendez-Ortiz (eds), *Dispute Settlement at the WTO: The Developing Countries Experience* (Cambridge University Press 2010) 210; M A Taslim, 'How the DSU worked for Bangladesh:

ambitious economy and an enthusiastic DSU user among developing country Members of WTO as it is yet to investigate India's handling of WTO disputes.[14] The doctoral research has filled this gap by examining the handling of WTO disputes and PPP arrangements formed in India through primary sources including interviews, written government responses and inspection of government files.

In light of this state of literature, it can clearly be concluded that there are certain issues relating to dispute settlement partnership approach and capacity building in developing countries which are not fully addressed in the existing literature. These unresolved issues are broadly presented in the following questions: How can a developing country government and an industry communicate and coordinate in an effective manner? What elements are important for a PPP arrangement to be effective? How should developing countries devise an effective domestic mechanism for coordinated management of foreign trade disputes? What problems, if any, would developing countries face in doing the same? The *objective* of the present research is to address these questions, as answers to them would address the capacity-related challenges which developing countries face at WTO DSM. The research objective will be achieved through a combination of approaches, including conceptualisation, fact-finding and analysis. The research will predominantly be conducted with the help of a brief literature review and multiple case studies which are based on the dispute settlement experiences of five Member States, i.e., the US, the EU, China, Brazil and India. Reasons behind selecting these countries are explained in the following section.

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the first least developed country to bring a WTO claim' in Gregory C Shaffer and Ricardo Melendez-Ortiz (eds), *Dispute Settlement at the WTO: The Developing Country Experience* (Cambridge University Press 2010) 230.

[14] The only relevant work in the available literature on India's case study is Biswajit Dhar and Abhik Majumdar, 'Learning from the India - EC GSP dispute: the issues and the process' in Gregory C Shaffer and Ricardo Melendez-Ortiz (eds), *Dispute Settlement at the WTO: The Developing Countries Experience* (Cambridge University Press 2010) 182.

1.4 Selected Countries: The EU, the US, Brazil, China and India

Mavroidis, Horn and Johannesson have divided WTO Members into five groups, depending upon their level of WTO DSU experience, level of development and foreign trade interests.[15] These groups are as follows:

1. G2 (the European Union and the United States): The group includes the Member States of the EU and the US.[16]
2. IND (other industrialized countries): It includes OECD members and non OECD members that have a very high per capita income.[17] Countries under this group are classified as high income countries by the World Bank.
3. BIC (Brazil, India, and China): The group comprises Brazil, India and China, who are developing yet emerging market economies with distinctly high rate of participation at WTO DSU. China and Brazil are upper middle income countries, and India is a lower middle income country.
4. DEV (developing countries other than LDC): 'The DEV group consists of all countries that do not fit into either of the above mentioned categories and are not BIC countries

[15] Henrik Horn, Louise Johannesson & Petros C Mavroidis, 'The WTO Dispute Settlement System 1995–2010: Some Descriptive Statistics' (2011) 45(6) Journal of World Trade 1107, 1138. Also see Henrick Horn and Petros C Mavroidis. 'Winners and Losers in the Panel Stage of the WTO Dispute Settlement System' in Chantal Thomas and Joel P. Trachtman (eds.), *Developing Countries in the WTO Legal System* (Oxford University Press 2009) 151, 155.

[16] In the paper, '[t]he EU is taken to be EU-15, since the enlargements came relatively late during the period we cover. For the most part, the choice in this regard makes little difference quantitatively, since most of the twelve countries acceding to the EU in 2004 and 2007 have been relatively inactive in the WTO.' [Horn et al, 'The WTO Dispute Settlement System 1995–2010' (n 15) 1138] However, this thesis treats G2 as comprising the US and 28 member states of the EU as of 14 June 2015.

[17] 'Economic Cooperation and Development (OECD) members, the non-OECD members among the twelve countries that most recently became members of the EU, those that are currently at an advanced stage of their accession negotiations, as well as countries that are not OECD members but have a very high per capita income, such as Singapore.' [Horn et al, 'The WTO Dispute Settlement System 1995–2010' (n 15) 1138] This thesis follows the same composition for IND, except for the fact that it excludes the twelve countries that are now the members of the EU and hence included in the G2.

either.'[18] These countries are classified as upper middle, middle or lower middle income countries by the World Bank.

5. LDC (least developed countries): This group comprises the list of LDCs prepared by United Nations. These countries are classified as low income countries by the World Bank.

This thesis actively focuses on the experiences of two groups: G2 and BIC. The chapter on G2, which is presented after the chapter on conceptual analysis, will provide an extension of the theoretical review as it will further clarify the conceptual underpinnings of PPP in the context of WTO DSU. It will also provide a brief literature review which will further be developed with the help of primary sources including statutory legislations, official notifications and working reports. The chapters on BIC will provide detailed case studies, and these case studies will build on the available literature with the help of empirical research and analysis. One may question the viability of focussing on the experiences of these large middle income countries (MICs) to provide guidance to a very heterogeneous group of developing countries, however, this selection can be justified on the basis of following three reasons: *First*, the experiences of BIC are most relevant for answering the research question as these emerging countries have cost-effectively developed the capacity and ambition to use WTO DSU. *Second*, these countries have also faced participation challenges, in common with other developing countries that have endeavoured to use DSU provisions. *Third*, they are the leaders of dispute settlement partnership approach, and from a legal realist's perspective, it will be useful to assess their relevant experience to provide practical insights to their peers, i.e., the other middle income countries. Hence, DEV countries can analyse these case studies and learn from their peers' experience. Other groups are excluded

[18] Horn et al, 'The WTO Dispute Settlement System 1995–2010' (n 15) 1138.

from the case studies because the domestic conditions of LDCs and INDs do not fit within the parameters of the discussion that is at the heart of this thesis.

The key reasons for choosing group G2 in the present research are explained in the following points:

1. The US and the EU States have either been a complainant or a respondent in most of the landmark WTO cases. They are seen as the leaders of WTO adjudication as the US and the EU together have filed and responded to more than forty one percent of the total complaints filed at WTO DSU.[19] They have been successful in negotiating settlements, litigating disputes and seeking enforcements. Therefore, an examination of their domestic dispute settlement strategies which have led to a wealth of DSU experience will provide the research with valuable inputs.

2. The developing world can learn from their dispute settlement experience as they have extensively relied on the private sector for addressing foreign trade disputes. They are the leaders of formal PPP system as they are the first WTO Member States to have established a legal system of rights and obligations directed at the facilitation of public private coordination.[20] With formal systems of PPP in place almost since the creation of WTO, their governments and industries have gained a wealth of dispute settlement partnership experience to share with the developing world. An overview of their formal PPP provisions and their utilisation during selected WTO disputes can provide an indication of their nature and effectiveness.

[19] Total number of complaints filed at the WTO DSU, as of 15 June 2015, are 492. Out of 492, the US is a complainant in 108 cases and a respondent in 124 cases. The EU is a complainant in 95 cases and a respondent in 81 cases. Taken together, they have filed 203 complaints and responded to 205 complainants at WTO DSU.
[20] See the case studies of the US and the EU (page 117 and 138 respectively).

3. Their study provides an intellectual and theoretical framework for the analysis of PPP approach in the case studies of China, Brazil and India. This is because the dispute settlement and PPP experience of the EU and the US are discussed at length in the existing literature.[21] This literature review prepares the reader to understand the relevance of PPP approach in the context of WTO dispute settlement proceedings before being thrown into the empirical findings laid down in the case studies.

Three emerging economies, China, Brazil and India, are selected from the developing world. This selection is made on the following basis:

1. BIC countries have certain things in common. All three countries are among the most active developing country users of WTO DSM. They have made use of effective dispute settlement strategies (at least much more effectively than other developing countries) and are therefore better enabled to litigate and defend their trade interests at WTO. They all are important international trade players with certain common economic and strategic interests.[22] They are members of BRICS, which is a trading alliance of major emerging

[21] Shaffer, *Defending Interests* (n 10); Mesut Aydin, 'WTO Dispute Settlement Mechanism and Developing Countries: Lessons for Turkey' (June 2007) Fletcher School of Law and Diplomacy, 23-24 <www.ekonomi.gov.tr/upload/BF09AE98-D8D3-8566.../Mesut_Aydin.pdf> accessed 15 June 2010; Greg Mastel, *American Trade Laws After the Uruguay Round* (ME Sharpe 1996); Mark A Pollack and Gregory C Shaffer (eds), *Transatlantic Governance in the Global Economy* (Lanham MD: Rowman & Littlefield 2001) 100; Alan V Deardorff and Robert M Stern (eds), *Constituent Interests in U.S. Trade Policies* (University of Michigan Press 1998) 282; European Commission, 'How the EU Works with the WTO' <http://trade.ec.europa.eu/doclib/docs/2013/april/tradoc_150988.pdf> accessed 19 March 2014; Commission, 'The Global Challenge of International Trade: A Market Access Strategy for the European Union' (Communication) COM (96) 53 final; Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions of 18 April 2007 'Global Europe: a stronger partnership to deliver market access for European exporters' (Communication) COM (2007) 183 final; European Commission: External Trade, 'Global Europe: A Stronger Partnership to Deliver Market Access for European Exporters', 3 <http://trade.ec.europa.eu/doclib/docs/2007/april/tradoc_134591.pdf> accessed 19 March 2014; Robert M Maclean, *EU Trade Barrier Regulation: Tackling Unfair Foreign Trade Practices* (London: Thomson, Sweet & Maxwell 2006); Debra Johnson and Colin Turner, *European Business: Policy Challenges for the New Commercial Environment* (Taylor & Francis 1998) 319.

[22] In China, from five percent of GDP in the year 1970, exports and imports have expanded to fifty five percent of GDP in the year 2011. In India, from eight percent in 1970, exports and imports have increased to forty six percent

market economies.[23] They have collaborated to form BASIC, which is a geopolitical alliance of newly industrialised and developing country superpowers.[24] They are members of Group of 77 (G-77), which is a coalition of developing nations at the United Nations.[25] They have also come together under Group of 20, which is an international alliance of economies that collectively accounts for almost eighty percent of world trade.[26] Hence, they are emerging powers with certain common interests but hugely different domestic circumstances and global ambitions.

At the same time, they are all designated as "developing countries" under the WTO agreements, as they continue to face many problems that the developing world shares in common.[27] For example, India has low standards of living, poor health and sanitation conditions and an acute problem of high population growth. Brazil faces the problem of governmental ineffectiveness and weak regulation. China faces high population growth and dependency burden, rapid urbanisation and challenges to environmental

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of GDP in 2011. In Brazil, from fourteen percent in 1970, it has expanded to twenty five percent of GDP in 2011. The data is obtained from the World Bank Database. 'On the macro level, a landmark Goldman Sachs report published in 2003 forecasts that the economies of Brazil, China, India and Russia could grow to be collectively larger than the G-6 economies (United States, Japan, United Kingdom, Germany, France and Italy) in U.S. dollar terms before the middle of the twenty-first century.' [Tarun Khanna and Krishna G Palepu, 'How to Define Emerging Markets' *Forbes* (27 May 2010) <http://www.forbes.com/2010/05/27/winning-in-emerging-markets-opinions-book-excerpts-khanna-palepu.html> accessed 15 May 2015].

[23] BRICS is the association of five major emerging national economies: Brazil, Russia, India, China and South Africa. BRICS Members represent forty percent of the world population and eighteen percent of the world economy. For more information, see The BRICS Post <http://thebricspost.com> accessed 10 November 2014.

[24] Karl Hallding, Marie Olsson, Aaron Atteridge, Marcus Carson, Antto Vihma and Mikael Roman, 'Together Alone: Brazil, South Africa, India, China (BASIC) and the Climate Change Conundrum' (August 2011) Stockholm Environment Institute (SEI) <http://www.sei-international.org/mediamanager/documents/Publications/Climate/sei-basic-preview-jun2011.pdf> accessed 15 June 2015.

[25] For information on the G-77, see the Group of 77 of the United Nations <http://www.g77.org/> accessed 15 June 2015.

[26] For information on G-20, see John J Kirton, *G20 Governance for a Globalised World* (Ashgate 2013) 1.

[27] A development economist, Michael P Todora, has devised a list of common characteristics of developing countries. The characteristics are as follows: i. Low Standards of Living, characterized by low incomes, inequality, poor health and inadequate education; ii. Low Levels of Productivity; iii. High Rates of Population Growth & Dependency Burdens; iv. High & Rising Levels of Unemployment & Underemployment; v. Substantial Dependence on Agricultural Production & Primary Product Exports; vi. Prevalence of imperfect markets & limited information; vii. Dominance, Dependence and Vulnerability in International Relations. [Jocelyn Blink and Ian Dorton, *Economics* (Oxford University Press 2007) 314-320].

sustainability. They all, in common with other developing countries, face high levels of corruption, low GDP per capita, wide inequality of income, lack of transparency and free flow of information.[28]

More importantly, these countries have faced very similar problems (in accessing WTO DSU) to those faced by other middle-income and even low income countries. The problems include, ineffective and resource-constrained governance, lack of transparency and information flow, unorganised and disengaged industries, poor observance of rule of law, limited knowledge and expertise with government officials, lack of legal expertise and language barriers.[29] To see how their peers have overcome, at least to some extent, similar capacity problems which they are confronting today at WTO DSU can be an effective way of learning for other upper middle and lower middle income countries. As developing country superpowers and the most active DSU users among developing countries, BIC countries can provide some practical insights and motivation on capacity building measures to their peers, i.e., DEV countries.

2. China's case study is relevant for answering the research question as it is the first and the only developing Member State which has, through legal reforms, established a formalised mechanism of PPP. China has emerged as one of the most active developing countries at WTO DSM.[30] It has played a vital role in changing world trade dynamics as it has

[28] It is based on the data provided by World Bank on development indicators in Brazil, China and India from 1996-2013. The compilation of data is obtained from the globaleconomy.com <http://www.theglobaleconomy.com/Brazil/wb_corruption/> accessed 20 May 2015.

[29] Gregory C Shaffer, Marc Busch & Eric Reinhardt, 'Does Legal Capacity Matter? A Survey of WTO Members' (2009) 8 World Trade Review 559, 561; Gregory Shaffer and Charles Sutton, 'The Rise of Middle-Income Countries in the International Trading System', in Randall Peerenboom, Tom Ginsburg (eds.), *Law and Development of Middle-Income Countries: Avoiding the Middle-Income Trap* (Cambridge University Press 2014).

[30] From the year 2001 to 2013, China has participated in 11 cases as a complainant, 31 cases as a respondent and 102 cases as a third party. More interestingly, China has challenged developed global economies such as the US and the EU in all 11 cases it has litigated as a complainant. In addition, it has been challenged by the US and the EU in

gradually established itself as one of the world's largest trading nations.[31] Nevertheless, China still remains a developing country beset with challenges which are similar to those of other developing countries.[32] China therefore is an interesting case-study as it presents the contrast of being an emerging world leader in international trade and a developing country which has learnt to utilise the WTO DSU provisions.[33]

3. Brazil has emerged as one of the most active and successful developing countries with regard to the WTO dispute settlement system.[34] It has taken significant steps towards establishing public sector institutions, private sector bodies and domestic procedures to facilitate the formation and functioning of PPPs for the efficient management of foreign trade disputes. Brazil's case study is situated between those of China and India as it presents a distinct form of partnership mechanism which has the elements of both formal and informal PPP arrangements. It introduces a semi-formal nature of institutionalised partnership and therefore further widens the horizon of this research. The developing condition of Brazil, its active participation at the WTO DSM, its institutionally developed

22 cases out of 33 cases in which it was a respondent. For details, see World Trade Organization: China and the WTO <http://www.wto.org/english/thewto_e/countries_e/china_e.htm> accessed 17 November 2013.

[31] The World Bank: China Overview <http://www.worldbank.org/en/country/china/overview> accessed 17 November 2013; Peter Hirschberg, 'China Eclipses U.S. as Biggest Trading Nation' *Bloomberg News* (10 February 2013) <http://www.bloomberg.com/news/2013-02-09/china-passes-u-s-to-become-the-world-s-biggest-trading-nation.html> accessed 17 November 2013; Phillip Inman, 'China overtakes US in world trade' *The Guardian* (11 February 2013) <http://www.theguardian.com/business/2013/feb/11/china-worlds-largest-trading-nation> accessed 17 November 2013.

[32] World Trade Organization: China and the WTO <http://www.wto.org/english/thewto_e/countries_e/china_e.htm> accessed 17 November 2013.

[33] Han Liyu and Henry Gao, 'China's experience in utilizing the WTO Dispute Settlement Mechanism' in Shaffer and Melendez-Ortiz, *Dispute Settlement at the WTO* (n 10) 137, 138.

[34] Brazil, from 1995 to 2013, has participated at WTO DSU as a complainant in 26 cases, as a respondent in 15 cases and as a third party in 85 cases. Chad P Bown and Rachel McCulloch, 'Developing Countries, Dispute Settlement, and the Advisory Centre on WTO Law' (2010) The World Bank, Policy Research Working Paper 5168, 7, 34 <http://elibrary.worldbank.org/doi/pdf/10.1596/1813-9450-5168> accessed 9 November 2013; Shaffer et al, 'The Trials of Winning at the WTO' (n 10) 388.

PPP and its inter-ministerial management of trade disputes are the key factors which make this a relevant case study for the present research.[35]

4. India has actively participated in multilateral and bilateral trade negotiations, WTO Ministerial Meetings and WTO Committee System. It has also participated numerous times in the WTO dispute settlement process as a complainant, respondent and third party.[36] India's case study is significant for this research as it sheds light on a variety of WTO cases that were handled through varying levels of ad-hoc and informal coordination between the government and industry.[37] India's case study therefore enables the research to study and evaluate the informal procedures of public private coordination, which are different to those that are studied in the previous case studies.

These case studies are required to answer the research question as the selected countries, with different legal frameworks, political and governance mechanisms, institutional set-up and economic structures, have employed different dispute settlement strategies for the handling of WTO disputes. These strategies range from the establishment of legal frameworks, to the creation of institutional structures, formal procedures of interaction and informal coordination systems. Hence, the inclusion of multiple case studies has enabled this research to comprehensively overview different dispute settlement strategies and PPP experiences.

[35] See the case study of Brazil (page 204).
[36] From the year 1995 to 2013, it has acted as a complainant in 21 cases, as a respondent in 22 cases and as a third party in 90 cases. For details, see WTO website: India and the WTO <http://www.wto.org/english/thewto_e/countries_e/india_e.htm> accessed 4 September 2013.
[37] See the case study of India (page 245).

1.5 Research Methodology

In order to address the research question, the researcher has employed a *triangulation* based approach.[38] Findings have been gathered through original empirical and library based research. Moreover, a case study approach has been used to conceptualise and propose generalisations about the PPP mechanism, its best practices and effective elements. Triangulation has been used to gain an in-depth and comprehensive understanding of the issues, to investigate and develop the presumptions, and to check and cross-check the validity of the findings gathered from different sources. The sources are fully documented in the footnotes, bibliography and appendices.

The *library based research* has been carried out by means of the available primary and secondary sources. The *primary sources* include official documents, case laws, working reports, annual reviews, legislative texts, rules, orders and official communications. In the *secondary sources*, the researcher has consulted the books and articles which have discussed the intersection of WTO dispute settlement, public private interactions and the domestic handling of foreign trade disputes in developed and developing countries. The researcher has also relied on the information provided on official websites of government departments, trade associations, law firms, and international and intergovernmental organisations. Wherever required, newspaper and magazine reports, newsletters, periodicals and blogs have also been consulted to cross-check or substantiate information or argument.

[38] Nahid Golafshani, 'Understanding Reliability and Validity in Qualitative Research' (2003) 8(4) The Qualitative Report 597, 603 [The author explains triangulation in the following manner: 'Triangulation is typically a strategy (test) for improving the validity and reliability of research or evaluation of findings.' The author also states that 'triangulation strengthens a study by combining methods. This can mean using several kinds of methods or data, including using both quantitative and qualitative approaches.']

Library based research has laid down the conceptual foundation for the research project. It has introduced the key issues relevant to the research and the possible ways in which these can be addressed. The empirical research has complemented, developed and sometimes contradicted the facts and arguments gathered from the existing literature and other primary sources mentioned as above. It has also filled the research gaps in the existing literature where certain key issues and possible approaches were not investigated or fully developed. Therefore, the library based research has laid down the research foundation which is further constructed with the help of empirical investigation.

For the *original empirical research*, the researcher has conducted semi-structured interviews and discussions with the help of selectively designed and individuated sets of questions. The interviewees were identified through a purposive snowball sampling approach. This method enabled the researcher to make an 'initial contact with a small group of people' that were related to the research area and then utilise these to establish further related contacts.[39] With this approach, it became possible to identify those officials who, in various capacities, have been engaged in the process of WTO dispute settlement, and could therefore share their first-hand experiences and provide practical insights into the study.

The case study approach is employed to examine the WTO dispute settlement and partnership experiences of selected developing countries. The approach employed in the chapter on the US and the EU has taken a slightly different form as the handling of disputes in these countries has been extensively discussed in the existing literature. This is why the chapter provides a brief literature review of the topic with a special focus on dispute settlement approach employed by the US and the EU. For the case study of India, additional empirical research methods are

[39] Alan Bryman, *Social Research Methods* (Oxford University Press 2012) 202.

employed as the information was also sought through written applications filed by the researcher and responses received from the Government of India under the India's Right to Information Act 2005.[40] Moreover, additional facts and insights have been gained from accessing and surveying the official documents (relating to WTO disputes) which were in the possession of the Ministry of Commerce and the Permanent Mission of India to the WTO.[41] These methods have only been employed for the case study of India because the researcher (as an Indian national) has the right to inspect documents and seek information on issues concerning public welfare.

1.6 Research Methods and Design

To begin with, the researcher studied the primary and secondary documents available online and at the libraries. The survey of existing literature prompted the researcher to devise the research hypothesis, research questions, thesis outline and a survey questionnaire in order to conduct a pilot survey. Subsequently, the questionnaire devised for pilot survey was revised in the light of the feedback received from supervisor and peer researchers. The document containing the hypothesis, questions and research outline was emailed to various international trade law scholars and practitioners to test the viability of the research. After receiving suggestions and positive feedback on the viability and importance of the research, the researcher undertook a detailed study and analysis of the existing literature.

With the understanding and knowledge accumulated from the library based research, the researcher devised detailed skeleton arguments under each proposed chapter, section and sub-

[40] The written responses received from Ministry of Commerce are enclosed as Appendices E.

[41] For example, the author browsed through the internal files of the India's Ministry of Commerce which contained a list of key procedures employed during the handling of WTO disputes. The author also browsed through the written memorandum of request which was filed by the private steel companies in India before the *US-Carbon Steel* case was launched by India at WTO. {Panel Report, *United States – Countervailing Measures on Certain Hot-Rolled Carbon Steel Flat Products from India*, WT/DS436/R and Add.1, circulated to WTO Members 14 July 2014 [appeal in progress]}.

section. The arguments were based on the findings gathered from the literature review. The skeleton document was useful in identifying the gaps in the existing literature as it enabled the researcher to locate the areas and issues which were not previously investigated, and which therefore needed further investigation. Additionally, the skeleton arguments provided a detailed outline of the thesis and an investigated course of arguments. This navigated the research and ensured that it continued to address its research objectives. Hence, the exercise of devising a skeleton thesis laid down the provisional course of research until the findings and arguments were validated, cross-checked and confirmed in the empirical investigation.

Once the skeleton document was prepared and the potential areas requiring empirical research were located, the researcher prepared an empirical research proposal. The proposal was submitted for ethical approval to the Humanities & Social Sciences Ethical Review Committee, University of Birmingham. For the process of ethical review, the researcher prepared a participant information document, consent form, interview schedule and scripts of general and individuated questions.[42] These documents were used and extensively relied upon throughout the conduct of the empirical research. The guidance received during the ethical review, and the approval and review of the overall research proposal, demonstrate that the research was conducted in an ethically responsible manner.

After preparing these documents and gaining ethical approval for conducting the empirical research, the researcher prepared a sampling document wherein an initial group of potential interviewees was identified. The document contained the names, organisational affiliations and email addresses of the potential interviewees. The thesis outline and skeleton arguments were

[42] Participant information document attached as Appendices C; Consent form attached as Appendices D; List of interviewees attached as Appendices A; List of Questions attached as Appendices B.

extensively consulted while identifying officials at this stage. With research questions at the heart of the sampling choices, the initially selected participants were the officials from international organisations (WTO, UN), inter-governmental organisations (ICTSD, CUTS International), and the Permanent Missions to WTO (India, Brazil, China and the US).The officials were contacted via emails containing a brief introduction about the research and the researcher, along with the participant information leaflet. Interviews were conducted at different locations, including Switzerland, the UK and India. The interviews were semi-structured in nature, as the discussions revolved around the questions initially proposed by the researcher and the issues subsequently raised by the interviewees. The interviewees who participated in these initial interviews proposed the names of other suitable participants from public and private sector organisations. On the basis of these suggestions, a second sampling document was prepared. The revised sampling targeted the issues and questions identified in each skeleton chapter.

The potential interviewees were contacted in the same manner, i.e., with an introducing email and the participant information document. A significant number of contacted officials responded and expressed their willingness to participate in the research.[43] Those who had not responded at the first instance were sent follow-up emails at least once.

The sampling was done in an unbiased and balanced manner as different perspectives from government officials, private sector representatives, lawyers, academics and diplomatic officials were taken into account for each case study. The claims made by government officials have been verified and cross-checked against the observations provided by private sector representatives

[43] For the list of interviewees, see Appendices A. In accordance with the interviewees' preferences, their names and organisational affiliations are either provided or are partly or completely anonymised in the citations. If an interview was conducted face-to-face, its citation has included city and country name where that specific interview took place. For the interviews which were conducted via other modes including voice call, video conferencing and Skype, the citations have not included city and country name.

and vice versa. Their claims and perceptions have further been corroborated, endorsed or refuted in the statements received from lawyers, academics and officials from international and inter-governmental organisations. The reliability, relevance and credibility of the participants are self-evident from their prestigious organisational affiliations and relevant experiences.[44] The sampling procedure therefore maintains the credibility and the unbiased outlook of the research approach.

The interview discussions were directed by individual interview guides devised (by the researcher) and conveyed (to the interviewee) prior to the interviews.[45] The semi-structured nature of the interviews allowed the flexibility of receiving inputs on issues that were new to the existing literature and to the researcher. Due to the topical nature of the research, the lack of relevant existing literature and the project's intersection with multiple disciplines (including political and regulatory theories, social and diplomatic concerns, international trade law, industrial concerns and governmental capacities), it was crucial to employ a flexible and an inclusive approach. Hence, the interviewees were informed that the interview guide would be used to steer the discussions, but they would be welcome to share any insight or experience (related or unrelated to the questions asked) which they thought would be relevant to any aspect of this research.

At the beginning of every interview, the interviewees were requested to sign a consent form and communicate their anonymity preference. In accordance with these preferences, the names of interviewees and their organisational affiliations have either been mentioned or withheld

[44] This information is provided in Appendices A.
[45] The scripts containing questions used during the interviews are enclosed as Appendices B.

throughout the thesis. The interview summaries, consent forms and email records are on file with the author.

During the interviews, the researcher, in accordance with the preference of the interviewee, either made a digital recording or took notes. Following each interview, the researcher prepared an interview summary highlighting the key points of discussion. The interview summary was subsequently emailed to the interviewee for his/her review and final comments. This was done to ensure that the interview summaries characterized the discussions in an accurate and responsible manner.

The interview summaries were analysed, and brief notes were prepared to put into focus the relevant points and information. Substantial changes were made in the substance and content organisation of the provisional skeleton arguments after accumulation and analysis of information gathered through the empirical investigation. After revising the skeleton thesis (including research questions) and substantiating the skeleton arguments with the help of the literature review and the empirical investigation, the next task was to draft the chapters in accordance with the finalised arguments and findings. Where relevant, draft chapters were emailed to interview participants to ensure that a fair, accurate and responsible use of their inputs had been made.

In short, the process of critical deduction was employed to carry out this research. Library based research generated the fundamental theory on dispute settlement and the use of PPP mechanism. A critical analysis of this theory was conducted to devise a hypothesis. This hypothesis was devised in the form of detailed skeleton arguments. Findings were also gathered through empirical research methods. These findings confirmed, strengthened or refuted the conceptions

laid down in the skeleton arguments. Hence, the skeleton document was revised in light of the findings gathered from interviews, discussions, survey of documents and written information applications.

With the use of these diverse research methods and a systemic research design, it has been possible to address the issues of research credibility, strength and reliability. Throughout the thesis, findings have been cross-checked and verified against different primary and secondary sources. Moreover, the use of empirical research methods has enabled the research to contribute to the existing literature as it has presented a new perspective on the ways in which foreign trade disputes can be jointly handled by developing country governments and industries in the future.

1.7 Research Limitations

There are certain *limitations* to the research methodology and research scope. They are as follows:

1. Public and private sector officials from the US, the EU, India, Brazil, China, Thailand and Bangladesh were identified during the sampling procedure. They were contacted via emails, telephone calls and letters. Not all of them responded. However, overwhelming responses were received from most of the contacted officials based in India, mainly due to the pre-established relations and the nationality of the author. Hence, there may be a bias towards the case study of India as it is entirely based on the findings gathered from semi-structured interviews, discussions and written responses from public and private sector officials in India. However, for other case studies, the existing literature has complimented the information received from a comparatively smaller number of interviews and discussions. Lack of willingness to participate, language problems and knowledge constraints can be viewed as the possible reasons for the restricted response of

other private and public sector officials. Hence, the findings laid down in different case studies may not fully represent the views of their governments and industries. This is one of the weaknesses of the snowball sampling approach as it does not aims to achieve representativeness and generalisation; it rather seeks to focus and address specific questions at hand.[46] Nevertheless, all the findings can reflect upon the individual issues concerning the domestic management of disputes, PPP strategies and the use of the WTO DSM. Some uniformity is maintained because the researcher has interviewed the key bureaucratic and legal officers who were actively involved in the conduct of disputes at the WTO Permanent Missions of all selected developing countries.

2. It will be seen throughout the thesis, and mainly in the literature review and the case study of Brazil, that the research has extensively relied on Professor Gregory C. Shaffer's work. This is because most of the significant literature concerning the intersection of domestic management of disputes, PPP and WTO DSU has been produced by Professor Shaffer in various books and articles. Extensive reliance has also been placed on the verbal interviews and discussions which the researcher has conducted for the case study of India. The reasons for this include the lack of existing literature, the author's contacts with the concerned government departments in India, and the proactive responses received from the interviewees.

3. The author acknowledges that the voluntary sector, including non-profit organisations, consumer organisations and inter-governmental organisations, can play an instrumental role and can effectively partner the governments during the handling of foreign trade disputes. They can also enhance the domestic capacity and expertise of the developing

[46] Bryman (n 39) 203.

country governments, as they can provide monitoring services, gather information and evidential documents, analyse a dispute from various economic, environmental, social and political perspectives, and engage in public relation-making and campaigning activities for ensuring compliance. However, the research has not discussed and examined the role which can be played by these voluntary organisations. This is mainly done to delimit the scope of the thesis and to focus (in accordance with the research objectives) on the relationship between governments and industries. Investigating and examining the role of the voluntary sector could constitute a useful topic for future researchers.

1.8 Thesis Structure

The thesis contains eight chapters. *Chapter one* is the introduction. It introduces the research topic, research question and its objectives. It describes the state of literature and scope for originality. It also provides reasons behind the selection of five Member States for conducting the case studies. Following on, it describes the research methodology, methods and design that are employed to conduct the present research. Finally, the chapter presents certain limitations of the research methodology and scope, and it concludes by providing a brief roadmap to all chapters in this thesis.

Chapter two provides a conceptual framework to this thesis. By identifying, describing and analysing the important concepts and issues that are relevant for answering the research question, the chapter seeks to prepare a benchmark against which the theoretical and empirical findings presented in the case studies will be assessed and analysed. It begins by discussing the benefits of participation at WTO DSU for State and non-State entities. After providing a definition of "developing countries", it briefly explains the nature of participation challenges that developing

countries face at WTO DSU and the possible ways to overcome them. Following on, the chapter focuses on the domestic strategies, including PPP approach, employed by certain developing Member States to strengthen WTO dispute settlement capacity. It then underlines PPP approach as one of the in-house strategies that have produced positive capacity-building results in certain developed and developing countries. The remaining chapter defines and conceptualises PPP in the context of WTO DSM.

Chapter three provides a theoretical base to this thesis, one which is grounded in the existing literature on the dispute settlement experiences of the US and the EU. It is divided into two sections. Section one deals with the US, whereas section two is focussed on the EU. In these two sections, the chapter summarises the legal and institutional provisions of dispute settlement and PPP employed by the US and the EU. It also briefly describes the manner in which the established provisions have been utilised during specific WTO disputes. However, the chapter goes beyond a mere literature review as it investigates the effectiveness of the formal PPP provisions devised in the US and the EU. Finally, the chapter identifies and discusses the key obstacles which have impeded the formation and functioning of formal partnership arrangements in these countries.

Chapter four presents the case study of China. The chapter provides an overview of the country's political and economic circumstances and their interaction with the laws, institutions and procedures established in China for the conduct of WTO disputes. Following the overview, the case study analyses the ways in which certain WTO disputes were jointly handled by the government and the private sector. It also investigates the issues of utilisation and effectiveness of the formal PPP mechanism established in China. Moreover, the chapter discusses certain other strategies which have strengthened the dispute settlement capacity of this relatively new and

developing Member State of the WTO. Finally, the case study discusses the challenges China has faced from time to time during the invocation of WTO DSU provisions and the formation of PPPs.

Chapter five presents a distinct case study, as it describes and examines the semi-formal nature of the PPP framework utilised during the management of trade disputes in Brazil. After providing an overview of the country's political and economic circumstances, it enunciates the strategies that the government in Brazil has introduced and employed to manage foreign trade disputes. The case study also analyses the ways in which several trade disputes were jointly managed by the government and the private sector in Brazil. The chapter outlines certain features of Brazilian PPP arrangements which have enabled this developing country to overcome its WTO-related capacity challenges. Finally, it investigates the weaknesses of the informal yet institutionalised arrangement of PPP commonly formed during the settlement of disputes in Brazil.

Chapter six presents the case of India. This chapter provides original insights into the nature, elements and operation of two different forms of dispute settlement partnerships, i.e., informal coordination and pattern of coordination. It provides an overview of the country's political and economic circumstances and their interaction with the existing set of procedures and institutions employed by the government for conducting trade disputes and coordinating with the private sector. It also presents a background to the evolution of the existing domestic procedures in India. In addition, the chapter analyses the WTO disputes litigated by the Government of India with the help of private sector entities. Finally, it outlines the challenges which the dispute settlement framework and PPP arrangements in India have and may face in the future.

Deriving lessons and distilling the main findings from dispute settlement experiences of the selected developed and developing countries, *Chapter seven* puts forward certain practical suggestions for devising dispute settlement partnership mechanisms in developing countries (with a special focus on middle income countries). It seeks to address the research question by exploring certain strategies through which the developing country governments and industries can coordinate and interact during dispute settlement.

Chapter eight concludes the thesis. It briefly summarises the main research findings, the potential limitations of the research findings, and the areas which need to be addressed further by future researchers and policy makers.

2. WTO DSU, PARTICIPATION CHALLENGES AND PUBLIC PRIVATE PARTNERSHIP: EVOLVING A CONCEPTUAL FRAMEWORK

Three key concepts run through the thesis, i.e., developing countries' access to WTO DSU, the public private partnership approach, and domestic management of WTO disputes. Contextualisation of these concepts is essential for clarifying the underpinnings of the present research, and for answering the following research question: How can a public private partnership arrangement enhance the WTO dispute settlement capacity of developing countries? In accordance with this research question and the key concepts under investigation, the chapter prepares a conceptual benchmark against which the theoretical and empirical findings presented in the case studies will be assessed and analysed.

The chapter begins by discussing the benefits of participation at WTO DSU for State and non-State entities. The participation benefits are highly variable, as they depend upon a number of factors, one of which is the cost of participation. The high cost and complexity of participation have introduced several challenges for those Member States that lack the capacity to litigate and defend their WTO rights. The chapter explains the nature of these participation challenges that developing countries face at WTO DSU and possible ways to overcome them. Following on, the chapter focuses on the domestic strategies, including the PPP approach, employed by certain developing Member States to strengthen WTO dispute settlement capacity.

The chapter puts forward PPP approach as one of the in-house strategies that can produce positive capacity-building results in developing countries. The chapter also defines and conceptualises PPP in the context of WTO DSM, and this is done from the perspective of certain

upper middle and lower middle income countries that have employed the partnership approach to overcome their capacity constraints. Finally, the chapter unfolds the domestic context and the challenges that may affect the effectiveness and suitability of PPP strategies in a given country. In this manner, it provides an analytical framework to understand and determine the effectiveness of PPP arrangements that will be examined during the course of case studies' analysis.

2.1 Participation at WTO DSU: Benefits for Member-States and Business Entities

The WTO dispute settlement system is a remarkable example of an international 'rule of law' and multilateral adjudication. WTO grants several rights to its Members, and WTO DSU provides a rule-oriented consultative and judicial mechanism to protect and enforce these rights in cases of WTO-incompatible trade infringements. It empowers its Member State to protect and expand its foreign market access by challenging foreign trade practices and defending its measures through a time-defined procedure of consultation, litigation and implementation.[1] One of the key objectives of WTO DSU is to enhance a country's overall economic growth and development, by reducing trade barriers and expanding foreign trade through multilateral regulation.[2]

In essence, the market access benefits from participation at WTO DSU are mainly realised by non-State entities that conduct foreign trade. Non-State entities do not enjoy any direct rights and

[1] Understanding on Rules and Procedures Governing the Settlement of Disputes ('Dispute Settlement Understanding') (15 April 1995) LT/UR/A-2/DS/U/1. For more information, see World Trade Organization, Dispute Settlement: Legal Text <https://www.wto.org/english/tratop_e/dispu_e/dsu_e.htm> accessed 5 May 2015.

[2] World Trade Organization, Understanding the WTO: What We Do <https://www.wto.org/english/thewto_e/whatis_e/what_we_do_e.htm> accessed 6 May 2015. Gregory C Shaffer, 'Developing Country Use of the WTO Dispute Settlement System: Why it Matters, the Barriers Posed, and its Impact on Bargaining' (May 2005) ICTSD Research paper: Legal Capacity, 178 <http://www.ictsd.org/themes/global-economic-governance/research/developing-country-use-of-the-wto-dispute-settlement> accessed 15 September 2014 [The author notes that 'the success of developing countries in WTO litigation (compared to under the GATT) appears to have increased in terms of gaining market access.']

remedies under WTO DSU provisions as only governments are authorised to bring disputes to WTO, however, it is mainly the trade interests of business communities that are defined, clarified and protected through dispute settlement procedures.[3] Exporters and importers are the direct beneficiaries and victims of international trade regulation and multilateral dispute settlement, and it is, in practice, the regulation of their business conduct and conflicts which gives rise to the burgeoning jurisprudence on international trade law.[4]

Open markets and an increase in foreign trade activities can create more employment and investment opportunities, and thereby contribute to a country's better living standards and overall development.[5] More particularly, WTO dispute settlement experience can enhance the Member States' understanding and expertise in international trade law, which the governments can utilise in identifying WTO-incompatible foreign trade practices and invoking WTO DSU provisions. With the experience, expertise and confidence to 'play with [WTO] rules'[6], the governments can develop bargaining strategies which they can employ to amicably resolve (and

[3] There is only one exception to the fact that non-State entities have no direct rights and remedies under WTO agreement, i.e., the Agreement on Pre-shipment Inspection (PSI) as it has a unique provision (Article 2.21) that confers a direct right to an individual to petition the WTO's Independent Entity if its rights guaranteed under the said Agreement are violated by an importing country. For further information, see
Agreement on Preshipment Inspection (15/04/1994) LT/UR/A-1A/6 arts 2-4.

[4] 'Although private business operators do not have access to the DSS of the WTO, they are the ones who are most likely to be affected by the inefficiencies of the system.' [Edwini Kessie, 'Enhancing Security and Predictability for private Business Operators under the Dispute Settlement System of the WTO' (2000) 34(6) Journal of World Trade 1, 17. Presently derived from Alberto Alemanno, 'Private parties and WTO Dispute Settlement System' (2004) Cornell Law School Inter-University Graduate Student Conference Papers, Paper 1, at 4 <http://scholarship.law.cornell.edu/lps_clacp/1> accessed 2 October 2012.]. Steve Charnovitz, 'The WTO and the Rights of the Individual' (March/April 2001) Inter-economics 14-17.

[5] Thomas W Hertel and Alan Winters (eds.), *Poverty and the WTO: Impacts of the Doha Development Agenda* (co-publication of the World Bank and Palgrave Macmillan UK, 2006) 3, 4, 427; World Trade Organization, 'The WTO and the Millennium Development Goals' (MDG 8: A Global Partnership for Development) 3-4 <https://www.wto.org/english/thewto_e/coher_e/mdg_e/mdg_e.htm> accessed 7 June 2015. This argument has been a subject of academic debate, and some authors have vehemently argued that free trade may not have a positive impact on living standard, economic growth and poverty reduction in a country. See for example, Sarah Joseph, 'The WTO, Poverty, and Development', in Sarah Joseph, *Blame it on the WTO: A Human Rights Critique* (Oxford Scholarship Online, September 2011).

[6] Gregory C Shaffer, 'How to Make the WTO Dispute Settlement System Work for Developing Countries: Some Proactive Developing Country Strategies' (March 2003) ICTSD Resource Paper No 5 <http://ictsd.org/downloads/2008/06/dsu_2003.pdf> accessed 18 July 2012.

diffuse) trade conflicts and thereby protect their industries' trade interests in the 'shadow of a potential WTO litigation'[7].

With better bargaining and litigation strategies, and with the consequentially enhanced capacity to raise credible litigation threats, Member States can improve their 'terms-of-trade', which can further generate wide economic, social and environmental benefits for its economic sectors and society at large.[8] The overarching ambit of WTO dispute settlement now encompasses areas other than business, as Panels and Appellate Body have interpreted and clarified issues that go well beyond law and economics, such as those relating to strategic raw material[9], green technology[10], consumer welfare[11], public health[12] and purely social concerns[13]. Hence, one can understand how, against a limited legal representation by Member States, WTO DSM can

[7] Gallanter has called this process 'litigotiation'. He describes it in the following words: '[T]he career of most cases does not lead to full-blown trial and adjudication but consists of negotiation and manoeuvre in the strategic pursuit of settlement through mobilization of the court process.' [M Galanter, 'Contract in court; or almost everything you may or may not want to know about contract litigation' (2001) 3 Wisconsin Law Review 577, 579]. Marc Busch & Eric Reinhardt, 'With a Little Help from Our Friends? Developing Country Complaints and Third-Party Participation', in Chantal Thomas and Joel P Trachtman (eds.), *Developing Countries In the WTO Legal System* (Oxford University Press 2009) 247, 248; Shaffer, 'Developing Country Use of the WTO Dispute Settlement System' (n 2) 173.

[8] Shaffer, 'How to Make the WTO Dispute Settlement System Work for Developing Countries' (n 6) 10-11.

[9] For example, see *China - Raw Material* [Panel Reports, *China – Measures Related to the Exportation of Various Raw Materials*, WT/DS394/R, Add.1 and Corr.1 / WT/DS395/R, Add.1 and Corr.1 / WT/DS398/R, Add.1 and Corr.1, adopted 22 February 2012, as modified by Appellate Body Reports WT/DS394/AB/R / WT/DS395/AB/R / WT/DS398/AB/R, DSR 2012:VII, p. 3501].

[10] *Canada – Renewable Energy/ Canada - Feed-in Tariff* case [Panel Reports, *Canada – Certain Measures Affecting the Renewable Energy Generation Sector / Canada – Measures Relating to the Feed-in Tariff Program*, WT/DS412/R and Add.1 / WT/DS426/R and Add.1, adopted 24 May 2013, as modified by Appellate Body Reports WT/DS412/AB/R / WT/DS426/AB/R].

[11] See, for example, *US-Tuna* [Appellate Body Report, *United States – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products*, WT/DS381/AB/R, adopted 13 June 2012, DSR 2012:IV, 1837]

[12] For example, see *European Union and a Member State – Seizure of Generic Drugs in Transit* cases [*European Union and a Member State – Seizure of Generic Drugs in Transit*, WT/DS409, in consultations on 12 May 2010; *European Union and a Member State – Seizure of Generic Drugs in Transit*, WT/DS408, in consultations on 11 May 2010].

[13] See, for example, the cases of *US – Gambling* [Panel Report, *United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, WT/DS285/R, adopted 20 April 2005, as modified by Appellate Body Report WT/DS285/AB/R, DSR 2005:XII, p. 5797; Panel Report, *United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services – Recourse to Article 21.5 of the DSU by Antigua and Barbuda*, WT/DS285/RW, adopted 22 May 2007, DSR 2007:VIII, p. 3105].

generate far-reaching economic and non-economic benefits for governments and business entities. However, these benefits differ from country-to-country and case-to-case.

The nature of a dispute, chances of winning and implementation, and a country's negotiating clout and retaliation capacity can impact its ability to realise the full benefits from WTO DSU participation. For instance, a Member State with a poor retaliation capacity and bargaining power may prefer not to invoke WTO DSU provisions even if a WTO-inconsistent measure injures its trade interests. This is especially so in cases where the challenged measure is maintained by an important trade partner or a country with a relatively stronger bargaining, litigation and retaliation capacity.[14] Moreover, a country may decide against launching a formal action after unsuccessful rounds of bilateral negotiations with an offending Member State if the anticipated cost and time involved in dispute settlement procedure exceed the expected benefits from settlement, or if the nature of a dispute makes a formal action socially, diplomatically or politically undesirable due to reasons beyond economics.[15]

Furthermore, a country with small market size and small absolute trading stakes[16] will generally face poor economies of scale and high cost of mobilising resources for WTO DSU

[14] Interview with Toufiq Ali, Chief Executive at Bangladesh International Arbitration Centre, Former Ambassador to WTO Mission of Bangladesh (21 August 2013); M A Taslim, 'How the DSU worked for Bangladesh: the first least developed country to bring a WTO claim', in G. Shaffer and R. Melendez-Ortiz, *Dispute Settlement at the WTO: The Developing Country Experience* (Cambridge University Press 2010) 230.

[15] Specific questions which are under economic, legal and political inquiry during this analysis are: What is the size of the market access that could be regained via removal of the alleged WTO violation? Is there a clear WTO violation case that can be won at the DSU? What is the likelihood of political reform (compliance) by the respondent? [For more details, see Chad P Bown, *Self Enforcing Trade: Developing Countries and WTO Dispute Settlement* (Brookings Institution Press 2009) 118-132. Also see Jan Bohanes & Fernanda Garza, 'Going Beyond Stereotypes: Participation of Developing Countries in WTO Dispute Settlement' (2012) 4 (1) Trade Law and Development 45, 66-67].

[16] Absolute trading stakes are the aggregate of a country's overall exports and imports (including the value, volume and variety of exports and imports).

participation.[17] This is because their low volumes of trade and low profit margins are likely to 'make it difficult to charge mark-ups to cover any non-economic (i.e., litigation) costs associated with maintaining or enforcing market access rights', mainly because the WTO litigation cost is insensitive to the economic stakes involved in a dispute.[18] Hence, a country with small market size and stakes is less likely to participate repeatedly at WTO DSU. Due to this low participation rate, such countries would have a small incentive to enhance their in-house dispute settlement capacity to fully realise the benefits of WTO DSU. Hence, low economies of scale would generally be accompanied by high start-up costs as additional resources may be required for hiring overseas lawyers and economic consultants, or for purchasing information and evidential documents from external agencies in the absence of standing monitoring institutions, information repositories and in-house expertise. As a result, the high cost of WTO litigation can significantly reduce the anticipated economic benefit which a country's economic sector is expecting to make from the removal of a trade barrier. Moreover, low retaliation capacity of a Member State can further dilute the benefits it can attain from litigation.[19]

Horn, Nordström and Mavroidis confirm that the number and kind of WTO disputes litigated and defended by WTO Members are proportionate to their respective volume and nature of foreign

[17] Hunter Notage, 'Developing Countries in the WTO Dispute Settlement System' (January 2009) Global Economic Governance Programme, GEG Working Paper 2009/47, at 5 <www.globaleconomicgovernance.org/sites/geg/files/Nottage_GEG WP> accessed 6 June 2015.

[18] Chad P Bown and Bernard M Hoekman, 'WTO Dispute Settlement and the Missing Developing Country Cases: Engaging the Private Sector' (2005) 8(4) Journal of International Economic Law 861, 863; Gregory C Shaffer, 'The Challenges of WTO Law: Strategies for Developing Country Adaptation' (2006) 5(2) World Trade Review 177, 185 [The author notes that WTO litigation cost is insensitive to the economic stakes involved in a litigation, hence, high litigation cost makes it economically unviable to conduct litigations with small stakes and high opportunity cost.]

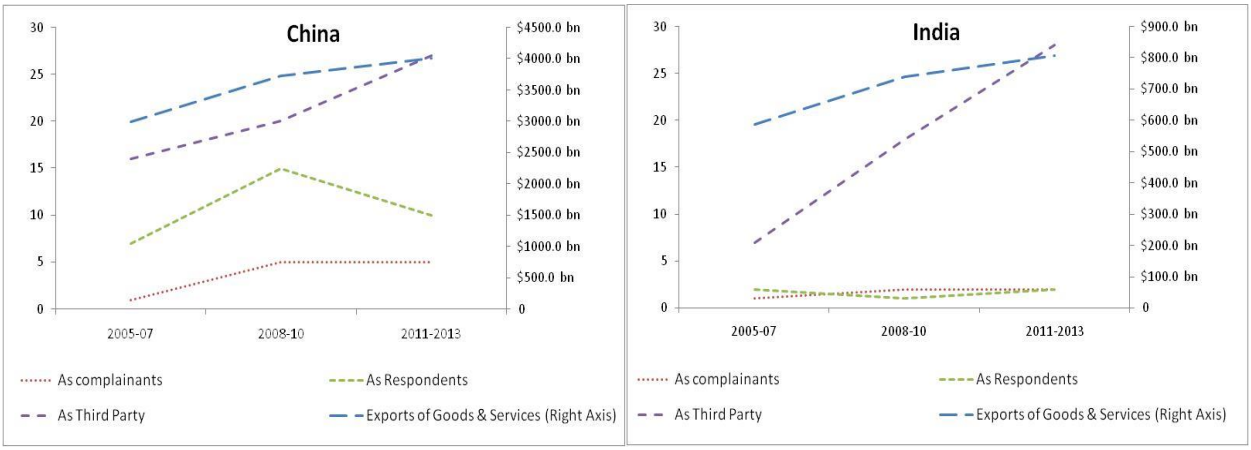
[19] Shaffer, 'How to Make the WTO Dispute Settlement System Work for Developing Countries' (n 6) 15 [The author has explained the correlation between trading stakes, level of economic development, economies of scale, repeat participation and high cost of WTO DSU participation.]; Taslim, 'How the DSU worked for Bangladesh' (n 14) 240.

trade.[20] Bohanes and Garza observe that 'larger WTO members trade greater volumes of more diversified trade to a greater number of trading partners, which in turn leads to a greater number of potential trade frictions and greater propensity to bring disputes'.[21] Bown has also established a positive correlation between the volume of exports and the number of disputes initiated and defended by a particular Member State.[22] Moreover, Shaffer and Sutton have taken a step further as they have linked the size of market with the capacity to participate and power to retaliate or negotiate. They observe that '[power] in the international trading system roughly corresponds to the size of a country's market – measured in terms of the ability of a country to exercise leverage by offering market access, or threatening to withdraw access, for foreign goods and services.'[23]

It is useful to consider the examples of India and China to further illustrate the argument. They are developing country Members of WTO with low per capita income, but they have made an active use of WTO DSU provisions. The figures below are indicative of a somewhat positive and symmetrical correlation between the value of the export of goods and services in China and India and their respective rate of participation at WTO DSU (as complainants, respondents and third party).[24]

[20] Henrik Horn, Petros C Mavroidis & Hakan Nordström, 'Is the use of the WTO dispute settlement system biased?' (29 November 1999) Centre for Economic Policy Research Paper 2009, 5 <http://www.econ-law.se/Papers/Disputes000117.PDF> accessed 3 June 2015.
[21] Bohanes and Garza (n 15) 57.
[22] Chad P Bown, 'Participation in WTO dispute settlement: complainants, interested parties and free riders' (2005) 19 (2) World Bank Economic Review 287, 310.
[23] Gregory Shaffer and Charles Sutton, 'The Rise of Middle-Income Countries in the International Trading System', in Randall Peerenboom, Tom Ginsburg (eds.), *Law and Development of Middle-Income Countries: Avoiding the Middle-Income Trap* (Cambridge University Press 2014) 59, 64.
[24] The overall period covered in the figures is 2005-2013, and the figures reflect a cumulative sum of data from 2013-2011, 2010-2008 and 2007-2005. Exports of goods and services (BOP, US Dollars) 'comprise all transactions between residents of a country and the rest of the world involving a change of ownership from residents to nonresidents of general merchandise, net exports of goods under merchanting, nonmonetary gold, and services'. This data is shown on right axis. Data compiled from The World Bank, Database <www.database.workbank.com> accessed 8 June 2015. Data on WTO Disputes is compiled from World Trade Organization, Database <www.database.wto.org> accessed 9 June 2015. The year of dispute indicates the year in which consultations where requested by the complainant(s). This data is shown on left axis.

Figure 1: WTO DSU Participation *versus* Exports of Goods & Services



The figures above illustrate that China had minimal litigation experience (other than third party participation) until the year 2005. However, by the year 2010 and 2013, the increasing value of exports in China was accompanied by its higher relative participation as a complainant and respondent at WTO DSU. A positive correlation between the increased value of exports and number of WTO complaints filed by the government can also be observed in India, although it is not as strong as in the case of China. Moreover, with increase in exports, China's and India's growing willingness to further develop in-house expertise in WTO law can also be evidenced from the striking increase in their participation as third parties. High aggregate trading stakes, an export-oriented economy and a wealth of DSU experience, which have further resulted in high economies of scale and low start-up costs in building in-house dispute settlement capacity, have better enabled these countries to self-enforce their WTO rights. Moreover, it may be fair to argue that their rapidly growing market size and position in the global economy has strengthened their capacity for negotiating a settlement or threatening or facing a retaliation threat, although it is very difficult (and beyond the scope of this thesis) to assess or measure the same. As a result, it can be argued that these countries can generally benefit more from a successful WTO litigation because their in-house capacity will enable their governments to litigate and defend the market

access interest of their industries in a cost-effective manner. Hence, high trading stakes and market size have, to some extent, contributed in making these countries less susceptible to high participation costs at WTO DSU.[25]

The above observations lead to a conclusion that the DSU participation benefits come at a cost and these costs may not be equally affordable by all WTO Members.[26] Busch and Reinhardt explain the problem of increased cost and the complexity of WTO DSM in the following words:

> By adding 26,000 pages of new treaty text, not to mention a rapidly burgeoning case law; by imposing several new stages of legal activity per dispute, such as appeals, compliance reviews, and compensation arbitration; by judicializing proceedings and thus putting a premium on sophisticated legal argumentation as opposed to informal negotiation; and by adding a potential two years or more to defendants' legally permissible delays in complying with adverse rulings, the WTO reforms have raised the hurdles facing [developing countries] contemplating litigation.[27]

In other words, with the more complex and rule-oriented system of WTO DSU, the Member States require higher relative capacity to use the adjudicatory mechanism than they required under the previous trading regime, i.e., they require more resources to monitor and enforce their international trade rights. Busch and Reinhardt further observe that WTO Member States, in order to participate effectively at WTO DSU, require 'experienced trade lawyers to litigate a case', 'seasoned politicians and bureaucrats to decide whether it is worth litigating a case', 'staff to monitor trade practices abroad', 'domestic institutions necessary to participate in international negotiations', and sufficient market power to ensure compliance and threaten retaliation in cases

[25] Gregory C Shaffer, Marc Busch & Eric Reinhardt, 'Does Legal Capacity Matter? A Survey of WTO Members' (2009) 8 World Trade Review 559, 561.
[26] Constantine Michalopoulos, *Developing Countries in the WTO* (Palgrave 2001) 3.
[27] Marc Busch & Eric Reinhardt, 'Testing International Trade Law: Empirical Studies of GATT/WTO Dispute Settlement', in Daniel L M Kennedy and James D Southwick, *The Political Economy of International Trade Law: Essays in Honor of Robert E. Hudec* (Cambridge University Press 2002) 457, 467.

of non-compliance.[28] This demand for greater resources has impeded developing countries' access to WTO DSM.

The term "developing countries" is commonly used in a very broad and ambiguous manner as it groups high income, middle income and low income countries under the same category. Moreover, it lacks a universally accepted definition. The use of 'purely' economic indicators by the World Bank and IMF, social and economic indicators by UN, and self-identification process employed by WTO to categorise countries and define development has, to some extent, diluted the meaningfulness of this term.[29] Hence, before discussing the participation challenges, it is important to define and categorise "developing countries" and identify the group of countries which are at the focus of this research.

2.2 Developing Countries: Meaning and Classification

Under GATT 1947, the term 'developing' was used for those countries where the economies '….can only support low standards of living and are in the early stage of development'.[30] The WTO agreements have not provided any definition or classification of the term, as they have incorporated a classification system of self-identification. The WTO agreements allow Member-States to self-designate themselves as developed or developing countries, and it adheres to the

[28] Marc Busch and Eric Reinhardt, 'The WTO Dispute Settlement Mechanism and Developing Countries' (April 2004) Trade Brief, Swedish International Development and Cooperation Agency, 3-4 <http://www9.georgetown.edu/faculty/mlb66/SIDA.pdf> accessed 15 November 2014.

[29] For more information, see Jonas Kasteng, Arne Karlsson, Carina Lindberg, 'Differentiation between Developing Countries in the WTO' (June 2004) Report 2004: 14 E, Swedish Board of Agriculture, International Affairs Division, 15 <http://www2.jordbruksverket.se/webdav/files/SJV/trycksaker/Pdf_rapporter/ra04_14E.pdf> accessed 3 August 2012.

[30] General Agreement on Tariffs and Trade 1947 (55 UNTS 194) 61 STAT pt 5; TIAS 1700, art XVIII: 1.

UN's definition and classification of least developed countries (LDCs) which is based on GNP per capita, human assets and economic vulnerability indicators.[31]

The WTO's self-classification system has produced a broad and heterogeneous group of "developing countries", as it ranges from small economies which are predominantly based on subsistence agriculture, to large and emerging economies like China, Brazil, Mexico and India.[32] At one end, the group of developing Member States comprises high income countries such as Argentina and Korea. At the other end, the same group comprises least developed countries with very low per capita income and GDP.[33] These diversely developed countries have very different levels of development, market size, and foreign trade interests. They have hugely diverse experience of participation at WTO DSU as some of them have participated actively, while others have had a minimal or no DSU participation experience.[34]

To delimit the scope of this study, and to meaningfully answer the research question, this thesis will focus on the experience and interests of those developing country Members of WTO that are classified as middle income countries (MICs) (including upper middle, middle and lower middle income countries as on 31 July 2015) by the World Bank. The economies and markets of MICs have risen faster than rest of the world, and they have shown an increasing enthusiasm to create

[31] UNCTAD website: United Nations Recognition of the Least Developed Countries <http://archive.unctad.org/Templates/Page.asp?intItemID=3618&lang=1> accessed 2 May 2012; UN Economic and Social Council, 'Committee for Development Policy: Report on the sixth session' E/2004/33 (29 March 29 – 2 April 2004) <http://www.un.org/en/development/ desa/policy/cdp/cdp_ecosoc/e_2004_33_en.pdf> accessed 15 June 2015.

[32] Out of the 161 WTO Members (as on 26 April 2015), only 37 members are developed countries. More than 80 percent of WTO Members have self-designated themselves under the wide category of 'developing countries'. The World Trade Organization, Member and Observers <https://www.wto.org/english/thewto_e/whatis_e/tif_e/org6_e.htm> accessed 16 May 2015.

[33] For the list of LDCs, see n 31.

[34] For instance, from the years 1995 to 2015, Brazil has filed 27 complaints and responded to 15 complaints, while Cuba has filed a single compliant and responded to none at WTO DSU.

new market opportunities and defend domestic policies through the use of WTO DSU.[35] More particularly, large MICs such as Brazil, China, India, Mexico and Thailand, have become more advanced in using WTO DSU to restore and protect their foreign market access. This can be seen in the table below, as it illustrates the total number of times some of the most active DSU users among MICs have participated as complainant, respondent and third party.[36]

Table 1: Participation of Middle Income Countries at WTO DSU (1995-2015)

Country	Complainants	Respondents	Third Party	Total Participation
China	13	33	121	**167**
India	21	22	108	**151**
Brazil	27	15	95	**137**
Mexico	23	14	75	**112**
Thailand	13	3	71	**87**
Turkey	2	9	67	**78**
Guatemala	9	2	34	**45**
Ecuador	3	3	31	**37**
Indonesia	10	13	13	**36**
Honduras	8	0	26	**34**
Peru	3	5	19	**27**
Philippines	5	6	14	**25**
Vietnam	3	0	19	**22**

The table above clearly ranks the leading developing countries, Brazil, India and China (BIC), as the top three users of DSU among MIC countries, with Mexico and Thailand following the trail of participation. It also indicates that MICs, including the larger ones, have been relatively more comfortable in joining the disputes as third parties, as compared to participating as complainants or respondents. This reflects, to some extent, that the top three users of DSU (BIC) too have their

[35] In the last two decades, the contribution of foreign trade to GDPs in middle income countries has increased substantially. From 20 percent of GDP in 1970, it has grown to an astonishing fifty six percent in 2011. [The World Bank Database].

[36] The data is compiled from World Bank Database and WTO website. It includes the number of times these middle-income countries have acted as complaint, respondent and third party at WTO DSU from January 1995 to June 2015.

reasons and constraints for avoiding the costly system of litigation; however, their continuing interest in the DSM is evident from their striking rate of participation as third parties. They, much like other members of MIC group and perhaps many low income countries, have preferred to improve their understanding of the system by learning through observation. Given this enthusiasm, it is an opportune time to assess and evaluate the strategies MICs, particularly large MICs, have employed to develop in a cost effective way their dispute settlement capacity.

There are great variations in the World Bank's category of 'middle income countries', as the group comprises of countries which have per capita gross national income from US $1,006 to US $12,275.[37] The countries included in this category differ in terms of their economic size, market interests, DSU participation experience, and nature of political economy. Hence, one may question the usefulness of focussing on this category as against the standard use of the word "developing countries" (which generally refers to all WTO Members which have self-designated themselves as developing countries). The research acknowledges that there are variations in this category, but there are two advantages of focussing on the group of middle income countries that are classified as developing WTO Members. *First*, the variations in this group are significant, but they are less radical than the variations found in the widely construed category of "developing countries". *Second*, by providing a narrower meaning to the term "developing countries", the research intends to clarify the scope of this thesis by specifically excluding the group of countries that do not form the subject of present investigation.

Countries classified under the World Bank's list of "low income countries" and "heavily indebted poor countries", along with the ones listed as "least developed countries" by UN, are

[37] World Bank Database (2014).

excluded from this research due to their almost non-existent DSU participation experience.[38] With a low level of development, small market size, low aggregate trading stakes and poor institutional capacity to litigate and defend trade interests at WTO, countries classified under these groups are less likely to file complaints against trade infringements. Due to a low DSU participation rate and high cost of DSU participation (which may be even higher for such countries due to poor economies of scale), these countries would generally have little future incentive to participate at WTO DSU. This is because, as discussed in the section above, their low volumes of trade and low profit margins, coupled with high cost of litigation, will substantially reduce the benefits from participation.

For these reasons, low income and least developed countries do not fit within the parameters of the discussion that is at the heart of this thesis, and hence, the focus of this thesis will be limited to upper middle, middle and lower middle income country Members of WTO. Accordingly, as a general rule, the term "developing countries", whenever used in this thesis, will mainly refer to the World Bank classified upper middle, middle and lower middle income countries that have self-designated themselves as developing Member States of WTO. The term, hereinafter, excludes those countries that are classified as least developed counties by the UN and low income countries and heavily indebted poor countries by the World Bank.[39] However, it is important to note that most of the academic works cited in this thesis have used the term "developing countries" to refer to all WTO Members that have self-classified themselves as

[38] Almost all countries classified under these lists have only participated as a third party in a handful of disputes or have not participated at all. However, there are few exceptions to this. Honduras is classified as heavily indebted poor country (HIPC) but it has filed eight complaints and joined twenty six cases as third party. Nicaragua is also classified as HIPC, and it has filed one complaint, responded to two, and joined seventeen disputes as a third party. Bangladesh is classified as LDC by the UN, and it has filed one complaint and joined one case as a third party.

[39] For country classification of the World Bank, see the list of country classification at World Bank Data: Countries and Economies <http://data.worldbank.org/country> accessed 5 June 2015. For list of least developed countries prepared by the UN, see n 31.

"developing". Hence, wherever the term is used in reference to a particular academic work or while citing an academic work, it would generally refer to all developing country Members of WTO unless it has been stated otherwise.

2.3 Participation Challenges at WTO DSU: Developing Countries

Academics, lawyers, economists and political scientists have written extensively about the participation challenges faced by various developing countries at WTO DSM.[40] The developing countries have faced problems in monitoring foreign trade practices and identifying or investigating foreign trade barriers. They have struggled in negotiating a settlement or conducting successful bilateral or multilateral consultations. They have also faced obstacles in litigating trade barriers at WTO DSU. Moreover, on several noted occasions, developing countries have found it difficult to ensure compliance even after a favourable ruling has been given by the Panel or Appellate Body (AB).[41] The key reasons behind these challenges which have impeded developing countries' access to WTO DSU are as follows:

i. First and foremost, developing countries lack the monitoring capacity that is required to monitor foreign trade practices, identify trade barriers and ensure compliance by offending Member States.

[40] Some of the key publications are as follows: Busch and Reinhardt, 'The WTO Dispute Settlement Mechanism and Developing Countries' (n 28); Asif H Qureshi, 'Participation of Developing Countries in the WTO Dispute Settlement System' (2003) 47(2) Journal of African Law 174; Bown and Hoekman, 'WTO Dispute Settlement and the Missing Developing Country Cases' (n 18); Bohanes and Garza (n 15); Michael Ewing-Chow, 'Are Asian WTO Members Using the WTO DSU 'Effectively'?' (2013) 16(3) Journal of International Economic Law 669; Joseph Francis, Henrick Horn and Niklas Kaunitz, 'Trading Profiles and Developing Countries Participation in the WTO Dispute Settlement System' (December 2008) ICTSD Issue Paper No 6 <http://www.peacepalacelibrary.nl/ebooks/files/ICTSD_Francois_Trading-Profiles.pdf> accessed 21 September 2014.

[41] Bohanes and Garza (n 15) 48; Busch and Reinhardt, 'With a Little Help from Our Friends?' (n 7); Ewing-Chow, 'Are Asian WTO Members Using the WTO DSU 'Effectively'?' (n 3) 671.

ii. Paucity of in-house legal and economic expertise and experience in WTO Law further impedes their effective access to WTO DSU, as these resources are essential to investigate a trade barrier, conduct consultations and adjudicate a case at WTO Panel.

iii. Insufficient financial resources also constrain their capacity as such resources may be required for the hiring of overseas trade lawyers and economic consultants to assist during consultations, litigation and post-litigation stages (in the absence of domestic expertise and experience).

iv. Another striking constraint is the paucity of political, diplomatic and subject-matter expertise within the government, as that may be required to gather information and coordinate tasks with the affected industry, overseas governments, its WTO Mission and WTO divisions. Political expertise and efficient bureaucracy is also required to make appropriate determinations in respect of bilateral/multilateral actions that are required to be undertaken in cases of infringements.

v. Poor information channels and ineffective governance structures lead to problems in gathering information and evidentiary documents relating to trade barriers, their impact, nature and magnitude of injury and their WTO-inconsistency.

vi. Inadequate powers of retaliation and bargaining lead to difficulties in negotiating or ensuring compliance even after a favourable ruling is adopted by DSB.

vii. Fears of adverse diplomatic and economic retaliation from stronger market powers and powerful trade partners further persuade the governments to stay away from any confrontation in the shape of formal consultation or litigation.

viii. Insufficient knowledge and awareness about the benefits of WTO DSU provisions among government officials and business entities further constrain developing

countries' ability to manoeuvre and utilise the DSU provisions for their legitimate trade interests.

Bohanes and Garza confirm that the main challenges which various developing countries have faced in the path of enforcing international trade rights are the lack of legal capacity, weak domestic governance, insufficient retaliatory powers and fears of political consequences and pressures.[42] Shaffer succinctly describes these challenges as '…constraints of legal knowledge, financial endowment, and political power, or, more simply, of law, money, and politics.'[43]

Multiple participation challenges, as listed above, are central to one common-most problem which most developing countries have faced: the problem of capacity-constraint. The term "capacity" in the thesis has a broad meaning as it includes a country's political, legal and financial power, and it generally refers to a country's overall ability to utilise the WTO dispute settlement provisions.[44] Capacity, in the context of WTO DSU, should not be measured on purely economic indicators (such as a country's per capita income) as a country can have low per capita income but large export markets and, therefore, advanced expertise and experience of participation at WTO DSU.[45] Dispute settlement capacity should be measured by taking systemic account of a country's ability to mobilise resources, as and when required, for monitoring and enforcing its WTO rights.[46] The problem of "capacity-constraint" refers to a situation where a country is unable to effectively and fully utilise the WTO DSU provisions due to lack of required

[42] Bohanes and Garza (n 15) 69.
[43] Shaffer et al (n 25) 572.
[44] Niall Meagher, 'Representing Developing Countries before the WTO: The Role of the Advisory Centre on WTO Law (ACWL)', European University Institute, RSCAS Policy Paper 2015/02, 2 <http://cadmus.eui.eu/handle/1814/35747> accessed 15 May 2015.
[45] For example, India has low indexed per capita income, but it is a major emerging economy which has participated actively at WTO DSU and has demonstrated the capacity to mobilise required resources and expertise to monitor and enforce its WTO rights. Shaffer et al, 'Does Legal Capacity Matter?' (n 25) 561; Shaffer and Sutton, 'The Rise of Middle-Income Countries in the International Trading System' (n 23).
[46] Shaffer et al, 'Does Legal Capacity Matter?' (n 25) 561.

resources and expertise.[47] Insufficient capacity therefore impedes a country's ability to utilise the remedies available under WTO DSM, be it in litigating or defending a dispute, conducting formal or bilateral consultations with foreign governments, or ensuring proper implementation and compliance.[48]

The problem of insufficient capacity becomes even more severe if a developing country (and specially a low income country) challenges a measure or if its measure is challenged by a developed country.[49] Busch and Reinhardt observe that 'the WTO has exaggerated the gap between developed and developing complainants with respect to their ability to get defendants to liberalize disputed policies. In short, wealthy complainants have become significantly more likely to secure their desired outcomes under the WTO, but poorer complainants have not.'[50] This situation can be more appropriately described as the problem of "capacity-gap" between the developing and the developed world.

"Capacity-gap" here refers to a situation where developing countries lack the capacity to identify a potential trade barrier, arrive at a bargained settlement, conduct WTO litigation, defend their practices or ensure compliance due to paucity of resources required for each task, as against a sufficiently resourced and developed country in opposition. 'Equal access to justice is a measure of the legitimacy of any legal order' and the WTO's international adjudicatory mechanism therefore 'must ensure that inequalities between its members do not grow too large'.[51] An

[47] Henrick Horn, Louise Johanneson and Petros C Mavroidis, 'The WTO Dispute Settlement System 1995-2010: Some Descriptive Statistics' (2011) 45(6) Journal of World Trade 1107, 1114. [It notes that WTO DSU participation is directly related to legal, informational and procedural capacity of developing countries.]
[48] Shaffer et al, 'Does Legal Capacity Matter?' (n 25) 576; Marc Busch and Eric Reinhardt, 'Developing Countries and GATT/WTO Dispute Settlement', (2003) 37(4) Journal of World Trade 719, 735; A T Guzman and B A Simmons, 'Power Plays and Capacity Constraints: The Selection of Defendants in WTO Disputes' (2005) 34(557) Journal of Legal Studies 557, 561.
[49] Meagher, 'Representing Developing Countries before the WTO' (n 44) 2.
[50] Busch and Reinhardt, 'Developing Countries and General Agreement on Tariffs' (n 50) 729.
[51] Bohanes and Garza (n 16) 48.

obvious reaction to this situation would be to raise the following questions: Can this resource gap between developed and developing country Members be bridged? How can developing countries enhance their capacity to resolve trade disputes through WTO DSM? Are there any developing countries that have participated frequently at WTO DSU, and can anything be learnt from their dispute settlement experience? These issues are addressed in the following section.

2.4 Overcoming the Participation Challenges

Broadly, there are two options that can be explored for addressing the capacity-related challenges. The *first* option is to introduce changes at the international level (which can include changing WTO rules), and the *second* option is to find solutions at the domestic level. The first option can be explored through proposals presented by developing countries and the academic community. The second option can be explored with the help of first-hand experiences of certain upper middle, middle and lower middle income countries that have employed varied strategies to mobilise resources for the utilisation of DSU provisions.

2.4.1 First Option: What *can* be done at international level?

WTO has introduced certain favourable provisions for enabling its developing country Members to participate effectively at WTO DSU. These provisions mainly include relief on reciprocity and time requirements[52], legal assistance extended by the Secretariat and ACWL[53], improved market access[54] and additional technical assistance[55]. However, in practice, they are far too limited and

[52] Understanding on Rules and Procedures Governing the Settlement of Disputes ('Dispute Settlement Understanding') (15 April 1995) LT/UR/A-2/DS/U/1, arts 12.10, 24.1 [Hereinafter referred to as DSU].

[53] Legal assistance provision by Secretariat is provided in DSU, art 27.2. Provision for additional legal assistance for developing countries by ACWL is provided in the Agreement Establishing the Advisory Centre on WTO Law (1 December 1999), art 2. The Agreement entered into force on 15 July 2001 and the ACWL became operational on 17 July 2001.

[54] It is provided in the Enabling Clause. The 'Enabling Clause' is officially known as the 'Differential and more favourable treatment reciprocity and fuller participation of developing countries'. It permits developed countries to make preferential arrangements with developing countries in goods trade. It is the WTO legal basis for the

inadequate to provide developing countries with an effective DSU access.[56] Hence, this section outlines those changes that are currently proposed at international level.

The *first* option finds support in many proposals. Developing countries have proposed multiple solutions to prepare a level playing field at WTO DSU. These proposals, amongst others, include introduction of retrospective and mandatory financial compensation in place of suspension of concession[57] and/or collective suspension of concession as powerful remedies for developing countries.[58] Developing Member States have also requested the creation of a fast track and simplified procedure of adjudication for cases with established precedents.[59] Moreover, they have asked for the creation of a WTO Fund which can provide them with financial assistance

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Generalised System of Preferences. [Differential and More Favourable Treatment, Recoprocity and Fuller Participation of Developing Countries (28 November 1979) L/4903, para 2].

[55] DSU, arts 27.2 and 27.3. For a review of Trade-Related Technical Assistance (TRTA) program, see WTO Annual Report on Technical Assistance and Training at World Trade Organization, Trade Topics <http://gtad.wto.org/publish/Annual_report_2013_e.pdf> accessed 10 June 2015.

[56] Bernard M Hoekman and Petros C Mavroidis, 'WTO Dispute Settlement, Transparency and Surveillance' in Bernard Hoekman and Will Martin (eds.) *Developing Countries and the WTO: A Proactive Agenda* (Blackwell Publishing 2001) 139 ['Article 27:2 DSU provides for technical assistance to be given to developing countries by the WTO Secretariat. The WTO's ability to satisfy this mandate is very limited…' Hence a number of other options need to be identified to 'level the playing field'.]. For information on the limitations and weaknesses of special and differential treatment provisions, see Insights from the International Institute for Sustainable Development, 'Special and Differential Treatment' (Spring 2003) IISD Trade and Development Brief <http://www.iisd.org/pdf/2003/investment_sdc_may_2003_2.pdf> accessed 4 June 2015; F Roessler, 'Special and Differential Treatment of Developing countries under the WTO Dispute Settlement System', in F Ortino and E U Petersman (eds.), *The WTO Dispute Settlement System 1995-2003* (Kluwer Law International 2004) 88.

[57] World Trade Organization, Dispute Settlement Body, Special Session, 'Contribution of Ecuador to the Improvement of the Dispute Settlement Understanding of the WTO' submitted by Ecuador [TN/DS/W/9] 8 July 2002.

[58] World Trade Organization, Dispute Settlement Body, Special Session, 'Text for the African Group Proposals on Dispute Settlement Understanding Negotiations' submitted by Kenya in the name of African Group [TN/DS/W/42]. 24 January 2003; World Trade Organization, Dispute Settlement Body, Special Session, 'Text for LDC Proposal on Dispute Settlement Understanding Negotiations' submitted by Haiti in the name of LDC [TN/DS/W/37] 22 January 2003; World Trade Organization, Dispute Settlement Body, Special Session, 'Negotiations on Improvements and Clarifications of the Dispute Settlement Understanding' submitted by Mexico [TN/DS/W/23] 4 November 2002.

[59] World Trade Organization, Dispute Settlement Body, Special Session, 'Responses to Questions on the Specific Input from China' submitted by China [TN/DS/W/57] 19 May 2003; World Trade Organization, Dispute Settlement Body, Special Session, 'Negotiations on the Dispute Settlement Understanding' submitted by Cuba, Honduras, India, Indonesia, Malaysia, Pakistan, Sri Lanka, Tanzania and Zimbabwe [TN/DS/W/19] 9 October 2002. [Both communications have also proposed the following change in DSU rule: 'If a developed-country Member is found to be in violation of its obligations under the WTO covered agreements in a dispute brought by a developing-country Member or if the developed-country Member failed to prove its claims against a developing-country Member in a dispute brought by it, the panel/AB shall determine reasonable amount of the legal costs and other expenses of the developing-country Member, to be borne by the developed-country Member.']

during the conduct of dispute settlement proceedings.[60] Another suggestion which has occupied some prominence in WTO Ministerial Conferences is the strengthening of special and differential treatment provisions in order to make them precise, effective and operational.[61]

Academics have also proposed several changes to WTO DSU rules. These proposals, amongst others, include the appointment of a special WTO prosecutor for developing countries, introduction of an additional provision for technical and administrative assistance[62], and training of adjudicators on special and differential treatment provisions contained in the WTO agreements. Scholars have argued in favor of allowing direct applicability of WTO Law in national courts for enabling developing countries to self-enforce favorable awards.[63] They have also proposed the establishment of additional provisions for differential and more favorable timeframes and evidential requirements during dispute settlement for developing country participants.[64]

Petersmann, with a 'bottom-up' approach towards WTO law, proposes that private parties should be granted direct litigation rights so that 'corporations and other private actors may enforce WTO

[60] World Trade Organization, Dispute Settlement Body, Special Session, 'Text for the African Group Proposals on Dispute Settlement Understanding Negotiations' submitted by Kenya in the name of African Group [TN/DS/W/42] 24 January 2003.
[61] World Trade Organization, General Council, 'Preparation for the Fourth Session of the Ministerial Conference' [WT/GC/W/442] 19 September 2001. For a brief explanation of special and differential treatment provisions, see Michalopoulos (n 26) 35.
[62] The proposal seeks to extend the scope of the present WTO's Trade-Related Technical Assistance (TRTA) and Training programme. For details on the existing provisions of technical assistance, see WTO Annual Report on Technical Assistance and Training at World Trade Organization, Trade Topics <http://gtad.wto.org/publish/Annual_report_2013_e.pdf> accessed 10 June 2015.
[63] Steve Charnovitz, 'Opening the WTO to Nongovernmental Interests' (2000) 24 Fordham International Law Journal 173; Hoekman and Mavroidis, 'WTO Dispute Settlement, Transparency and Surveillance' (n 56) 144; Alberto Alemanno, 'Private parties and WTO Dispute Settlement System' (2004) 1 Cornell Law School Inter-University Graduate Student Conference Papers <http://scholarship.law.cornell.edu/lps_clacp/1> accessed 8 August 2012 [The paper proposes that individuals should be able to protect their economic interests directly through national courts in the offending States].
[64] Ibid.

law through national courts'.[65] Nordstrom and Shaffer, on the other hand, maintain a 'top-down approach' as they put forward a different proposal for granting easier WTO access to private individuals in developing countries. They propose that developing countries with small trading stakes and market size (amidst high litigation cost) can benefit significantly from a small claims procedure established at WTO.[66] They argue that a small claims procedure, which can be made available for a specific monetary value of non-complicated claims (with established precedents) and limited to a well-defined group of developing country governments, can result in prompt and cost-effective settlement of trade disputes.

Numerous critiques of these proposals have been advanced by academics and policy-makers, and these critiques are discussed extensively in the existing literature.[67] One of the most non-contentious critiques comes from the fact that adopting these (and other similar) proposals would require multilateral re-negotiations and complex trade-offs between more than 161 WTO Member States (as on 26 April 2015) which have 'varying interests, values, levels of

[65] Ernst-Ulrich Petersmann, *Constitutional Functions and Constitutional Problems of International Economic Law: International and Domestic Foreign Trade Law and Foreign Trade Policy in the United States, the European Community and Switzerland* (University Press 1991) 243, 463.

[66] Hakan Nordstrom and Gregory Shaffer, 'Access to Justice in the World Trade Organization: The Case for Small Claims Procedure?' (2008) 7(4) World Trade Review 587, 589. Similar reforms proposed by Bernard Hoekman and Petros C Mavroidis in Hoekman and Mavroidis, 'WTO Dispute Settlement, Transparency and Surveillance' (n 56) 140.

[67] One of the criticisms posed by academics is that not all developing country members of WTO require financial or legal aid and all developing members do not have similar financial needs. For instance, the financial needs and conditions of Brazil and China with respect to the utilisation of WTO DSM will be very advanced from that of Bangladesh. Hence, in order to implement proposals which seem to indiscriminately favour all developing country members, the WTO Members would need to better define and categorise the term "developing countries". [Sheila Page and Peter Kleen, 'Special and Differential Treatment of Developing Countries in the World Trade Organization' (2005) Global Development Studies No. 2, 45, 79 <http://www.worldfuturecouncil.org/fileadmin/user_upload/papers/40725_Gl_Dev_Stud_2.pdf> accessed 5 June 2015]. Bohanes and Graza argue that '[f]rom a practical perspective, it seems unlikely in the present political climate that developed countries would agree to the establishment of such an additional cash-based legal aid regime, especially given the favourable track record of the ACWL'. [Bohanes and Garza (n 15) 76-77].

development, and priorities'.[68] The WTO's long-standing ineffectiveness in striking multilateral agreements makes the *first* option less feasible and somewhat unachievable in the present circumstances.[69] Besides that, changing WTO rules to favour developing countries is an option which, throughout the GATT and WTO era, has been resisted and challenged by developed countries.[70] 'Developed countries prefer the *status quo* and will not agree to this reform. Therefore, as interesting as many of these reform proposals are, they remain exclusively academic in the current political climate.'[71] Moreover, a trade policy advisor confirms that any endeavour to achieve a consensus among WTO Members for changing WTO rules would be similar to 'finding a needle in a haystack'.[72] At the best, developing countries can only influence the WTO jurisprudence with active participation in WTO Ministerial Meetings, its Committee System and Dispute Settlement Proceedings.[73] 'The capacity of the developing countries to promote changes to the system of rules governing international trade that will benefit their development depends very much on the effectiveness of their participation in the WTO'.[74] This observation brings the discussion back to its original concern, i.e., the need to explore an attainable solution to help developing countries enhance their WTO dispute settlement capacity.

There are other proposals which may not require changes to WTO rules, but would nevertheless call for actions to be undertaken at international level. For example, Bown has proposed that an

[68] Gregory C Shaffer, *Defending Interests: Public-Private Partnerships in WTO Litigation* (Brookings Institution Press 2003) 156.
[69] The rationale for this argument comes from the fact that, after a long stalemate of Doha Development Round, the first ever multilateral agreement since the establishment of WTO is the 'Trade Facilitation Agreement' which was recently signed in 2014 and is still awaiting ratification by WTO Member States.
[70] Michalopoulos (n 26) 3.
[71] Bohanes and Garza (n 15) 101.
[72] Aurelie Walker, 'The WTO had failed Developing Nations' *The Guardian* (14 November 2011) <http://www.theguardian.com/global-development/poverty-matters/2011/nov/14/wto-fails-developing-countries> accessed 8 June 2015.
[73] Shaffer, *Defending Interests* (n 68) 156 ['Those governments that participate most actively in the dispute settlement system are best positioned to effectively shape the law's interpretation and application over time.']
[74] Michalopoulos (n 26) 152.

international institution should be established to monitor compliance on behalf of developing countries and generate requisite information for the government and private sector.[75] It is also proposed that dispute settlement funds should be created at international level, and developed countries and international financial institutions should contribute to the building up of these funds. The proposed funds could be utilised to strengthen the legal aid mechanism for developing countries. Shaffer suggests that the ambit of the Advisory Centre on WTO Law should be expanded and, in coordination with international NGOs and intergovernmental organizations, it should extend enhanced legal, informational, monitoring and technical support to developing countries.[76]

Some political scientists and socio-legal scholars have extended support to changes proposed at international and multilateral levels with the argument that increased participation of developing countries at WTO will result in the better integration of developing countries into the world trading system, thereby creating new trade opportunities for the entire world.[77] Some have also argued that the institution of WTO can only be more acceptable and credible if all WTO Members participate effectively.[78] On the other hand, these proposals are opposed on multiple grounds by the developed world. Developed countries have argued that it is not fair to extend favourable treatment to all developing Member States without making any distinction on the basis of their level of development and size of economy. It is also argued that implementing these proposals at international level, especially if they also favour emerging market economies

[75] Bown, *Self-Enforcing Trade* (n 15) 208 [Bown suggests that the proposed 'Institute for Assessing WTO Commitments' can improve developing countries' capacity to self-enforce their WTO rights by strengthening their monitoring capacity.]
[76] Shaffer, 'The Challenges of WTO Law' (n 18) 189.
[77] Gregory Shaffer, 'Towards a Development – Supportive Dispute Settlement System in the WTO' (March 2003) ICTSD Sustainable Development and Trade Issues Resource Paper No. 59 <http://ictsd.org/downloads/2008/06/dsu_2003.pdf>; Bohanes and Garza (n 15) 50.
[78] Meagher, 'Representing Developing Countries before the WTO' (n 44) 1; Tuula Honkonen, *The Common But Differentiated Responsibility Principle in Multilateral Environmental Agreements* (Wolters Kluwer 2009) 54.

like China and Brazil, would generate external benefits that would go beyond (and sometime against) the interests of developed countries.[79] These divergent views can cause undue delay in the consideration and implementation of these proposals.[80] Moreover, all proposals discussed under this *first* option have a common limitation, i.e., they require developing countries to seek intervention from external agents that are beyond their control and influence. On the other hand, the *second* option discussed in the following section does not attract such points of criticism.

2.4.2 Second Option: What is *being* done at domestic level?

The *second* option for developing countries is to explore possible ways to build their in-house WTO participation capacity by introducing changes at the domestic level.[81] The present study is based on this approach because most of the capacity-related challenges faced by developing countries are deeply rooted in the domestic context of these countries and therefore solutions can best be found at the domestic level.[82] For example, paucity of lawyers and government officials trained and experienced in WTO law can, to some extent, be blamed for high litigation costs as

[79] Page and Kleen (n 67) 45, 79.

[80] Barry Wilson, 'Rift between developing and developed countries seen as root of WTO stalemate' *The Western Producer* (12 July 2012) <http://www.producer.com/2012/07/rift-between-developing-and-developed-countries-seen-as-root-of-wto-stalemate/> accessed 4 June 2015.

[81] There are many advocates of this approach. Some prominent scholars have proposed the following strategies: 1. Establishment of domestic monitoring centers, think tanks, research centers and domestic political groups [Mesut Aydin, 'WTO Dispute Settlement Mechanism and Developing Countries: Lessons for Turkey' (June 2007) Fletcher School of Law and Diplomacy <www.ekonomi.gov.tr/upload/BF09AE98-D8D3-8566.../Mesut_Aydin.pdf> accessed 30 July 2010]; 2. Creation of legal service centres, law schools, *pro bono* work by law firms, consumer organizations and development organizations [Bown and Hoekman, 'WTO Dispute Settlement and the Missing Developing Country Cases' (n 18)]; 3. Engagement of private sector for identifying and challenging trade barriers, increased third party participation at WTO DSU, creation of information-sharing channels between government departments and between government and industry, organized private sector community, reorganization of governmental structures and creation of coordination procedures [Bohanes and Garza (n 15) 79-88]; 4. Creation of domestic procedures and institutions for the management of WTO disputes [Ewing-Chow (n 40) 679]; 5. Establishment of inter-ministerial framework of governance and dedicated WTO dispute settlement unit within the appropriate government department [in Gregory C Shaffer and Ricardo Melendez-Ortiz (eds), *Dispute Settlement at the WTO: The Developing Countries Experience* (Cambridge University Press 2010) 345].

[82] Bohanes argues that 'vast majority of existing constraints today is situated at the domestic level and thus requires, first and foremost, action by the governments themselves' [Bohanes and Garza (n 15) 50].

the lack of domestic legal expertise necessitates hiring expensive overseas lawyers.[83] Paucity of information and evidential documents with a complaining or responding government is mainly due to lack of inter-ministerial coordination and disengaged private stakeholders, and it sometimes results in increasing the litigation cost as data is purchased from overseas agencies.[84] As Michalopoulos puts it, 'there is no point to trying to strengthen the representation of a country's interests in Geneva without improving its institutional capacity at home'.[85] On this basis, the present research argues that these constraints should directly be dealt with at the domestic level, and therefore it is essential for developing countries to develop and maintain ongoing procedures for information-gathering, monitoring, consultation, litigation and enforcement of awards.

This option can be explored practically with the help of first-hand dispute settlement experience of certain developing Member States. Certain MICs have made significant progress in overcoming the participation challenges, as they have learnt to utilise WTO DSM more effectively than other WTO Members from the developing world. Most notably, Brazil, China and India, all emerging yet developing economies, have rigorously explored the *second option* as they have employed different domestic strategies for overcoming the challenges they have faced during identification of barriers, settlement of disputes and enforcement of awards. A review and

[83] Interview with Moushami Joshi, Luthra and Luthra (Delhi, India, 21 June 2013). [Interviewee observes the following: 'With more number of cases being litigated by and against India mainly from the year 2001, the government has decided to expand its legal expertise. It is not feasible and economically viable to hire expensive Geneva based lawyers, especially in the cases where India is challenged. The government therefore has started to rely more on domestic expertise for cutting down the high litigation cost.']

[84] In *EC – Export Subsidies on Sugar (Thailand)*, the sugar industries in Brazil, Australia and Thailand jointly purchased the evidential data from LMC International for substantiating and updating their litigation briefs and responses. [Panel Report, *European Communities – Export Subsidies on Sugar, Complaint by Thailand*, WT/DS283/R, adopted 19 May 2005, as modified by Appellate Body Report WT/DS265/AB/R, WT/DS266/AB/R, WT/DS283/AB/R, DSR 2005:XIV, 7071]. ACWL, 'The ACWL at Ten: Looking Back, Looking Forward' (WTO Conference, Geneva, Switzerland, 4 October 2011) 25. <http://www.acwl.ch/e/documents/reports/ACWL%20AT%20TEN.pdf> accessed 20 September 2013.

[85] Michalopoulos (n 26) 172.

analysis of strategies they have employed are indispensible for answering the research question as these Member States are the top three MIC users of WTO DSU, and hence, their experience of managing trade disputes can motivate and guide other MICs to meaningfully consider the in-house remedies.

Brazil is the fourth most active complainant at WTO DSU, and its successful performance at WTO DSU, especially in strategically important cases won against the EU and the US (such as *Sugar*[86] and *Upland Cotton*[87]), is recognised nationally and internationally.[88] China, the world's fastest emerging economy, after acceding to WTO in December 2001, has promptly established itself as a prominent WTO DSU user by successfully litigating and defending cases against powerful countries such as the US and the EU.[89] India, again an ambitiously emerging economy, has joined the club of active and successful DSU users by presenting a strong litigation and defence in significant WTO cases against developed and developing Member States.[90] The nature and extent of their participation exhibits their continuing commitment towards expanding their in-house ability to further utilise DSU provisions.

At the same time, it is important to note that these ambitious economies too have faced various capacity-related problems in accessing WTO DSM. For example, *Canada – Aircraft*[91] and *Brazil*

[86] Panel Report, *European Communities – Export Subsidies on Sugar*, Complaint by Brazil, WT/DS266/R, adopted 19 May 2005, as modified by Appellate Body Report WT/DS265/AB/R, WT/DS266/AB/R, WT/DS283/AB/R, DSR 2005:XIV, 6793

[87] Panel Report, *United States – Subsidies on Upland Cotton*, WT/DS267/R, Corr.1, AND Add.1 to Add.3, adopted 21 March 2005, as modified by Appellate Body Report WT/DS267/AB/R, DSR 2005:II, 299.

[88] World Trade Organization, 'Disputes by Country' <https://www.wto.org/english/tratop_e/dispu_e/dispu_by_country_e.htm> accessed 4 June 2015.

[89] Shaffer and Sutton, 'The Rise of Middle-Income Countries in the International Trading System' (n 23) 4, 5, 14.

[90] Ibid, 15.

[91] Panel Report, *Canada – Measures Affecting the Export of Civilian Aircraft*, WT/DS70/R, adopted 20 August 1999, upheld by Appellate Body Report WT/DS70/AB/R, DSR 1999:IV, 1443.

- *Aircraft*[92] cases exhibited the emergent need to expand the dispute settlement capacity in Brazil. During these disputes, the government realised that an institutional reorganisation, additional financial and information resources and legal expertise were required for successful litigation and compliance proceedings.[93] Similarly, China, during the initial litigations, faced high litigation cost due to insufficient domestic trade law expertise and lack of litigation experience.[94] India has also faced multiple difficulties in identifying trade barriers, locating in-house expertise, gathering information and ensuring compliance.[95] However, Brazil, China and India have learnt from their past dispute settlement experience and, to some extent, from the enormous experience of the US and the EU (the two most active DSU users), and as will be seen in the following chapters, they have evolved distinct capacity-building strategies at the domestic level.

Broadly, Brazil, China and India have strengthened their DSU participation with the help of multiple strategies, including third party participation, enhancement of domestic legal expertise in WTO law, creation of dedicated laws, institutions and procedures to manage WTO disputes, creation of in-house monitoring capacity with the help of voluntary sector and local law firms, and government-industry coordination during the management of disputes.[96] The present study focuses particularly on the last mentioned strategy, i.e., government-industry coordination.

[92] Panel Report, *Brazil – Export Financing Programme for Aircraft*, WT/DS46/R, adopted 20 August 1999, as modified by Appellate Body Report WT/DS46/AB/R, DSR 1999:III, 1221.
[93] Interview with Celso de Tarso Pereira, Permanent Mission of Brazil to the WTO (Geneva, Switzerland, 16 September 2013).
[94] Henry Gao, 'Taking Justice into Your Own Hand: The TBI Mechanism in China' (2010) 44 Journal of World Trade 633; Henry Gao, 'China's Participation in the WTO: A Lawyer's Perspective' (2007) 11 Singapore Year Book of International Law 72; Pasha L Hsieh, 'China's Development of International Economic Law and WTO Legal Capacity Building' (2010) 13(4*)* Journal of International Economic Law 997; Interview with Professor Henry Gao, Singapore Management University (24 June 2013).
[95] Interview with an official, Permanent Mission of India, WTO (Geneva, Switzerland) [Name and details withheld]; Interview with an official representative, Centre for WTO Studies, Indian Institute of Foreign Trade, New Delhi (Delhi, India, 5 June 2013) [Name withheld].
[96] These strategies are discussed in the following chapters.

However, the capacity-building potential of other in-house strategies mentioned-above cannot be disputed as they are also vital for the handling of disputes in developing countries. Hence, these strategies would also be discussed (in the forthcoming case studies) to the extent they are relevant in answering the research question.

The government departments of certain developed and developing countries have actively coordinated and exchanged resources with industries during the handling of WTO disputes.[97] The available literature presents the EU and the US, the two most active DSU users, as the leaders of this coordination approach. Moreover, Shaffer and Ortiz-Melendez present India, China and Brazil as the most distinct examples of developing countries that have engaged their private sector for the effective conduct of dispute settlement proceedings.[98] With the wealth of their dispute settlement and private sector participation experience, the present study can usefully review and analyse the best practices, weaknesses and capacity-building potential of government-industry coordination.

The government-industry coordination is grounded in the notion of public private partnership (PPP).[99] Grossman observes that 'special interest groups', which include private companies, trade associations, chamber of commerce, unions and confederations, influence and impact almost all areas of government's policy-making and decision-making endeavours.[100] However, in the area of international trade, they are the frontrunners as transaction of goods and services across borders are mainly carried out by profit-motivated business groups. Hence, some form of

[97] Bown and Hoekman, 'WTO Dispute Settlement and the Missing Developing Country Cases' (n 18); Bohanes and Garza (n 15) 79; Ewing-Chow (n 40) 679; Christian Tietje and Karsten Nowrot, 'Forming the Centre of a Transnational Economic Legal Order? Thoughts on the Current and Future Position of Non-State Actors in WTO Law' (2004) 5(2) European Business Organization Law Review 321, 327 – 37; Hoekman and Mavroidis, 'WTO Dispute Settlement, Transparency and Surveillance' (n 56) 144.
[98] Shaffer and Melendez-Ortiz (eds), *Dispute Settlement at the WTO* (n 81) 21, 137, 174.
[99] Ibid 354.
[100] Gene M Grossman and Elhanan Helpman, *Special Interest Politics* (The MIT Press 2001) 3 [The authors define 'special interest groups' (SIG) as any identifiable group with similar preferences on a subset of policy issues.]

coordination between government and industry, in most cases, is embedded in the nature of WTO dispute settlement proceedings as the violation of WTO rules directly affects business interests of exporters, importers, manufacturers and producers, which in most cases are private companies. Moreover, industries are a vital source of information and evidential documents.

Business entities are best placed to gather information relating to trade barriers for two primary reasons. *First*, exporters and importers can gather knowledge during the course of conducting their everyday business activities. *Second*, a member of an industry should have 'collective action interest' in gathering and building upon such information.[101] In other words, an exporter should invest in gathering information on market access violations as removal of a trade barrier would not only benefit the special economic interests of that exporter but, more broadly, its entire industry. Business entities may not always capture this 'positive externality' argument and may prefer to 'free-ride' by enjoying trade benefits generated from the investment of resources by other companies, government, industry associations and NGOs.[102] However, an organised and combined effort by exporters with overlapping trade interests and share of labour between government and an organised industry can result in better protection of trade interests through effective dispute settlement proceedings.

PPP, unlike other discussed strategies, is a dynamic concept as its suitability and capacity-building impact is highly dependent on the domestic context that surrounds it. Ad-hoc PPPs, as compared to other strategies, have the advantage of providing tailor-made solutions, as these can be devised in accordance with the country and case specific requirements and conditions. It is

[101] Grossman and Helpman, *Special Interest Politics* (n 100) 104.
[102] Bown, *Self Enforcing Trade* (n 15) 104, 110; Grossman and Helpman, *Special Interest Politics* (n 100) 103 ['On one hand, individuals who have similar policy preferences have much to gain from pooling their resources to pursue common political aims. On the other hand, there is always the temptation to "free-ride". This is so because those who share a group's objectives can benefit from its political efforts even if they refuse to help pay the bills.']

therefore essential to evaluate different PPP arrangements and identify those which can particularly work in developing countries (mainly middle income countries), and this task will be undertaken in the forthcoming chapters.

These arguments, considered together, give rise to the following questions: How can the notion of PPP be conceptualised in the context of WTO DSU? What should be the benchmark for judging the effectiveness of a PPP arrangement? How can PPPs enhance a country's dispute settlement capacity, and how can resources be exchanged in an effective manner? The next section provides answers to these questions, as it conceptualises the PPP mechanism in the context of WTO DSU.

2.5 Conceptualising Public Private Partnership

2.5.1 Meaning of PPP in context of WTO DSU

WTO DSU, while formally considered as a form of public international law, directly affects business interests.[103] In *Japan-Laver* case, for instance, the Japanese laver import regulations directly infringed the economic interests of the laver industry in China.[104] In *India-Battery* case, the anti-dumping duties imposed by India on the Bangladeshi battery imports infringed the financial interests of the battery exporters in Bangladesh.[105] A similar correlation between a trade barrier and business interests can be seen in almost all WTO litigations. Therefore, a commercial entity, to protect or expand its market access interests, can provide its government with the relevant resources (such as information, evidence, finances and legal expertise) required for the removal of a trade barrier. The privately owned resources can be utilised by the government to investigate a barrier, launch bilateral negotiations and WTO consultations, and litigate a dispute.

[103] Tietje and Nowrot (n 97) 327-9.
[104] See the case study of China (page 181).
[105] *India - Anti Dumping Measure on Batteries from Bangladesh*, WT/DS306, in consultations on 28 January 2004.

In this manner, the constitutional authority of a government can be indirectly invoked by an industry (as they do not have any direct rights under WTO DSU) with the help of a privately funded governmental action at WTO DSU. The arrangement therefore provides industries with an indirect route to access international trade adjudication.

In general terms, a public private partnership refers to a contractual arrangement or understanding between the public and private sectors, where both sectors invest their unique resources to achieve a mutually beneficial goal and both sides share the risks and rewards from the partnership.[106] In the context of WTO DSU, PPP refers to the synergy of resources between a government and an industry during the conduct of WTO dispute settlement proceedings. At stake, during this arrangement, are the respective national and exporting interests of a government and an industry, and both sectors are mutually dependent on each other's resources for the protection of their respective interests. Their distinct yet overlapping interests can be protected with the reciprocal exchange of resources through an effective partnership arrangement.

Jan Kooiman observes that '[n]o single actor, public or private, has all the knowledge and information required to solve complex, dynamic and diversified problems.'[107] It is therefore important that the governments and industries function in a complementary manner even during the management of WTO disputes.[108] A trade representative from USTR states that: 'We at

[106] Major Christopher E Martin, 'Sovereignty, Meet Globalization: Using Public-Private Partnerships to Promote the Rule of Law in a Complex World' [2009] 202 Military Law Review 91, 116 [The article describes the importance of public private partnerships in the context of maintaining rule of law at international level.]

[107] Jan Kooiman, 'Findings, Speculations and Recommendations' in Jan Kooiman (ed), *Modern Governance: New Government - Society Interactions* (Sage Publications 1993) 252 [presently derived from Shaffer, *Defending Interests* (n 68) 14].

[108] C Degregarie, 'Assets and Access: Linking Lobbyists and Lawmakers in Congress' in PS Herrnson, RG Shaiko, and C Wilcox (eds), *The Interest Group Connection: Electioneering, Lobbying, and Policymaking in Washington* (Chatham House Publishers 1998) 137, 146; RAW Rhodes, 'The New Governance: Governing without Government' (1996) 44 Political Studies 652.

USTR rely on industry'[109]. A trade representative from the European Commission observes the following:

> None of our disputes is brought without there being an industry that is adamantly behind it and pushing for the case to be taken to the WTO. The Commission does not have the resources to monitor observance of the rules and litigate all trade concerns. So it prioritises to take those cases where there is a demand and resource support by the private sector.[110]

The resource crunch experienced by these developed country governments further strengthens the argument that exchange of resources is even more vital for the resource-constrained governments of developing and least developed countries.

2.5.2 Benchmark for an Effective PPP Mechanism

The research question, as presented in the introduction, requires a detailed investigation into the possibility and procedures for establishing an effective PPP arrangement. To answer the question, and to examine whether the PPP procedures employed by selected countries are effective and advantageous, it is imperative to explain what an effective PPP mechanism is in the context of this thesis. The present section therefore defines an *effective* PPP mechanism, and it prepares a benchmark for assessing the *effectiveness* of PPP arrangements that will be examined in the subsequent chapters on the US, the EU, China, Brazil and India.

Walter Powell explains the rationale behind the envisaged relationship in the following statement: 'A basic assumption of network relationships is that one party is dependent on

[109] Shaffer, *Defending Interests* (n 68) 47.
[110] Interview with an official representative, DG Trade, European Commission (3 June 2013) [Name withheld].

resources controlled by another, and that there are gains to be had by the pooling of resources.'[111] On the basis of this rationale, the primary *objective* of the proposed PPP mechanism is to enable developing country governments mobilise resources in a cost-effective manner, and thereby strengthen their capacities to protect, defend and negotiate the international trade rights. Put differently, an *effective PPP mechanism* should seek to facilitate the formation of 'public-private networks' which can enable the governments to utilise the WTO dispute settlement procedures.[112]

The *effectiveness* or *success* of government-industry coordination, in the context of this research, will not be measured in terms of the nature and extent of resources exchanged between the partners, or the extent to which an industry has financed a dispute. A PPP strategy will be effective and advantageous if it can strengthen developing countries' WTO dispute settlement capacity. In other words, the success of a PPP mechanism will be measured in terms of its ability to achieve its objective, i.e., its potential to perform a capacity building function, by incentivising and facilitating optimal resource exchange and a regulated share of labour between government and industry in a developing country.[113] However, there is no standard form of an effective PPP system. PPP, as mentioned above, is an approach that acts as a foundation for different types of coordination systems. These mechanisms can be devised and employed in different forms, and some of these forms are illustrated in the next section.

[111] Walter Powell, 'Neither Market nor Hierarchy: Network Forms of Organization' in J Frances, R Levacic, J Mitchell & G Thompson (eds), *Markets, Hierarchies & Networks: The Coordination of Social Life* (Sage Publications 1991).
[112] Shaffer, *Defending Interests* (n 68) 20.
[113] Capacity is defined above (text to n 47).

2.5.3 Different Forms of PPP Strategies

There are varied ways in which governments and industries can coordinate and share resource-burdens with each other. The forthcoming chapters will identify and examine such varied forms of partnership. However, to begin with, it is important to make certain presumptions.

2.5.3.1 Initial Research Presumptions

It is presumed that there are three forms of public-private coordination that can be formed during the management of WTO disputes: (i) informal coordination, (ii) a 'pattern of coordination' and (iii) a formal system of coordination. These forms are based on several research-derived presumptions which are as follows:

1. Different types of partnership arrangements will have different utilisation patterns, functioning, advantages and disadvantages.
2. Informal coordination will be the most preferred option as it is non-confrontational, simpler and cost-effective for both industry and government.
3. A 'pattern of coordination' will usually emerge when informal procedures are opted for on a more regular basis by a particular industry in a particular country.
4. The third and arguably the most restrictively used procedure will be the formal system of coordination. Arguably, it will be invoked infrequently due to its presumed complexity and cost implications for both government and the affected industry. However, the importance of a formal procedure cannot be denied as it may have significant benefits, such as: enhanced transparency[114], better empowerment and

[114] Steve Charnovitz, 'The WTO and the Rights of the Individual' (March/April 2001) Inter-economics, 10 <http://ssrn.com/abstract=282021> accessed 28 November 2011.

access to justice for private stakeholders[115], confidence building among the private sector members [116] and protection of national interests through regulatory provisions[117].

5. From the perspective of WTO DSM, there will be a number of common elements that can be identified in all forms of coordination. They include the exchange of resources, reciprocity and interdependency of resources, ad-hoc partnerships and share of labour.

The given presumptions will be investigated with the help of a literature review and case studies in the forthcoming chapters.

2.5.3.2 Forms of Partnership

The three possible forms of partnership systems are further illustrated and explained in the figure below:

[115] Ibid; Robert Howse and Kalypso Nicolaïdis, 'Legitimacy and Global Governance: Why Constitutionalizing the WTO is a Step Too Far' in Roger Porter, Pierre Sauve, Arvind Subramanian and Americo Zampetti (eds) *Efficiency, Equity, Legitimacy: The Multilateral Trading System at the Millennium* (Brookings Institution Press 2001) 227-252.
[116] Shaffer, *Defending Interests* (n 68) 73, 157.
[117] Tietje and Nowrot (n 97) 330, 347.

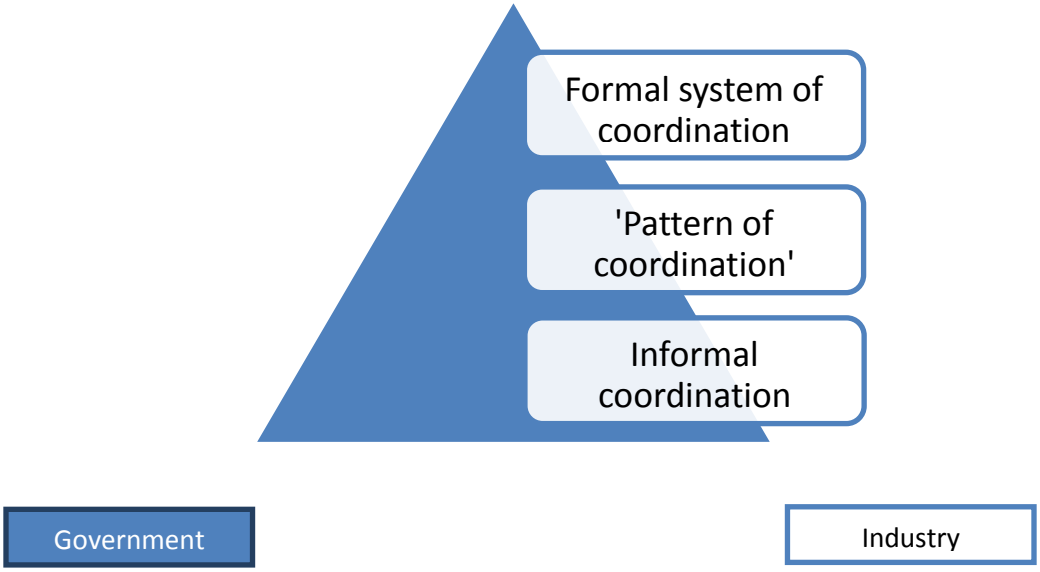


Figure 2: Possible Forms of Public Private Coordination

Figure 2, when read in conjunction with the presumptions, indicates that dispute settlement coordination can initially and most commonly be carried out through informal means between a government and an industry as both can enter into informal dialogues and exchange resources on a reciprocal basis wherever and whenever their interests overlap. Moreover, 'patterns of coordination' and formalised PPPs can also be formed with the initial help of informally established contacts between the two actors. Therefore, the origin of the other two coordination procedures, in certain circumstances, may lie in informal procedures.

There are also instances where a more regular pattern of ad-hoc coordination can be identified. A recurring formation of coordination between a particular industry and a government can eventually lead to a 'pattern of coordination' between the two. Such partnerships usually operate on a voluntary basis and are mainly prompted by cost-benefit analysis conducted by the affected

industry and the government.[118] This form of coordination will mainly be investigated in the case study of India, especially in the examples involving the textiles industry as a repeat private partner to the Government of India.

A dialogue between the public and private partners during dispute settlement can also be established through legal provisions, regulations and institutions. For instance, the US has a mechanism that provides a right to its private stakeholders to petition the United States Trade Representative (USTR) if their trade interests are infringed.[119] Likewise, the EU and China have similar formal provisions for the formation of partnerships during the settlement of trade disputes.[120] Therefore, the formation of public-private coordination with the help of legal provisions, specialised institutions and regulatory procedures will be considered as a formal system of PPP. The key distinguishing aspect of a formal system of PPP will be the existence of a right with private entities to petition their government if and when their trade interests are infringed by a foreign practice. Correspondingly, the government will have an obligation to administer and preliminarily examine such petitions. The government may also have an obligation to coordinate with the concerned private individuals if the government decides to pursue the matter.[121] On the other hand, a coordination (or a pattern of coordination) formed between a government and an industry without the framework of established regulations or national legal provisions will be considered as an *informal* system of coordination.

It will be observed in the case studies that the line of distinction between a formal and an informal system of PPP can become blurred or may even disappear, as these may either overlap

[118] For further details, see Ewing-Chow (n 40) 697.
[119] See chapter three (page 117).
[120] See chapter three (page 138) and four (page 169) respectively.
[121] Shaffer, *Defending Interests* (n 68) 19-65 [Shaffer has defined formal PPP mechanisms with the help of the US and the EU examples.]

at times or coordination may be formed by the intermingling of the formal and informal procedures. For example, in the *Japan Laver* case, partnership between the industry and the government was initially formed with the help of national legal provisions. However, the elements of informal exchanges were clearly visible as the industry was engaged in persuasive lobbying and bargaining practices.[122] Therefore, the partnership in this case was a formal partnership but with certain elements of informal coordination. Hence, it may not always be possible to clearly differentiate between a formal and an informal PPP mechanism. More importantly, it is not the focus of the present research to define or distinguish the formal PPP processes from the informal ones. The research focus here is to identify the elements of an *effective* PPP mechanism (not necessarily a formal one) for developing countries. The existence of a more formal or an informal system of coordination will only be relevant in so far as it makes the partnership more effective in building the dispute settlement capacity of developing countries.

2.5.4 Composition of PPP Mechanism: Key Participants

From the perspective of this thesis, the key participants in monitoring market access, investigating trade barriers, developing and litigating a legal case and ensuring compliance are the governmental and the concerned business entities. The private stakeholders in their varied forms, i.e., as exporters and importers, producers of goods and services, companies and trade associations, chambers of commerce and global alliances, can partner their governments at various stages of dispute settlement.[123] There are other noted contributors, such as academics, non-profit organisations, think tanks and international organisations that can assist governments

[122] See the case study of China (page 181).

[123] Virachai Plasai, 'Coordinating Trade Litigation' (April 2013) ICTSD Issue Paper No 14, 4 <http://www.ictsd.org/sites/default/files/research/2013/04/coordinating-trade-litigation1.pdf> accessed 24 September 2014.

in the monitoring of market access.[124] They can engage in fact-finding for supporting the investigation and development of cases.[125] Academics and voluntary organisations can also guide the WTO adjudicators with their amicus briefs[126]. NGOs can endeavour to generate public support for the removal of barriers or enforcement of awards.[127] Additionally, law firms and technical consultants can also become an indispensable part of the process.[128] However, for the purposes of the present research, the primary partners in the envisaged partnership arrangements are the government (public sector) and the industry (private sector).

[124] Some NGOs which have assisted the government in this manner are as follows: Global Trade Alert <http://www.globaltradealert.org/about>; Global Subsidies Initiatives <http://www.iisd.org/gsi/>; Non-Tariff Barriers: Reporting, Monitoring and Eliminating Mechanism <http://www.tradebarriers.org/about> accessed 18 July 2013. The function is also performed by the World Trade Organization Trade Policy Review Mechanism <http://www.wto.org/english/tratop_e/tpr_e/tprm_e.htm> accessed 20 July 2013.

[125] Such a function has been performed by various organisations such as OECD and ICTSD. For example, see 'WTO, OECD Find U.S. – China Deficit Smaller Under "Value-Added" Approach' *Inside U.S. Trade: World Trade Online* (22 January 2013) <http://insidetrade.com/Inside-Trade-General/Public-Content-World-Trade-Online/wto-oecd-find-us-china-deficit-smaller-under-value-added-approach/menu-id-896.html> accessed 28 June 2013.

[126] The academics submit amicus briefs to guide the adjudicators or supplement their information. For instance, Dr. Luca Rubini submitted a brief in *Canada – Renewable Energy* on 12 March 2013 [Appellate Body Reports, *Canada – Certain Measures Affecting the Renewable Energy Generation Sector / Canada – Measures Relating to the Feed-in Tariff Program*, WT/DS412/AB/R / WT/DS426/AB/R, adopted 24 May 2013]. Professor Rob Howse submitted a brief in *U.S. – Tuna II* on 12 February 2012 [Appellate Body Report, *United States – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products*, WT/DS381/AB/R, adopted 13 June 2012, DSR 2012:IV, 1837]. Various international organisations and NGOs have also contributed in this manner. For example, Gene Watch UK, Foundation for International Environmental Law and Development (FIELD), Royal Society for the Protection of Birds (RSPB), the Centre for Food Safety, International Forum for Globalisation, and few others submitted a brief *in EC – Approval and Marketing of Biotech Products* on 27 March 2004 [Panel Reports, *European Communities – Measures Affecting the Approval and Marketing of Biotech Products*, WT/DS291/R / WT/DS292/R / WT/DS293/R / Add.1 to Add.9 and Corr.1, adopted 21 November 2006, DSR 2006:III, 847].

[127] Oxfam International played a notable role in *US — Upland Cotton* dispute as it educated the public on the international consequences of WTO-inconsistent policies. [Panel Report, *United States – Subsidies on Upland Cotton*, WT/DS267/R, Corr.1, AND Add.1 to Add.3, adopted 21 March 2005, as modified by Appellate Body Report WT/DS267/AB/R, DSR 2005:II, 299]. The Geneva-based IDEAS Centre has helped developing countries in building the capacity to generate the political and public pressure for enforcement. Consumers Unity & Trust Society (CUTS) has also assisted developing countries in several monitoring and enforcement actions. Other examples of development focussed NGOs are: International Centre for Trade and Sustainability Development (ICTSD) and the International Institute for Sustainable Development (IISD). Also, an example of an inter-governmental organisation assisting developing countries is South Centre and International Lawyers and Economists against Poverty (ILEAP). For more details, see Bown, *Self-Enforcing Trade* (n 15)175-206; Tietje and Nowrot (n 97) 339-40.

[128] Trade lawyers are integral service providers to the WTO dispute settlement process as they provide legal analysis, interpret legal texts, marshal legal arguments and present them at the adjudication hearings. The Advisory Centre on WTO Law is seen as an important participant in the process of dispute settlement as it offers subsidised legal services to developing country members. Law firms have also started to offer monitoring services recently. For a list of such law firms, see n 143. Economic consultants have also participated in the process in several ways. They have provided economic analysis, marshalled technical arguments and have engaged in monitoring services. The examples of such economic consultancies are provided in n 144.

There are some similarities between industrial entities and voluntary organisations as they can both be managed and controlled by private individuals or groups or associations. Rechenberg confirms this overlap as he attempts to clarify that 'the members of an NGO may be individuals or corporate bodies...'[129] Hence, the term "private sector" would generally also include voluntary organisations such as NGOs, consumer organisations, think tanks and intergovernmental organisations, and a dispute settlement partnership, to perform its capacity building role, may also require the assistance from such voluntary organisations. However, for the purpose of this research, the typology of *private sector* refers to business entities only. Besides delimiting the scope of the present research, the key reasons for the given typology are as follows:

1. The key significance of a PPP arrangement lies in its domestic capacity building potential. As seen earlier, the private stakeholders are most suitably placed to gather information and devise commercial arguments for developing a legal case. The industries can also finance the entire dispute settlement process, especially in cases involving antidumping and subsidy issues. On the other hand, voluntary organisations can also perform various functions and assist developing country governments. However, as compared to commercial stakeholders, their capacity building potential would arguably be restricted for reasons of comparatively limited motivation and resources available at their disposal. Hence, the capacity building function can be fully and effectively performed by the affected business communities. The voluntary organisations can, at best, provide supplementary assistance for the same.

[129] H K Rechenberg, 'NGOs' in R Bernhardt (ed) *Encyclopaedia of Public International Law* (Vol. 9, North – Holland 1986) 276.

2. The interaction and exchange of resources between industries and governments have occasionally given rise to potential regulatory concerns, such as corporate regulatory capture arising from rent seeking, lobbying or corruption.[130] Gene Grossman confirms that the interplay between business communities and political organisations can influence and shape a nation's foreign trade policy to the detriment of other wider economic and social concerns.[131] Hence, there is arguably a need to further investigate this complex web of networks and devise regulatory procedures to ensure that PPP mechanisms in developing countries strike an effective balance between national and business interests. To meet this end, the forthcoming chapters examine the interaction between the government and industries in selected countries and WTO disputes, and underline the ways in which domestic regulatory frameworks have been created to monitor and supervise such interaction.

For these reasons, this research considers *industry* as the primary partner of the government for the purpose of building a PPP strategy during the management of foreign trade disputes in developing countries.

The typology of *public sector*, on the other hand, broadly comprises those governmental units, departments and committees (constituted and controlled by government) which are responsible for inter-governmental matters relating to international trade and commerce, international dispute settlement and other WTO matters.

[130] See page 86.
[131] Problems of bribery, regulatory capture and lobbying emerging from the partnership discussed in Gene Grossman and Elhanan Helpman, 'Protection for Sale' (1994) 84(4) The American Economic Review 833.

2.5.5 Additional Characteristics of PPP Mechanism: Domestic, Ad-hoc and Dynamic

The PPP mechanism, in the context of this thesis, is a domestically devised partnership with a national government and a concerned industry as its key partners, coordinating with each other at a domestic level. Cross-border partnerships can also be formed between various governments and industries, but they remain outside the scope of this research.[132] Hence, as it will be observed in the following chapters, effective partnership arrangements can commonly be devised with the help of laws, institutions, procedures and participants – all established and functioning at the domestic level.

Shaffer observes that the EU's partnership system 'is a dynamic, ad hoc, hybrid, multi-tiered process in which private interests are deeply implicated…….It is ad hoc because private businesses coordinate their positions among themselves and form partnerships with EC public officials on an ad hoc basis.'[133] The fact that such partnerships are usually formed on an ad-hoc basis is a pertinent feature. These networks are not usually set-up on a long term or a continuing basis for the conduct of a range of subsequent trade disputes. Such partnerships are temporarily formed between the government and the concerned business entities whose trade interests have been injured by a foreign measure. The partnership can exist until the stage of enforcement (if the dispute goes through all the stages of WTO DSM) or until the mutual settlement of conflict. For example, in the *Japan-Laver* dispute, the Jiangsu Laver Association assisted MOFCOM to investigate the barrier and negotiate a settlement with Japan. Coordination between the Chinese laver industry and the government ceased when Japan announced a new global quota system for

[132] For example, transatlantic partnerships have occasionally been formed between the industries and the governments of the EU and the US. For details, see Shaffer, *Defending Interests* (n 68) 126.
[133] Shaffer, *Defending Interests* (n 68) 101.

laver import.[134] Similar ad-hoc partnerships will be discussed and examined in the case studies as models of continuing partnerships remain outside the scope of this thesis.

Shaffer further observes that such partnerships are hybrid in nature. 'It is a hybrid process because it is neither purely intergovernmental nor purely private, but rather involves public-private networks operating in the shadow of international trade law.'[135] The hybrid nature of partnership can also be observed in the nature of most WTO litigations as the extent of industry, governmental and expert participation, resource exchange and their inter-relationship differs substantially from one case and country to the other. The hybrid and dynamic nature of PPPs is further explained by Niall Meagher.

> In different countries, there will be a spectrum of public private partnerships. In terms of who needs to do how much work, who is the senior partner and who is the junior partner – it will greatly vary. For example, in the US, the industry might be the leading partner. In the EU, the Commission might be the senior partner leading the process.[136]

However, irrespective of their changing relationship dynamics, it should always be the government that must retain the authority for final decision-making. In a PPP arrangement, the government should lead the dispute settlement process in the direction of public interest and should sustainably balance it with special private interests.

These observations, read together with the research question, gives rise to following questions: How can developing country governments and industries exchange resources for the effective management of WTO disputes? More broadly, how can PPP arrangements achieve their stated

[134] For details, see the case study of China (page 181).
[135] Shaffer, *Defending Interests* (n 68) 101.
[136] Interview with Niall Meagher, ACWL (Geneva, Switzerland, 11 April 2013). A similar observation has been made in Shaffer, *Defending Interests* (n 68) 108.

objective, i.e., the building of dispute settlement capacity in developing countries through resource-optimal procedures of exchange and interaction? The next section deals with these questions, as it provides a conceptual framework to illustrate the significance of the PPP approach, i.e., its capacity building potential.

2.5.6 The Key Significance of PPP Approach: Capacity Building

The key *significance* of a PPP arrangement lies in its ability to build the WTO dispute settlement capacity of a government through mutually beneficial exchange and coordination. The procedure and extent of coordination between a government and an industry differs from country-to-country and case-to-case, but it is nevertheless useful to understand the underlying rationale behind the stated objective of PPP mechanism, i.e., how exchange of resources at a particular stage of dispute settlement can enable a government to mobilise the required resources for conducting that stage with fewer internal costs and constraints. The importance of this section lies in the fact that it provides a conceptual framework to understand how a domestic partnership mechanism can significantly impact and influence the international trade adjudication at WTO.

Public private coordination can take place at every stage of the WTO dispute settlement proceedings, and a pattern of its nature and possible extent can be explained with the help of the following illustration. The model illustrated in the figure below has drawn inspiration from Bown's model of 'The Extended Litigation Process'.[137] The model is used as the theoretical lens of this thesis as it illustrates the manner in which PPP arrangements, through exchange of resources at each stage of a WTO dispute, can enhance the dispute settlement capacity of developing countries.

[137] Bown, *Self Enforcing Trade* (n 15) 112. [The 'Extended Litigation Process' proposed by Bown has illustrated the key procedural stages through which a foreign trade dispute can be handled. The present research has built upon and developed this six stages model into a nine stages model for dispute settlement.]

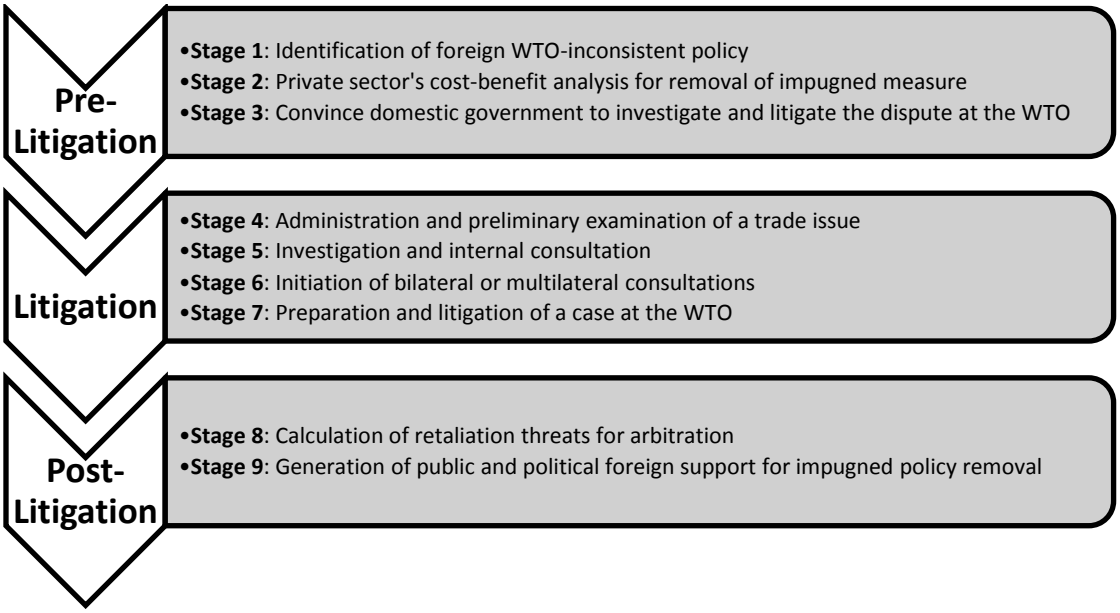


Figure 3: Public Private Partnership: Potential Stages of WTO Dispute Settlement Proceedings

Figure 3 illustrates nine potential stages through which a WTO dispute (conducted by means of a public private partnership) may proceed. The operational nature and significance of dispute settlement partnerships, and the possibilities for exchange and resource mobilisation during such partnerships will be explained in the sequence of each stage (mentioned in the figure). The following discussion is therefore divided into three parts, covering three phases of WTO dispute settlement proceedings: Pre-litigation, litigation and post-litigation.

2.5.6.1 Pre-litigation phase

The key stages at the pre-litigation phase, as shown in Figure 3, are: identification of a foreign WTO-inconsistent measure(s); cost-benefit analysis conducted by private sector for the removal of an alleged trade barrier; convincing the government to investigate a measure and litigate a dispute at WTO DSM.

A precondition for the efficient enforcement of WTO rights is the existence of a strong monitoring mechanism.[138] However, due to shortage of resources and poor economies of scale, developing country Members are likely to find it difficult to develop and functionalize dedicated monitoring processes and institutions.[139] The key *issue* therefore is: whether the private sector can help the developing country governments to identify foreign trade barriers? Certain countries have established dedicated processes to monitor and list foreign trade barriers.[140] However, in the case of developing and particularly least developed countries, where governments may not be able to spend their scarce resources on similar monitoring provisions, division of the monitoring task between the government and industry becomes crucial.[141] This resource deficit can be filled with the help of public private coordination.

As the key beneficiaries, victims and operators of foreign trade, the affected business players are arguably best placed to identify the foreign trade barriers affecting their economic interests.[142] The exporting firms and trade associations, in the past, have identified and reported infringements to the governments. Moreover, they have outsourced the monitoring and

[138] 'A large and essential part of members' work in the WTO is to monitor how the agreements that they have negotiated are being implemented.' [WTO website – Implementation and Monitoring <http://www.wto.org/english/tratop_e/monitor_e/monitor_e.htm> accessed 28 November 2012].

[139] See Busch and Reinhardt, 'The WTO Dispute Settlement Mechanism and Developing Countries' (n 28) 3-4.

[140] For example, the US Department of Commerce's International Trade Administration (ITA) has a dedicated team of Market Access and Compliance (MAC) in the Trade and Compliance Centre (TCC). For related programs of ITA, see Trade Compliance Centre <http://tcc.export.gov/> accessed 9 October 2012. For MAC's initiatives on monitoring and identifying trade barriers, see Trade Compliance Centre, Report a Foreign Trade Barrier <http://tcc.export.gov/Report_a_Barrier/index.asp> accessed 9 October 2012. Similar governmental processes in the EU are the provision of "Trade Barrier Regulation" (<http://ec.europa.eu/trade/tackling-unfair-trade/trade-barriers/> accessed 9 October 2012) and Directorate General for Trade's "Market Access Database" (<http://madb.europa.eu/madb_barriers/barriers_select.htm> accessed 9 October 2012).

[141] In least developed and developing countries, the monitoring and identification of trade barriers is mainly conducted either by firms or industry or trade associations (if they are well-resourced and organized), or by the regional or international NGOs (for example, Global Trade Alert <http://www.globaltradealert.org/about>; Global Subsidies Initiatives <http://www.iisd.org/gsi/>; Non-Tariff Barriers: Reporting, Monitoring and Eliminating Mechanism <http://www.tradebarriers.org/about>) or by the WTO Trade Policy Review Mechanism <http://www.wto.org/english/tratop_e/tpr_e/tprm_e.htm> accessed 25 September 2014.

[142] See Bohanes and Garza (n 15) 81-82. [Bohanes has argued that better coordination between the private and public sector will foster the 'identification of the trade barriers that can be challenged in WTO litigation'.]

identification of barriers to corporate law firms[143] and economic consultancies[144]. Multinational companies and powerful trade associations have also created their dedicated in-house team of lawyers and consultants to perform this function. The public sector authorities, on the other hand, can also identify foreign trade barriers on a *suo moto* basis and reach out to the private sector (for information, evidence or other form of resources) during initial investigation or consultations.

At the *second* stage, the private sector estimates the potential economic benefits from the removal of a trade barrier. An affected firm or trade association, at this stage, will investigate several issues, including the expected economic benefits from the removal of an impugned barrier, the amount of resources required to be spent on investigation and overall conduct of a case, and the chances of winning the case and getting the award enforced. The extent of the private sector's participation and resource contribution will depend upon this cost-benefit analysis. The *cost* generally includes the 'cost of monitoring and information collection', 'the cost of industry organisation and engaging government policymakers and legal service providers', 'cost of actual WTO enforcement litigation', and the 'cost to obtain compliance'. *Benefits* would mainly include the financial benefits, chances of winning and enforcement, and other benefits which could be social, diplomatic, political or ethical in nature.[145]

[143] The international law firms have established dedicated teams for monitoring and gathering information on foreign trade practices. The list of law firms is provided in Bown, *Self Enforcing Trade* (n 15) 122-123. Some of the major law firms which pursue this practice are Sidley Austin (<http://www.sidley.com/wto/>), Van Bael & Bellis (<http://www.vanbaelbellis.com/en/fiches/practice-areas/trade-and-customs-law/wto.cfm>), Winston & Strawn (<http://www.winston.com/index.cfm?contentID=19&itemID=260>) accessed 9 October 2012.

[144] The firms and trade associations hire economic consultancies to monitor and assess developments in trade policies and negotiations. Examples of such economic consultancies are Giz (<http://www.giz.de/Themen/en/25019.htm>), Datagro (<http://www.datagro.com.br/>), Deloitte offering monitoring and assessment services in customs and global trade (<https://www.deloitte.com/cz/customs-news/100820>) and issuing global trade alerts (for example, see <http://www.deloitte.com/view/en_za/za/6026bf29bfff0210VgnVCM100000ba42f00aRCRD.htm> accessed 10 September 2014).

[145] For further details on anticipated costs and benefits, see Bown, *Self-Enforcing Trade* (n 15) 118-132. Also see Bohanes & Garza (n 15) 66-67.

The *third* stage is where the affected private sector convinces the government to investigate and pursue a case at WTO. The industry can approach the government either through established laws and procedures, or through informal procedures of coordination. The cost incurred by the private sector at this stage can be substantial, as the government may require it to find answers to various complex questions such as: Does the given trade barrier vitiate the national interest and the overall economic wellbeing of the nation? What is the extent of its impact on the economic wellbeing of the nation or an industry? What are the chances of winning the case at WTO and thereafter securing compliance? Is it politically favourable to pursue the case at WTO? How complicated is the case and how many resources are available within the government to prepare and litigate the case at WTO? Would the affected private sector supplement these governmental resources? If yes, to what extent? Combined efforts of the affected private sector and the government to find answers to these questions can be seen as another instance of resource mobilisation and joint efforts to improve performance at WTO DSU.

To assist the government in the initial examination of these issues (and for the conduct of cost-benefit analysis), the private sector entities can hire legal, economic and technical experts.[146] Moreover, they are suitably placed to provide required information to the government for examining the alleged barrier and its impact on the industry. Grossman provides the rationale behind this argument in the following words:

> Interest groups are obvious source of information for policymakers, both because the groups are already familiar with many of the technical issues from their every-day involvement in the areas where policies are to be determined and because

[146] An example is the case of *India - Anti Dumping Measure on Batteries from Bangladesh*, WT/DS306, in consultations on 28 January 2004. In this case, Rahimafrooz's undertaking to finance the dispute was seen as the main reason which convinced the reluctant Bangladesh's Ministry of Commerce to invoke WTO DSM against India. [Interview with Toufiq Ali, Chief Executive at Bangladesh International Arbitration Centre, Former Ambassador to WTO Mission of Bangladesh (21 August 2013)].

> they are prepared to undertake research to produce information that they do not initially have.[147]

On the other hand, an analysis of the political state of affairs, the political outcome and possible repercussions of pursuing a dispute can predominantly be carried out by governmental agencies.[148] It is the public sector which mostly delves into prioritising and listing the trade barriers, scrutinizing the significant ones, and analyzing the extra-WTO counter retaliation capacity of the offending Member State. Evaluating the chances of success and enforcement, based on its retaliation capacity and the chances of counter-retaliation from offending States, becomes a serious issue for developing and least developed countries, especially when a dispute is against a developed and a powerful nation. In this manner, a joint identification and examination of foreign trade barriers at the pre-litigation phase of a dispute can help the governments to comprehensively analyse these issues, and it can thereby provide a sound foundation to the formation of PPP arrangements.

2.5.6.2 Litigation phase

At the litigation phase, the key potential stages are: the administration and preliminary examination of a trade concern; investigation and internal consultations; initiation of bilateral or multilateral consultations; preparation and litigation of a case at the WTO DSM, including the stage of appeal if required.

To begin with, the private sector can file a complaint or informally communicate a problem to its government. The government can register a complaint and initiate the process of investigating the legitimacy, significance and overall impact of pursuing a dispute. In order to estimate and

[147] Grossman and Helpman, *Special Interest Politics* (n 100) 5.
[148] For example, in *India - Anti Dumping Measure on Batteries from Bangladesh*, Bangladesh Tariff Commission (BTC) investigated the legitimacy and significance of pursuing the dispute, and it acted as the political strategist to the Bangladesh's Ministry of Commerce. [Taslim (n 14) 230].

assess the political, legal and economic viability of litigating a dispute at WTO, the government requires commercial inputs and expert assistance of trade lawyers, economists, foreign policy experts and political strategists. The private stakeholders can provide requisite information and documents to the government. The private entities can also hire or finance the hiring of experts, and they can conduct market research, hold joint consortiums and consultation meetings with the government and with other industry representatives.[149]

Once the government has investigated a complaint and has found a measure which violates the WTO rules or which impedes its foreign trade, it would generally have several options. The government, depending upon its economic and political climate and the nature of the dispute, would either raise the matter at the relevant WTO Committee or launch consultations with the offending Member States. If the government's initiative at this stage (such as bilateral consultations or WTO Committee discussions or multilateral consultations) fails, a subsequent stage could be the development and litigation of a case at the WTO DSU. The costs incurred by the private sector and the government at this stage vary to a large extent, as the sums involved mainly depend upon the nature of the case, willingness of the partners to support each other, the stakes involved, chances of winning and enforcement, the state of development of law on the issue in question and the complexity of gathering supporting evidence.

[149] In *EC – Export Subsidies on Sugar (Thailand)*, the Thailand's sugar association sent its experts to Geneva to hold consultations with the Government's mission on the questions of initiating a dispute at WTO, its benefits, costs and the threats involved. The Thai sugar association coordinated with the Brazilian and Australian sugar industries to gather and supply better informational and evidentiary inputs to the Thai government. [Panel Report, *European Communities – Export Subsidies on Sugar*, Complaint by Thailand, WT/DS283/R, adopted 19 May 2005, as modified by Appellate Body Report WT/DS265/AB/R, WT/DS266/AB/R, WT/DS283/AB/R, DSR 2005:XIV, 7071]. Pornchai Danvivathana, 'Thailand's experience in the WTO dispute settlement system: challenging the EC sugar regime' in Shaffer and Melendez-Ortiz (eds), *Dispute Settlement at the WTO'* (n 81) 210; Interview with an official, Government of Thailand (3 February 2014). In *Japan – Quantitative Restrictions on Laver*, the Jiangsu Laver Association sent its representatives to Korea and Japan to conduct field research for supporting the investigations, followed by submission of a report to MOFCOM. See the case study of China (page 181).

The main participants at this stage can be: lawyers, economists, consultants, foreign policy experts, concerned subject-specific experts (such as scientists, engineers, health professionals and environmentalists), government representatives and industry representatives (and at times, NGO's).[150] The participants work in close coordination while they jointly prepare legal briefs, develop arguments, engage in research and fact-finding, and gather supporting evidence.[151] A private sector representative asserts the importance of government-industry coordination at this stage in the following words:

> The Government's team of lawyers and trade policy experts can interpret the legal texts from a legal aspect, but it is only the concerned industry which can interpret these legal texts from a commercial perspective and marshal the required commercial facts, evidence and arguments. Without commercial inputs from industry, the legal analysis would remain in a vacuum.[152]

Hence, this stage provides a clear example of a burden-sharing approach between the two partners.[153] The presentation of a case at WTO is mainly carried out by the Mission officials at Geneva, and the officials can be closely supported by other government representatives, private sector representatives and the team of public and private lawyers.[154] Similar coordination and involvement of these public and private sector agencies are again required if a Member State

[150] For further details on sharing of tasks at consultation and litigation stages, see Plasai (n 123) 9-13.
[151] For example, in *EC – Export Subsidies on Sugar (Thailand)*, the sugar association hired the services of Sidley Austin (law firm) and Datagro (economic consultants) to assist the Thai Government with preparation and litigation of the case at WTO. [Danvivathana (n 149); Interview with an official, Government of Thailand (n 149)].
[152] Interview with an official representative, TEXPROCIL (Mumbai, India, 27 June 2013) [Name withheld].
[153] Shaffer at al, 'Does Legal Capacity Matter?' (n 25) 570-71 [The author notes the following: '[T]he prospect of potentially paying a half million to a million U.S. dollars (or more) in legal fees can be difficult to justify in intergovernmental decisions involving the Treasury Ministry. If the private sector agrees to cover all or a large portion of these legal fees, then the government is more likely to file a case in Geneva.']. Similar arguments can be found in Plasai (n 123).
[154] Appellate Body in the *EC – Bananas III* case clarified that private legal counsels and private law firms can participate in the WTO dispute settlement proceedings and be engaged in other related legal work. For details, see Appellate Body Report, *European Communities – Regime for the Importation, Sale and Distribution of Bananas*, WT/DS27/AB/R, adopted 25 September 1997, DSR 1997:II, 591.

appeals a Panel decision. This would be the case irrespective of whether a country is acting as an appellant or an appellee.

The division of labour between the private and public participants at the litigation stage can also be observed during the conduct of various WTO disputes. For example, the *EC – Export Subsidies on Sugar (Thailand)*[155] case is an interesting example of public private interaction in Thailand as it illustrates the potential role which can be played by private entities during the litigation of WTO disputes. The Thai sugar industry in this case coordinated with the government at every stage of the dispute settlement. Informal consultations, joint meetings and field trips were frequently organised by the industry and the Thai government during investigation, preparation and litigation of the case.[156] The trade association and the concerned private companies, during various stages of the dispute, offered financial contributions to the government for hiring the law firm (which was ACWL in this case) and the economic consultants (LMC International and Datagro).[157] The sugar association also established dedicated legal and managerial teams to assist the government in litigating the dispute.[158] Furthermore, the sugar industries in Brazil, Australia and Thailand (which were the co-complainants in the matter) jointly purchased the relevant evidential data from LMC International. They purchased this data to ensure, in a cost-effective manner, that their respective case files remained updated and well substantiated.[159] The case therefore is a sound example of how industries from different countries

[155] Panel Report, *European Communities – Export Subsidies on Sugar, Complaint by Thailand*, WT/DS283/R, adopted 19 May 2005, as modified by Appellate Body Report WT/DS265/AB/R, WT/DS266/AB/R, WT/DS283/AB/R, DSR 2005:XIV, 7071.
[156] Danvivathana (n 149) 216.
[157] Interview with an official, Government of Thailand (n 149); Ewing-Chow (n 40) 687 [It notes that 'the ACWL's help and simultaneously used financial contributions from the Thai private sector to hire a private law firm' were the two driving factors during the EC – Export Subsidies on Sugar (Thailand) case.].
[158]ACWL, 'The ACWL at Ten: Looking Back, Looking Forward' (n 84) 25.
[159] Ibid.

can form cross-border alliances and reduce the burden of cost imposed on each of them for the protection of their common and overlapping interests.[160]

2.5.6.3 Post-litigation phase

There are two key stages at the post-litigation phase. These stages can also be referred to as the stages of implementation. They are: calculation of the WTO-sanctioned economic retaliation threats for arbitration, and generation of public and political foreign support and pressure for the removal of WTO-inconsistent policy.

Winning WTO litigation is not always the final stage, as it may at times be followed by enforcement proceedings pursued at the request of the winning Member State. A government can request the establishment of the arbitral tribunal or compliance Panel in the cases of non-compliance. The enforcement remedies could be in the nature of the suspension of concessions or other retaliatory actions. The limits of retaliatory measures are determined and authorised by the arbitral tribunal at WTO.[161]

During this stage, the private sector can play an important role by studying the markets and identifying the right products in order to intelligently target the retaliatory measures. The private sector can identify products which are politically, socially or economically strategic for the offending governments and which, at the same time, would produce minimal damage in its own economy. Private firms and industries, in the past, have hired law firms and economic consultancies to calculate effective retaliation levels and to identify suitable products for

[160] Danvivathana (n 149) 216; Interview with an official, Government of Thailand (n 149) [The interviewee acknowledges that if an affected industry supports the government to initiate and conduct a WTO dispute, it becomes easier for the government to justify the action and to invoke the provisions of WTO DSU in that matter.]

[161] For further study on how these limits are calculated, see Chad P Bown and Michele Ruta, 'The Economics of Permissible WTO Retaliation' in Chad P Bown and Joost Pauwelyn (eds), *The Law, Economics, and Politics of Retaliation in WTO Dispute Settlement* (Cambridge University Press 2010).

retaliation.[162] On the other hand, governments at this stage can also be assisted by their lawyers, think tanks, policy analysts and foreign policy makers. Occasionally, the governments can also receive informational inputs from non-profit based organisations.[163]

The final possible task in the lifecycle of a WTO dispute could be the generation of public and political foreign support and pressure for the removal of WTO-inconsistent policy. In cases where retaliation is not politically or economically favourable, or if it proves to be ineffective or insufficient for enforcing compliance, the potentially final stage of the enforcement phase steps in. In the words of Bown, this stage 'involves engaging other political forces to generate a public outcry within the offending country to create the momentum for policy reform to achieve WTO compliance.'[164] This stage may involve media campaigns and organized public relation activities which can take place at national and international levels. This function can jointly be carried out by the government and the affected industry representatives with the help of joint workshops, exchange programmes and publications. NGOs and IGOs can also play an instrumental role in the organisation of public relation activities and campaigns.

A striking example of private sector initiative during the post-litigation phase can be seen in the *EC-Sugar* case, where the Thai Sugar Association, along with Australian and Brazilian sugar associations, developed close contacts with other sugar associations under the Global Sugar Alliance Group.[165] The alliance undertook the responsibility of monitoring the EC's

[162] Evidence of this could partially be obtained from the WTO services section of the Sidley Austin LLP website, which states that the firm offers advisory and legal services to business units, trade associations and the government clients on issues relating to WTO law, dispute settlement and enforcement measures. See Sidley Austin LLP: WTO Disputes <http://www.sidley.com/wto/> accessed 12 October 2012.
[163] For example, see the case study of Brazil (page 229).
[164] Bown, *Self Enforcing Trade* (n 15) 117.
[165] This is an alliance of the world's leading sugar trade associations. It represents over fifty percent of the world's sugar production and more than 85 percent of raw sugar exports worldwide. It is an international forum of coordination between sugar associations striving to achieve similar trade goals. It is officially known as Global Alliance for Sugar Trade Reform & Liberalisation <http://www.globalsugaralliance.org/> accessed 16 August 2013.

implemention of the award. The Chairman of the Global Sugar Alliance, Mr Keith De Lacy, issued a statement that the 'Global Sugar Alliance will be closely monitoring the reforms to make sure it happens'.[166] In addition to this, the 'Global Sugar Alliance members called on the world's leaders to make their commitment to the elimination of export subsidies unequivocal, not dependent on the outcome of the Round'.[167] Therefore, the alliance was engaged in international campaigning for the purpose of ensuring effective and smooth implementation of the award and improvement in worldwide sugar trading conditions. The engagement of the private sector during the enforcement stages and its potential to enhance its government's enforcement (including retaliation) capacity are also acknowledged by Bown as one of the crucial benefits of a dispute settlement partnership.[168]

During all three phases of dispute settlement, resource exchange will be *effective* if it leads to improved dispute settlement capacity of the government and thereby achieve the stated objective of a PPP mechanism. It will be *optimal* if the deployment of public and private sector resources to dispute settlement endeavours gives rise to a condition which is conducive to a favourable outcome for the government and industry.

At the same time, it is important to note that PPP mechanism may not be able to perform a similarly positive role in building a country's capacity in cases where that country is acting as a respondent. PPP in such cases may be constrained in facilitating an effective resource exchange and interaction as the private sector may not be as forthcoming as in the instances discussed above from a complainant's point of view. From a respondent's point of view, a private sector

[166] 'Global Sugar Alliance to Monitor EU Implementation of WTO Sugar Decision' *Global Alliance for Sugar Trade Reform and Liberalization* (6 July 2006) <http://www.globalsugaralliance.org/resources.php?action=viewResource&id=51> accessed 17 August 2013
[167] Ibid.
[168] Bown, *Self-Enforcing Trade* (n 15) 130.

may not be forthcoming in assisting its government, unless the challenge has a direct and substantial implication on a specific industry's or exporter's interest.[169] It is conceivably difficult to convince a non-incentivised industry to bear the cost of litigation when an existing practice (which is challenged at the WTO) does not directly and significantly affect an industry's interest.[170] An official states that 'the extent to which an industry can participate here is rather limited and restricted. It is because the challenge has been raised against the government, and it may or may not concern an industry.'[171]

Unaware individuals may often perceive that a WTO challenge is made against a government and not an industry. With this mindset, they may fail to understand and calculate the benefits they can gain if the dispute is won or losses which they might incur if their government is made to withdraw a trade practice. Moreover, it may happen that the industry which is affected from a WTO challenge is not sufficiently-equipped (with the required information, evidence and finances) to provide resource assistance to the government when a challenge arises.[172] Therefore, substantial coordination between government and industry cannot often be observed in cases where a country is acting as a respondent. In such cases, it is more likely that a government will be required to reach out and convince an industry if the government requires its assistance to examine and investigate a measure, or it will be left on its own to manage and finance the entire dispute if the affected industries cannot be convinced. This is a limitation of a dispute settlement partnership, and it can partially be overcome by educating private stakeholders about the benefits of participation and devising ways for incentivising them to participate during defence

[169] Interview with a trade lawyer, White & Case, Geneva (London, 16 May 2013) [Name Withheld]; Interview with Moushami Joshi, Luthra and Luthra (Delhi, India, 21 June 2013); Also see Bohanes & Garza (n 15) 81; Ewing-Chow (n 40) 687.
[170] Ewing-Chow (n 40) 687.
[171] Interview with an official representative, Centre for WTO Studies (Geneva, 11 April 2012).
[172] Ibid. These observations are further confirmed in the interview with an official representative, Fisheries & Fishing Communities in India (Mumbai, India, 17 June 2013) [Name Withheld].

litigations. In addition, there are other challenges which can impede the formation and operation of PPP arrangements.

2.6 PPP Strategies: Potential Challenges and Weaknesses

PPP strategy is not free from weaknesses. Multiple factors operating at a domestic level in developing countries can impede the exchange of resources between the government and industry, or they can restrict the capacity building potential of government-industry coordination. Moreover, undue and unregulated reliance on PPPs can leave a country's national interests susceptible to special private interests. It is therefore important to understand certain challenges and weaknesses of this approach, as these challenges should be examined carefully during the establishment of dispute settlement procedures in developing countries. The first two challenges, i.e., threat of regulatory capture and discriminatory protection of trade interests, are presented as the potential weaknesses of this approach. All other challenges mentioned under 2.6.1, 2.6.2 and 2.6.3 are presented as the impediments that may restrict the formation and effective functioning of PPP systems.

2.6.1 Regulatory Challenges

i. Threat of regulatory capture:

The dispute settlement partnerships should lead to maximum protection of trade interests, but it should not lead to a situation where protection of trade interests injures national interests.[173] However, there may be situations where an industry will have an economic interest the protection of which will not be in line with those of other industries or may not be in line with that of the nation as a whole. The government, in such cases, especially where an industry is

[173] Grossman and Helpman, *Special Interest Politics* (n 100) 31.

funding the action, might find it difficult to reconcile the conflicting interests.[174] Shaffer describes it as a situation where '…. the private sector provides financial support for the hiring of an outside law firm, the private sector's interests may not coincide with the government's perception of the public interest'.[175]

When privately hired lawyers are preparing and presenting a case at WTO and if they are not sufficiently supervised by government officials, they may be inclined to protect special economic interests of their financers at the cost of national interests. Moreover, PPPs could provide greater opportunities for engaging in corruption, bribery or lobbying to business entities and government officials who may seek to protect their respective financial interests.[176] Where a government official weighs financial contributions on a higher scale, a profit-motivated business entity might secure a chance to induce a government action that selectively protects its business interests even at the cost of wide economic, social or environmental interests.[177] In this manner, a privately-funded action can possibly lead to a situation of *private capture* or *corporate regulatory capture* where government officials can be inclined (for various reasons) to uphold private interests at the cost of national interest.[178]

Gene Grossman defines 'corporate regulatory capture' as an interplay between the special interest groups and government organisations that can influence and shape up a nation's foreign

[174] Interview with Government Representative, Brazil [Name and details withheld]; European Commission, 'Guidelines for Successful Public-Private Partnerships' (n 181).
[175] Gregory C Shaffer, Michelle Raton Sanchez Badin and Barbara Rosenberg, 'The Trials of Winning at the WTO: What Lies Behind Brazil's Success' (2008) 41(2) Cornell International Law Journal 383, 474.
[176] Grossman and Helpman, 'Protection for Sale' (n 131) 833
[177] Grossman and Helpman, *Special Interest Politics* (n 100) 241.
[178] Abigail C Deshman, 'Horizontal Review between International Organizations: Why, How, and Who Cares about Corporate Regulatory Capture' (2011) 22(4) European Journal of International Law 1089 [The article demonstrates a situation of corporate regulatory capture with the help of a case study of World Health Organization.]

trade policy to the detriment of the other wider economic and social concerns.[179] These threats could potentially arise due to various regulatory problems including corruption, bribery and lobbying.[180] These regulatory challenges could pose a serious threat to the functioning of PPPs especially in developing countries that have high levels of corruption and poor observance of rule of law. Poor observance of the rule of law in a country can lead to an unsupervised system of governance permeated with various forms of corruption. These impediments could jeopardise the balance between the national interests and private interests, and might consequentially hamper a country's development of international trade in a sustainable manner.[181] This is a potential weakness of PPP approach, since capture of national interests, including wide economic, social, environmental, ethical and welfare interests, by a handful of profit-motivated organisations or individuals is never a winning situation, and effective PPP arrangements should always try to balance such competing interests in the best interests of the nation and industry.

ii. Discriminatory protection of trade interests:

Wealth inequality among different economic sectors, which is a common condition in developing countries, can result in an unevenly organised private sector.[182] The wealthy industries, on one hand, can potentially approach the concerned government officials without any assistance from industry representatives.[183] Moreover, if they have high trading stakes in WTO litigation, they

[179] Problems of bribery, regulatory capture and lobbying emerging from public private partnership elaborated in Grossman and Helpman, 'Protection for Sale' (n 131).
[180] Ibid. Lobbying is defined as the 'pervasive involvement of representatives of special interests in nearly every phase of the legislative process'. [Grossman and Helpman, *Special Interest Politics* (n 100) 5].
[181] Grossman and Helpman, *Special Interest Politics* (n 100); European Commission, 'Guidelines for Successful Public-Private Partnerships' (March 2003) 39 <http://ec.europa.eu/regional_policy/sources/docgener/guides/ppp_en.pdf> accessed 29 July 2013.
[182] Sam Pizzigati, 'To End Extreme Poverty, End Extreme Wealth' *Inequality.org* (27 January 2013) <http://inequality.org/extreme-poverty-extreme-wealth/> accessed 24 September 2013; Soutik Biswas, 'India's Billionnaires and the Wealth of the Nation' *BBC News: India* (12 October 2012) <http://www.bbc.co.uk/news/world-asia-india-19921501> accessed 24 September 2013.
[183] See, for example, the description of *US-Carbon Steel* case (page 285).

will generally have the incentive to play an active role and invest resources that they possess.[184] The partnership procedures can therefore enable resourceful business actors to protect their exporting interests through a privately funded governmental action at WTO. But the same result may not be achieved in cases where the exporting interests of resource-constrained, developing and small scale industries are at stake. Poor industries may find it difficult to organise their resources for representing their trade interests to the government in an organised way.[185] Providing resource assistance to the government can be an unaffordable option for business entities which cannot afford to collect information or 'buy in' the external expertise required for preparation and filing of DSU complaints.[186] The approach may therefore result in 'discriminatory protection' of special economic interests by a government, arguably on the basis of resources possessed by affected business entities.

iii. Conflict of interests:

Conflict of interests between government and industry may impede their interaction while conducting foreign trade disputes.[187] Government is in theory the guardian of national interests and an industry represents special economic interests. The national interests and special economic interests, in all disputes, may not converge and overlap.[188] Protection of one may, at times, lead to the violation of the other. It is therefore argued that the partnership between the two would only be formed where their interests overlap and, therefore, it may not be possible for

[184] Shaffer, *Defending Interests* (n 68) 160 ['Just as in domestic litigation, the haves more likely come out ahead at the international level.']
[185] Interview with an official representative, TEXPROCIL (Mumbai, India, 27 June 2013) [Name withheld].
[186] Shaffer et al, 'The Trials of Winning at the WTO' (n 175) 474 [The authors note the following: 'There may also be divisions within the private sector so that only that portion of the private sector with the means to fund the outside lawyers will be represented.'].
[187] Interview with Anant Swarup, Permanent Mission of India, WTO (Geneva, Switzerland, 12 April 2012); Also mentioned in European Commission, 'Guidelines for Successful Public-Private Partnerships' (n 181) 31.
[188] Bohanes and Garza (n 15) 72. ['The industry might advocate legal positions that do not necessarily correspond to the government's systemic, long term interests.']

them to coordinate and exchange resources if the national interest clashes with the special economic interest of an industry and vice versa. Grossman and Helpman confirm that the exchange of information between government and special interest groups (including business entities) will be hampered in situations where an interest group and policymaker do not share similar objectives.[189] It is therefore important that best practices are pursued at the domestic level to ensure that government actions lead to a balance of interests and that the operation of PPP remains immune from any form of regulatory threat.[190]

2.6.2 An Unorganised and Unaware Private Sector

i. Unorganised private sector:

An "organised private sector" is a vital requirement for the establishment and smooth functioning of the proposed partnership in developing countries.[191] The significance of an organised private sector is two-fold. *First*, it facilitates an industry to represent a wide economic

[189] Grossman and Helpman, *Special Interest Politics* (n 100) 23.

[190] For further details on regulatory capture and lobbying emerging from private participation, see Tony Makkai and John Braithwaite, 'In and Out of the Revolving Door: Making Sense of Regulatory Capture' (1992) 12(1) Journal of Public Policy 61-78; Frederic Boehm, 'Regulatory Capture Revisited – Lessons from Economics of Corruption' (2007) Internet Centre for Corruption Research Working Paper 22 <http://www.icgg.org/downloads/Boehm%20-%20Regulatory%20Capture%20Revisited.pdf> accessed 20 December 2011; 'A Rotten State', *The Economist* (10 March 2011) <http://www.economist.com/node/18332796> accessed 12 April 2012; 'Collusive corruption: Transparency International lifts lid on public-private sector partnership on graft, mining, oil and power' *Mail Online India* (21 March 2012) <http://www.dailymail.co.uk/indiahome/indianews/article-2118406/Transparency-International-lifts-lid-public-private-sector-collusive-corruption-graft-mining-oil-power.html> accessed 12 April 2012. Corruption as a threat further discussed in Dani Rodrik, 'Industrial Policy for the Twenty-First Century' (2004) CEPR Discussion Paper No 4767 <http://ssrn.com/abstract=666808> accessed 18 November 2011.

[191] From an economic perspective, there are multiple factors (such as productivity, work force, economic output, profits, industry size, wage rate and literacy) which determine whether an industry is organised or unorganised. However, the term "organised private sector" or "organised industry" in this thesis is used to refer to an industry that has the following characteristics: 1. Industries that are strongly represented by trade associations, confederations, export promotion councils or chambers of commerce; 2. Industries with established channels of communication and exchange between producers, manufacturers, exporters, importers and their representative organisations; 3. Industries in which the exporters, importers and their representatives are aware of international trade developments, foreign and national trade policies affecting their business interests and the possibility of approaching their governments to address trade grievances. 4. Industries that have the capacity and know-how to gather information and other required resources which may be required for presenting trade grievances in well-substantiated and investigated manner to their governments. For definition of 'organised private sector' as provided in the relevant literature, see chapter three (n 83).

interest in order to influence and convince the government to initiate an investigation or consultation. *Second*, it enables industry representatives to gather and consolidate the required resources possessed by affected business entities. The industry representatives may require these resources to monitor and investigate foreign measures, and to assist the government with the investigation and overall management of foreign trade disputes.[192]

The wealthy businesses, even in the absence of an industry representative, may be able to assist the government with the required resources.[193] But in the absence of an organised private sector representing a broad economic interest, the smaller and resource-constrained firms would generally struggle to convince the government to litigate their trade interests at WTO DSM.[194] If they somehow manage to convince the government, they may not be able to participate effectively and assist the process of dispute settlement. Hence, in the absence of a resourceful and well-connected industry representative, the private sector may not be able to form an effective dispute settlement partnership with the government. As a result, the government might not be able to acquire the capacity required to identify barriers or conduct trade disputes. The situation may ultimately frustrate the aim of the proposed PPP mechanism, i.e., domestic capacity building.

[192] Grossman and Helpman, *Special Interest Politics* (n 100) 103-4. ['An organised group can take advantage of the economies of scale by researching issues centrally and educating its rank-and-file members. The groups also may use the information they gather to win over policymakers…']

[193] See, for example, the case study of India (page 285) where a similar situation was observed in the case of *US – Carbon Steel*.

[194] An official representative from TEXPROCIL, India said that 'we lost one year in convincing the Government of India to initiate consultations with Turkey in the dispute of Turkey-Cotton Yarn. It was due to the fact that we were the only players, without constant support from the companies and confederations, who were going to the Government again and again with various trade issues. It is crucial that the industry should provide support to its trade associations for better protection of individual interests.' {Interview with an official representative, TEXPROCIL (Mumbai, India, 27 June 2013) [Name withheld]}.

The *US-Shrimp*[195] is a case that could not be successfully litigated due to an insufficiently organised private sector community in India.[196] Although the Seafood Exporters Association of India (SEAI) in the case provided some commercial facts to the government during the proceedings at WTO[197], it is contended that those facts were not comprehensive as they were detached from the realities which the fishermen in India faced.[198]

> In the dispute, you have two actors which are structurally very different. In the US, you have an organised shrimp industry which was pushing their government with sound environmental arguments for the protection of their commercial interests. On the other hand, you have a poor, almost illiterate, and not so organised fishery industry in India which had difficulties in approaching its government during the dispute.[199]

This case is a classic instance of 'structural asymmetry' between the fisheries industry in India and the US. The outcome of this case exhibits that an organised and knowledgeable industry is a vital requirement for the effective handling of trade disputes. An effective interaction between an industry and a government is possible only when the private sector is well organised, aware, interconnected and strongly institutionalised. This may not be the case with many industries, especially in developing and least developed countries.[200] Investment should therefore be made in developing the institutional and resource capacity of the private sector by creating

[195] Panel Report, *United States – Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58/R and Corr.1, adopted 6 November 1998, as modified by Appellate Body Report, WT/DS58/AB/R, DSR 1998: VII, 2821.
[196] Interview with an official representative, ICTSD (Geneva, Switzerland, 11 April 2013) [Name withheld].
[197] Interview with an official representative, Centre for WTO Studies (Geneva, Switzerland, 11 April 2012).
[198] Interview with an official representative, Fisheries & Fishing Communities in India (Mumbai, India, 17 June 2013) [Name Withheld]
[199] Interview with an official representative, ICTSD (Geneva, Switzerland, 11 April 2013) [Name withheld].
[200] Bohanes and Garza (n 15) 71. [The authors note that 'the less developed a country is, the less well organized its domestic industry tends to be.']

interconnected and well-funded trade unions, cooperatives, trade associations, chamber of commerce and export promotion councils.

ii. Unaware Private Sector:

The lack of awareness among private sector entities about WTO laws and possible avenues for seeking international trade opportunities is a problem that may impede the formation of effective partnerships between the government and industry.[201] Unawareness about the possibility of approaching the government for the protection of trade interests and benefits which WTO Agreements can potentially extend to business communities can be a common characteristic of an unorganised or institutionally underdeveloped industry.[202] Certain private stakeholders in developing countries may even opine that international trade laws and foreign trade policies are there to protect the interests of the government and, hence, the government should be solely responsible for the handling of WTO related matters. '[T]he private industry players "may simply not know how useful the WTO DSM is", and they may "prefer adapting their businesses to the laws and practices of their trading partners, regardless of whether they are WTO consistent or not".'[203]

With such perceptions, industries tend to distance their special economic interests from the common national interest. Hence, uninformed and unaware attitudes within the private sector may act as a major hindrance to the smooth formation and functioning of PPPs. Lack of communication channels between government and industry, disconnected and inadequately

[201] Interview with an official representative, Fisheries & Fishing Communities in India (Mumbai, India, 17 June 2013) [Name Withheld]
[202] Ibid. Confirmed in Bohanes and Garza (n 15) 80; Hoekman and Mavroidis, 'WTO Dispute Settlement, Transparency and Surveillance' (n 56) 137.
[203] Ewing-Chow (n 40) 693.

organised industry, and paucity of outreach and training opportunities for business communities can lead to this problem.

2.6.3 Weak Governance Framework

i. Weak governance framework with no dedicated units and lack of inter-departmental coordination

Lack of dedicated governmental units responsible for the management of disputes and coordination with industries can further impede such partnerships. Plasai suggests that 'it is practical to have a single mechanism at home that serves as the focal point for coordination among the various actors at the domestic level'.[204] These 'various actors' can include other government departments, industries, civil society organisations, lawyers and permanent mission at WTO. In the absence of a dedicated unit, the government may face difficulties in effectively managing WTO disputes, reaching out to industries for resource assistance, and educating them about the possibility and benefits of coordinated management of WTO disputes.

In addition, it is important to have an inter-departmental component in the domestic handling of trade disputes.[205] Amidst the increasingly multidisciplinary and complex nature of WTO disputes, and in the absence of an inter-ministerial component, a resource-constrained government can impose an undue resource burden on the affected private stakeholders. The Interim Evaluation Report on the Trade Barrier Regulation confirms that public private partnership provisions can impose a high burden of evidential requirements on the affected

[204] Plasai (n 123) 4.

[205] Interview with an official, PMI to WTO (13 April 2013) [Name withheld]; Practical procedures for managing internal coordination between the government departments are suggested in Marie Wilke, 'Practical Considerations in Managing Trade Disputes' (December 2012) ICTSD Information Note 11 <http://ictsd.org/downloads/2013/02/practical-considerations-in-managing-trade-disputes.pdf> accessed 27 September 2013.

industries, and this can seriously discourage them from approaching their government.[206] It is therefore important that the concerned government department should be able to mobilise as much information as possible from the subject-specific departments without imposing an excessively deterring evidential burden on the affected industries.

ii. Insufficient channels of communication and coordination, leading to lack of transparency and confidence

Lack of confidence between the government and industry is another factor that can impede the formation of effective networks between the two.[207] If the governmental authorities are not proactive in disclosing information about ongoing disputes, the system will suffer from lack of transparency and paucity of information exchange. A *secrecy-favouring approach* of a government and consequential *lack of transparency* can act as serious deterrents to the formation of PPPs as industries might be unwilling to share their trade knowledge and information with government entities that might act covertly in relation to such matters.[208] Consequential paucity of information will possibly constrain the ability of a government to analyse, consider and incorporate overall business, national and international perspectives during investigation and decision-making.[209] Smooth conduct of dispute settlement procedures requires a relationship of confidence and trust between government and industry, and this can mainly be possible if there are open channels of communication and smooth exchange of information between the two.

[206] European Commission DG-Trade, 'Final Report: Interim Evaluation of the European Union's Trade Barrier Regulation (TBR)' (June 2005) 51 <http://trade.ec.europa.eu/doclib/docs/2005/october/tradoc_125451.pdf> accessed 25 September 2014.
[207] Bohanes and Garza (n 15) 80.
[208] For an example, see the case study of China (page 197).
[209] Ibid.

2.6.4 Cultural and psychological barriers

Certain cultural barriers can also pose a challenge to the desired engagement of the private sector. For example, a government official observes that the remnants of non-litigious culture in China are still very much engrained in the mindset of business entities and the government officials.[210] Such psychological constraints have, in the past, deterred the affected industries from approaching the government and the governments from litigating issues at WTO DSU. However, China to a large extent has overcome this barrier as it has increasingly filed complaints at WTO DSU and engaged its private sector in the overall process of dispute settlement.

Moreover, governments may have a strict inter-ministerial approach of dealing with WTO disputes and, therefore, may not be inclined to seek explicit (or rather any) resource assistance from industries during WTO litigations. A government may opine that PPPs can result in the overriding of national interests as certain government officials involved in the conduct of disputes may succumb to industry pressures and financial inducements. As discussed above under regulatory challenges, this fear is not unfounded and is based on well-reasoned possibilities of regulatory threats. Moreover, a policymaker may doubt the credibility and reliability of arguments, information and evidential documents provided by an affected industry. Grossman and Helpman explain this issue in the following words: 'We take it that policy-makers accept at face value only those assertions that a lobbyist has reason to make truthfully; otherwise, they discount the claims appropriately in recognition of the groups' bias.'[211] Hence, government officials' cautiousness may deter a smooth flow of information between the public and private sector. However, this obstacle may no longer act as a serious threat to PPP in this era of open

[210] Ibid; Ewing-Chow (n 40) 677.
[211] Grossman and Helpman, *Special Interest Politics* (n 100) 23.

market economies, more so because governments have established certain watchdog provisions to verify the reliability, validity and comprehensiveness of information.[212]

Finally, private stakeholders may fear that partnering the government during active litigation or enforcement may lead to *undesirable trading complications* for their industries as it may further jeopardise their trade relations with overseas trade partners or their governments. If a government has an aggressive or confrontational mechanism for investigating a barrier or launching litigation, or if the procedures of PPP do not grant a right to the participating traders to remain anonymous, *fears of unfavourable retaliation* may further lower the industry's confidence and commercial motivation to seek governmental intervention.[213]

Beside these challenges, the suitability and potential of PPP approaches will also differ from country to country, as they will largely depend upon the domestic conditions within which PPP operates. The next section discusses the impact and relevance of a country's domestic context to PPP approach.

2.7 Domestic Context: Factors Affecting the Success and Failure of a PPP Mechanism

PPP arrangements do not operate in a vacuum. They are deeply embedded in the legal, institutional, political, economic and social environment of a country. Multiple factors, working together or in isolation in a given country can shape and impact the dispute settlement partnerships. For example, the private sector's contribution in a dispute may largely depend upon the nature of the dispute, the cost-benefit analysis of launching a formal action, and the chances of winning and enforcement. If it is a complicated dispute with higher expected litigation cost, or

[212] See, for example, the chapter eight (page 315).
[213] Alfredo C Robles, *The Asia-Europe Meeting: The Theory and Practice of Interregionalism* (London: Routledge 2008) 106.

if the anticipated time frame for the settlement of the dispute is long because the relevant law is unclear or there are no clear precedents, or if a case is being contested against an important or powerful trade partner, the affected industry might prefer to negotiate a settlement or endure the adverse impact of a trade barrier. It may also be reluctant to approach the government if the chances of winning the case are low, or if it is likely that the offending country will not mend its ways even after a favourable award is adopted by DSB because of the small market size and consequential low retaliation capacity of its government (as compared to the market size and cross-retaliation capacity of the offending country).[214] In addition to these factors, other domestic conditions may also have a positive or an adverse impact on the effectiveness of PPP arrangement in a given country. These factors are discussed in the following subsections:

2.7.1 Political, Social and Diplomatic Context

PPPs are deeply embedded in a country's political context. Domestic political forces and the nature of the political set-up in a country can influence the extent to which a government will be likely to protect individual business interests with or without engaging the affected private sector. In democratic countries with multi-party systems, for instance, governments generally are more accountable and responsive to the needs of industries, civil society organisations, media and the society at large. In addition to the political motivation to remain in power, government's responsiveness in democracies may also stem from the fact that special interest groups in certain electoral campaigns provide resources to candidates and parties. They make financial contributions, or provide information and personnel for electoral campaigns, through direct and

[214] Bernard Hoekman, Henrick Horn and Petros C Mavroidis. 'Winners and Losers in the Panel Stage of the WTO Dispute Settlement System' in Chantal Thomas and Joel P. Trachtman (eds.), *Developing Countries in the WTO Legal System* (Oxford University Press 2009) 151 [The authors argue that 'limited scope for credibly threatening retaliation' arising from small market size and economy can act as a key disincentive for the government and industry to bring a matter to DSU.]

indirect circumventing procedures if direct giving is outlawed in a country. However, these contributions do not come for free. The elected governments, in turn, may tend to sympathise with the special interests of their financers.[215] In the US, for example, business groups and corporations are the largest contributors of money in electoral campaigns. They gain an easier access to USTR and can influence their decisions relating to foreign trade matters with the help of Congressmen they have supported during elections.[216]

On the other hand, policymakers in a democratic environment, being in theory accountable to their voters (consumers and society at large), also have reasons to refrain from accepting direct financial contributions for litigating cases at WTO. Grossman confirms that many voters in a democracy might hold their elected representatives in 'disdain' if they 'were to pander to special interests so blatantly'.[217] Shaffer further strengthens the observation by arguing that, in democracies, the 'government leaders will be subject to demands of favoritism from particular economic sectors, whether for demanding protection from imports or government support for exports'.[218] Therefore, governments might be introvert and cautious while forging public private alliances for the protection of business interests, and government officials in that case might be wary of accepting direct or explicit contributions from business entities. This can be illustrated with the help of an example. The Government of India, for example, states in an explicit manner that all WTO disputes are financed entirely by the Government, and that 'no financial assistance is taken from the industry'.[219] However, as it will be seen in the case study, the private sector in India has paid the legal fee of trade lawyers, hired subject matter experts, and purchased

[215] Grossman and Helpman, *Special Interest Politics* (n 100) 8.
[216] Ibid 10.
[217] Ibid 242.
[218] Shaffer and Sutton, 'The Rise of Middle-Income Countries in the International Trading System' (n 23).
[219] The information was requested by the researcher via RTI application dated 17 September 2013. The RTI reply was received on 5 December 2013 vide Document No. 1/27/2013- TPD. [The RTI responses are enclosed as Appendices E]

evidential data from external agencies to assist the government during multiple WTO litigations.[220]

An aware and free media in a democracy can possibly create domestic political pressure upon a government by educating a nation about the adverse impact of the government's failure to initiate a dispute at WTO, or the positive impact of its victory at WTO. For example, during the conduct of *Aircraft* litigations, it became important for the Brazilian Government to win these disputes as the national and international media was extensively covering their developments. The issue had become a popular subject of discussion for the general public as well as academics. These cases were discussed in Brazilian newspapers just as a 'soccer match' is covered and discussed in Brazil, and they therefore became symbolically very important.[221] Mass awareness and resulting expectations of victory at WTO DSU created a domestic political pressure on the government which was planning to campaign for its re-election during these years. Hence, strongly contesting the disputes at WTO with the full engagement of aircraft industry became a strategic part of the government's political campaign for subsequent elections. For these reasons, democratic governments tend to be relatively more particular about balancing successes against failures at international fronts.

The shape and effectiveness of a PPP strategy will also depend upon the nature of political institutions in a country. For example, the inter-governmental set-up at the Commission and the Council in the EU and the political pressure from the EU governments and industries have resulted in a decentralised and fragmented form of dispute settlement coordination.[222] On the other hand, China, with its national, state and provincial system of governance and effectively a

[220] See the case study of India (page 272 and 277).
[221] Interview with Celso de Tarso Pereira, Permanent Mission of Brazil to the WTO (Geneva, Switzerland, 16 September 2013)
[222] See chapter three (page 137).

single political party at the national level, has devised a centralised form of procedures and institutions for coordinated management of WTO disputes. Amidst increasing political decentralisation in China, the management of WTO disputes remains centralised to ensure that state and local authorities' intervention in economic affairs can be kept to the minimum.[223]

The engagement of the private sector may also depend upon the extent to which a government, as a matter of *policy*, would accept its assistance. Governments may want to retain entire control over the dispute settlement process and therefore may prefer to hire their own lawyers and experts. Other governments may be more liberal in this regard and may not have such conservative policy issues. Some governments may accept draft submissions from law firms hired by an industry. Others might be inclined to have more control and draft the submissions themselves, with or without conducting consultations with the affected individuals and their law firms.

The European Commission may accept assistance from private sector lawyers in drafting, but it will generally prepare its final submissions and present its case by itself.[224] On the other hand, Japan has accepted submissions prepared by private sector law firms but has not invited the private sector representatives into the hearing room.[225] In simple cases, several governments may prefer to manage a case without the assistance of (and intervention from) the private sector. But the same governments may, in complicated cases, seek resources from the private sector as and when the budgetary and informational requirements become unaffordable. Hence, governments may have different approaches and policy issues with respect to private sector participation and

[223] See the case study of China (pages 169-174).
[224] Interview with an official representative, DG Trade, European Commission (Brussels, Belgium, 3 June 2013) [Name Withheld]
[225] Ibid.

the extent of PPP in different cases may accordingly vary in relation to the individual policy approach.

Governments may be reluctant to involve industries where a trade conflict has the potential to affect sensitive aspects of national welfare, such as those relating to public policy, health, social or moral considerations, environmental protection and consumer interests.[226] There are several instances where governments have financed an entire dispute because it was strategically important for the country or had sensitive implications. For example, in the case of *EU – Seizure of Generic Drugs*[227], the industry did not participate actively in spite of the fact that the dispute had significant trade ramifications for the pharmaceutical industry in Brazil. Because the dispute had the potential to adversely affect the 'right to health' of the citizens of Brazil, it was considered strategically important and was therefore entirely led and financed by the government.[228]

Furthermore, a government might be under a *political or diplomatic pressure* from the offending country or it may *fear adverse diplomatic retaliation*, especially in cases where the alleged measure is maintained by an important trade partner or a powerful developed country.[229] In the case of *Turkey – Safeguard Measure on Imports of Cotton Yarn Other Than Sewing Thread*[230], TEXPROCIL initially faced difficulties in convincing the Indian Government about the favourable conditions and possibilities of launching a dispute against Turkey and the dispute was

[226] Hoekman and Mavroidis, 'WTO Dispute Settlement, Transparency and Surveillance' (n 56) 133-4.
[227] *EU – Seizure of Generic Drugs in Transit*, WT/DS409, in consultations on 12 May 2010.
[228] Interview with Celso de Tarso Pereira, Permanent Mission of Brazil to the WTO (Geneva, Switzerland, 16 September 2013); 'Right to Health: Seizure of Generic Drugs in Transit to Brazil in European Ports' *CONNECTAS: Human Rights* (14 September 2013) <http://www.conectas.org/en/actions/foreign-policy/news/right-to-health-seizure-of-generic-drugs-in-transit-to-brazil-in-european-ports> accessed 11 November 2013; Sangeeta Shashikant, 'Concerns Voiced at TRIPS council over Seizure of Drugs' *SUNS* (11 June 2009) <http://www.twnside.org.sg/title2/health.info/2009/twnhealthinfo20090602.htm> accessed 11 November 2013.
[229] Hoekman and Mavroidis, 'WTO Dispute Settlement, Transparency and Surveillance' (n 56) 134.
[230] *Turkey – Safeguard Measure on Imports of Cotton Yarn Other Than Sewing Thread*, WT/DS428, in consultations on 13 February 2012.

therefore initiated by the unwilling government after a delay of one year. The government was unwilling because of its reluctance to challenge an important diplomatic and trading partner with which it shares strong bilateral relations, and the consequent possibility of facing untoward trade and diplomatic retaliation.[231] More so, middle income countries, and particularly larger ones, highly depend upon the markets of high income countries for their exporting interests, and they therefore 'need to manage trade relations with HICs [high income countries] to maintain market access'.[232] Hence, diplomatic state of affairs and bilateral trade relations can also have a significant bearing on the approach employed by governments towards the management of trade conflicts.

2.7.2 Economic Context

The cost of litigating a dispute at WTO is substantial, and due to poor *economies of scale*, it becomes even more substantial for the industries that have not been repeat participants in the process.[233] A full blown dispute may take around two years to reach the stage of compliance, and there might also be further delays in that time frame.[234] If an award is not implemented by the offending Member State, the process of compliance may need to be initiated, which may further bring in more uncertainty, time delays, and a call for additional resource investment.[235] Additionally, the remedies available under the WTO laws are prospective and, in practice, non-compensatory in nature. Hence, it is often not an economically viable option for businesses that

[231] Republic of Turkey, Ministry of Foreign Affairs: Turkey-India Economic and Trade Relations <http://www.mfa.gov.tr/turkey_s-commercial-and-economic-relations-with-india.en.mfa> accessed 12 September 2013.
[232] Shaffer and Sutton, 'The Rise of Middle-Income Countries in the International Trading System' (n 23)
[233] Shaffer, 'How to Make the WTO Dispute Settlement System Work for Developing Countries' (n 6) 15; Ewing-Chow (n 40) 684.
[234] For time frames, see WTO Dispute Settlement System Training Module: Chapter 6 <http://www.wto.org/english/tratop_e/dispu_e/disp_settlement_cbt_e/c6s1p1_e.htm> accessed 24 September 2013.
[235] European Commission DG-Trade, 'Final Report' (n 206) 60.

require immediate and predictable gains.[236] For these reasons, the businesses may prefer to divert their exports to a different market than to resort to the WTO mechanisms for regaining the lost market access.

Formation of partnerships for the invocation of WTO DSM may also be an unaffordable option for traders with small *commercial stakes* because the 'litigation costs are more or less independent of the commercial stakes involved in a dispute'.[237] The small trading stakes 'are not sufficiently offset by smaller litigation costs or a reduced need for domestic WTO legal expertise'.[238] Moreover, there would be some trade frictions between industries or traders which are non-litigable and non-continuing in nature and WTO DSU may not be a viable route to address such concerns.[239] A private entity faced with such non-litigable concerns will prefer to resolve them through informal procedures such as negotiations or bargaining, or by approaching the government to raise an issue at the WTO Committee Meetings, or with the help of Alternate Dispute Resolution (ADR) procedures provided in the DSU Agreement through their government. However, the nature and extent of coordination needed during committee meetings, mediation, conciliation, or negotiation will be different from those required during active litigation.

The *structure and ownership of economic sectors* in a country may also define the manner in which these partnerships function. An organised industry comprising powerful trade associations with expert officials that can coordinate with the government on a regular basis can facilitate the

[236] Hoekman and Mavroidis, 'WTO Dispute Settlement, Transparency and Surveillance' (n 56) 135. [The authors note that 'standard remedies that require a member to being its measures into compliance with WTO obligations do not involve any compensation for damage incurred or financial penalties. This reduces the attractiveness of using the system.']
[237] Nordstrom and Shaffer, 'Access to Justice in the World Trade Organization' (n 66) 587
[238] Ibid 593.
[239] Hoekman and Mavroidis, 'WTO Dispute Settlement, Transparency and Surveillance' (n 56) 137.

coordination during monitoring, investigation, negotiations and litigation. Pre-established relations between association officials and government departments can further spur the formation of PPPs as it provides a *trustable* channel of interaction between them.[240] On the other hand, an industry with 'less sophisticated' associations and a 'fragmented industry' with 'small companies' and 'disintegrated representatives' may reduce the capacity building potential of the partnership approach.[241]

Different approaches are required for the deployment of partnership strategies in countries that have *privately owned industries* from the ones that have *state owned industries*. Owing to their democratic set-up, privatised industries and open market economies in the US and the EU, firms and associations 'across both sides of the Atlantic find it quite natural to turn to the governments for help when they encounter trade barriers in overseas markets'.[242] The US and the EU, to further encourage and empower their enthusiastic industries, support and strengthen the dispute settlement partnerships with user-friendly provisions and institutions.[243] However, it is important to note that their procedures of PPP are different from each other, as they have been devised as per their respective political economies. The legal provisions and procedures of interaction in the US employ a 'bottom-up' approach as their industries play a more 'aggressive' and 'proactive' role in dispute settlement. The EU, in contrast, in accordance with its interstate, institutional, legal and administrative set-up, employs a 'top-down' approach as the Commission plays a

[240] Shaffer et al, 'The Trials of Winning at the WTO' (n 175) 67, 80.
[241] Bohanes and Garza (n 15) 83 ['It would make little sense for one individual company to lobby the government to initiate action at the WTO against a trade barrier. Rather, a more rational course of action for that one company would be to adjust to the trade barrier and/or seek other export markets, especially when the company cannot tolerate revenue fluctuations.']
[242] Gao, 'Taking Justice into Your Own Hand' (n 94) 650; Hsieh (n 94) 1021.
[243] See chapter three (pages 115 and 135).

leading 'entrepreneurial' and 'managerial' role in the PPP arrangements and only allows the industries to play a supplementary role.[244]

As a striking contrast to the above-mentioned examples, the government in China commands a distinctively greater role in economic development and the overall operation of commerce in China. The economic sectors in China comprise a complex mix of controlled private companies, quasi-state enterprises and nationally, provincially and municipally controlled state-owned enterprises (SOEs).[245] The government therefore has a greater ability to intervene in the operations of foreign trade through state-owned enterprises, state-controlled industry representatives, or favourable support policies granted to privatised and strategic sectors.[246] Hence, the government would always be the lead partner in dispute settlement partnerships formed in China.

2.7.3 Legislative, Institutional and Administrative Context

The *legislative framework* for handling WTO matters can be very different from country to country. There can be a constitutional set-up where all WTO matters are handled by a single ministry with separate departments handling investigation, private sector coordination and litigation work. Alternatively, different ministries may be responsible for the conduct of WTO matters. For example, in Brazil, the Ministry of Foreign Affairs is the central department responsible for the settlement of trade disputes, though the Ministry of Trade and Industry has

[244] Shaffer, *Defending Interests* (n 68) 6, 149.
[245] In the year 2010-2013, domestic private companies generated around thirty percent of the overall exports in China. Rest of the exports were generated by foreign and state owned enterprises. Moreover, most of the strategic and wealthy economic sectors in China, such as steel, telecoms, oil, energy and finance industry are owned by the State. Derek Scissors, 'The Fall and Rise of Chinese State-Owned Enterprises' [Chinese State-Owned Enterprises and U.S.–China Economic Relations, The Heritage Foundation (1 April 2011)] <http://www.heritage.org/research/testimony/2011/04/chinese-state-owned-enterprises-and-us-china-economic-relations> accessed 20 May 2015
[246] Shaffer and Sutton, 'The Rise of Middle-Income Countries in the International Trading System' (n 23); Scissors (n 245).

also recently assumed more powers in the field.[247] In India, the Ministry of Trade and Commerce is responsible for the overall conduct of WTO disputes, but it has to conduct bilateral or multilateral consultations with other countries through the Ministry of Foreign Affairs. It also has to make a request to the Ministry of Law and Justice for the appointment of trade lawyers.[248] On the other hand, China vests all WTO-related powers in the Ministry of Commerce (MOFCOM) which is responsible for the management of WTO disputes.[249] MOFCOM, with the help of its internal departments (and externally hired professionals), performs its core functions relating to the protection of WTO rights.

Where a single official is responsible for deciding the appropriate course of action after consulting the affected industry, concerns regarding a potentially unfavourable outcome and allegations of corruption and bribery can 'weigh more heavily on [the] individual decisionmaker, especially at the non-political level, for fear of staining his or her personal career by authorizing an unsuccessful dispute'.[250] The responsible official can therefore employ a 'risk-averting' approach and that can influence the extent to which a government can protect its industries' interests through a privately funded action at WTO DSU. If decisions are made by multiple officials and departments, the shared risk of a possible failure and allegations of wrongfully launching a privately funded action may weigh less heavily on the government officials and that may make them more proactive in directly dealing with industries and making confident endeavours to protect their interests. However, a centralised system has its advantages. For example, the availability of a single dedicated department with expert officials responsible for

[247] See the case study of Brazil (page 210).
[248] See the case study of India (pages 252-257).
[249] See the case study of China (page 175). The Ministry was established in 2003, by merging the State Economic and Trade Commission with the Ministry of Foreign Trade and Economic Cooperation (MOFTEC). They were merged because '…the separate agencies could not cope with the market economy mechanism that the WTO mandates.' [Hsieh (n 94) 1016].
[250] Bohanes and Garza (n 15) 83.

the overall management of disputes can, to some extent, foster dispute settlement partnerships as it can make it easier for the industries to locate, approach and confide in the known officials.[251]

Moreover, for a coordinated management of disputes, it is important that the private sector confides in its government and believes that its government will protect and restore its infringed market access interests. A legal provision that can provide participating stakeholders with the right to seek confidentiality of information and anonymity may have a positive impact on building a relationship of confidence.[252] Moreover, a dedicated workforce, well-defined procedures of dispute management and PPP, and a forthcoming approach employed by the designated ministry can be instrumental in establishing and maintaining a relationship of trust and confidence between government and business community in a country.[253] However, the rotation of bureaucrats and the problem of 'brain drain' from government to the private sector can impede the formation of trusted and long lasting government-industry relationships.[254]

More experience in WTO litigation enables the government and industry to understand the requirements of WTO DSM and the actions that are required at the domestic level, and that can further enable them to develop appropriate arrangements for financing disputes and gathering information. Moreover, operation of PPPs also depends upon the qualifications of government officials and their previous experience of dealing with a particular industry. The extent of resource exchange would also depend upon the legal expertise possessed by the concerned government department. If the government department (that is responsible for managing disputes in coordination with industries) possesses foreign trade and WTO litigation expertise, it can

[251] Interview with an official representative, ICTSD (Geneva, Switzerland, 11 April 2012) [Name Withheld]
[252] Bohanes and Garza (n 15) 83 [Authors observe that '…a private company may be unwilling to give the government access to confidential information (sales data, identity of customers, internal accounting, etc.) that would be needed to effectively challenge an anti-dumping order in an export market'.]
[253] Interview with an official representative, ICTSD (Geneva, Switzerland, 11 April 2012) [Name Withheld]
[254] Bohanes and Garza (n 15) 70.

smoothly interact and seek required information from non-State entities. It will also allow the government to prioritise the trade concerns of its industries, conduct meaningful consultations with the private sector, and lead the process of partnership at the domestic and international level. Presence of in-house government lawyers with trade law expertise can also enable the government to oversee the working of trade lawyers and subject-specific consultants hired by industries for the preparation and presentation of a case. Hence, a domestic trade policy community, with knowledge and experience of WTO law, can effectively engage with the affected private sector entities including companies, export promotion councils, trade associations, chamber of commerce, law firms, academics and civil society members.[255]

The bureaucratic structure of the government will also influence the effectiveness and operation of PPPs. The private sector will be more forthcoming if there is clarity, expeditiousness and non-complexity in locating and approaching the government officials that are responsible for coordinating and negotiating with offending country's government, coordinating with industries and the permanent mission, and handling procedures of confidentiality of information, investigation of barriers and overall conduct of disputes.[256] In India, for instance, trade associations and companies are discouraged from approaching the government due to complex bureaucracy and multiple layers of decision-makers before a formal consultation or litigation is launched.[257] On the other hand, private stakeholders in Brazil have benefitted from approachable and dedicated bureaucrats. A Brazilian private sector official observes the following: If we have

[255] Ibid 79.
[256] Interview with an official representative, ICTSD (Geneva, Switzerland, 11 April 2012) [Name Withheld]
[257] Interview with Private Sector Representative (15 June 2013) [Name and details withheld].

a problem, we know whom to approach in the ministry and we can approach that government official by a phone call or an email or a visit to Brasilia.'[258]

These are some of the conditions which may influence PPP systems in a given country. However, the list of factors presented and discussed here are by no means exhaustive. There can be other domestic conditions that may have a significant bearing on the suitability of PPP approach. For example, poor observance of rule of law in a country can impede the formation and functioning of effective PPP mechanisms. Moreover, a system of rights and obligations for a regulated exchange of resources during WTO proceedings may foster these partnerships. Hence, the effectiveness and suitability of PPP systems largely depend upon multiple factors including the political and economic climates, administrative cultures, and institutional and legislative set-ups prevailing in individual countries. In other words, the success and failure of PPP strategies are susceptible to the domestic context of the countries employing them.

2.8 Concluding Remarks

With this conceptual background, the forthcoming chapters will explore the ways in which governments and industries can coordinate during the conduct of foreign trade disputes. A performance review of the existing PPP procedures in China, Brazil and India will provide practical insights for other developing countries. However, prior to the examination of the BIC's domestic handling of trade disputes, the thesis in the following chapter provides a brief review of how the most active DSU users and the masters of PPP approach (the US and the EU) identify and investigate trade barriers, engage in consultations, and prepare and litigate disputes at WTO. The following chapter can be seen as an extension of the theoretical review as it further clarifies the conceptual underpinnings of PPP in the context of WTO DSU. It also provides a brief

[258] Interview with Private Sector Representative (28 October 2013) [Name and details withheld].

literature review which is further developed with the help of primary sources including statutory legislations, official notifications and working reports.

3. DOMESTIC HANDLING OF WTO DISPUTES: THE UNITED STATES & THE EUROPEAN UNION

The United States of America (US) and the European Union (EU) are the most frequent users of WTO DSU.[1] It is argued that this frequent use of WTO DSM can partially be attributed to their closely established networks with their respective private sectors.[2] To support the argument, Shaffer draws a positive correlation between their active WTO performance and the existing channels of public private coordination in the US and the EU.[3] The US and the EU Governments have devised multiple strategies to finance their handling of WTO disputes through a combination of public and private sector resources. Their resource needs are frequently supported by well-organised and resourceful industries engaged in the removal of a trade barrier.[4] Hence, a critical review of their laws, institutions, procedures and practices established for the management of foreign trade disputes will provide an extended theoretical review as it will further clarify the conceptual underpinnings of PPP in the context of WTO DSU.

[1] From the year 1995 to 2013, the United States has acted as a complainant in 106 cases, as a respondent in 121 cases and as a third party in 108 cases at WTO DSU. For more information, see World Trade Organization, Member Information: The United States of America <http://www.wto.org/english/thewto_e/countries_e/usa_e.htm> accessed 27 January 2014. The European Union, from the year 1995 to 2013, has acted as a complainant in 90 cases, as a respondent in 77 cases and as a third party in 138 cases at WTO DSU. For more information, see World Trade Organization, Member Information: The European Union <http://www.wto.org/english/thewto_e/countries_e/european_communities_e.htm> accessed 27 January 2014.

[2] Gregory C Shaffer, *Defending Interests: Public-Private Partnerships in WTO Litigation* (Brookings Institution Press 2003); Gregory C Shaffer, 'How to Make the WTO Dispute Settlement System Work for Developing Countries: Some Proactive Developing Country Strategies' (March 2003) ICTSD Resource Paper No 5, 5-11 <http://ictsd.org/downloads/2008/06/dsu_2003.pdf> accessed 18 July 2012.

[3] Active participation of the US and the EU at WTO DSU after the establishment of their PPP mechanisms *vis. a vis.* other nations has been shown in the tabular representation provided in Shaffer, *Defending Interests* (n 2) 73, 157.

[4] The multinational firms in the US and the EU follow WTO law and foreign trade practices which concern their trade interests. While trading across borders, they are often caught up in situations where a foreign trade practice injures their legitimate trade interests. In such situations, they have commonly approached their governments to seek the removal of trade barriers. They have partnered the government when their estimated benefits from the removal of a foreign trade barrier have been greater than the estimated litigation costs. See Neil Komesar, *Imperfect Alternatives: Choosing Institutions in Law, Economics and Public Policy* (University of Chicago Press 1994) 8, 68 [The author observes that '[t]he character of institutional participation is determined by the interaction between the benefits of that participation and the costs of that participation. ...Interest groups with small numbers but high per capita stakes have significant advantages in political action over interest groups with large numbers and smaller per capita stakes.']

At the same time, it is important to note that developed countries are not the focus of this study, and an examination of the US and the EU dispute settlement and partnerships mechanisms in this chapter should not suggest that the domestic provisions of the US and the EU, however effective or workable in their respective jurisdictions, can be suitably adopted by developing countries. The conditions and needs of developing countries are different from those of developed ones, and therefore, the laws, institutions and procedures of developed countries may not produce similarly positive results in developing countries. However, a review of the dispute settlement mechanisms and practices established by the US and the EU are relevant for answering the research question as it illustrates different approaches, including the use of PPP arrangements, which have strengthened their participation at WTO DSU.

More importantly, they have formalised the procedures of coordination between their public and private sectors. The US and the EU are therefore important examples useful for understanding and examining the formal systems of PPP as against the informal ones. Moreover, the importance of this chapter stems from the fact that it conducts a brief literature review of the research topic. The existing literature has, at length, examined the US and the EU's handling of WTO disputes, their domestic procedures, and the ways in which the governments and industries have coordinated during WTO disputes.[5] Hence, in light of the available literature, this chapter will briefly summarise their formal provisions and practices of dispute settlement and government-industry coordination. For the readers' convenience, the chapter will also briefly describe the manner in which the formal provisions have been utilised during selected WTO disputes. More importantly, this chapter will investigate the effectiveness of the formal PPP

[5] Shaffer, *Defending Interests* (n 2); Shaffer, 'How to Make the WTO Dispute Settlement System Work for Developing Countries' (n 2); Mesut Aydin, 'WTO Dispute Settlement Mechanism and Developing Countries: Lessons for Turkey' (June 2007) Fletcher School of Law and Diplomacy, 23-24 <www.ekonomi.gov.tr/upload/BF09AE98-D8D3-8566.../Mesut_Aydin.pdf> accessed 15 June 2010.

provisions in the US and the EU. The main significance and originality of this chapter, besides providing an extended conceptual analysis and a brief literature review, will lie in its attempt to answer the following questions:

1. Have the private sectors in the US and the EU frequently invoked the formal PPP provisions (Section 301-310 US Trade Act 1974[6] and EU's TBR[7]) for the protection of their trade interests?
2. Have these provisions been instrumental in the formation of public private coordination during the settlement of trade disputes?
3. Are there any problems with the formal provisions which might have dissuaded their respective private sectors from approaching their governments? If so, what are these problems?
4. Which features of the US and the EU's formal systems have cost-effectively enhanced their dispute settlement capacity, and which ones have been ineffective or problematic?

[6] See n 19.
[7] See n 130 and 131.

3.1 The United States

The United States is the first Member State under the GATT and the WTO trading system which has established legal and institutional provisions for the facilitation of PPPs during the handling of WTO disputes. It is the first Member State which has granted petitioning rights to its private individuals in the event where a foreign practice impedes their trade interests. Its legal and institutional frameworks devised for the handling of foreign trade disputes are described below.

3.1.1 Institutional Framework

The United States Trade Representative (USTR) is the primary government authority responsible for the management of foreign trade disputes and overall WTO participation of the US.[8] The Act of 1998 has shifted Presidential responsibilities for implementing actions under Section 301 (Trade Act 1974) to USTR.[9] USTR is therefore an institutional interface between the government and the private individuals seeking to remove unfair trade barriers. It receives and examines petitions filed under Section 301, it investigates those that are legitimate, and it decides the appropriate course of action for the removal of foreign trade barriers.[10]

The government has devised several advisory channels to enhance the communication and information exchange between USTR and the private sector. One such interface is the Private Sector Advisory Committee. The Advisory Committee provides commercial information and advice to the US Government with respect to the private sector's positions of bargaining and

[8] For details on the composition, structure and functions of USTR, see United States Trade Representative: Mission of USTR <http://www.ustr.gov/about-us/mission> accessed 28 January 2014.
[9] USTR is the competent authority under US Trade Act 1974, ss 301-310. It is obliged to function under specific directions of the President. [Omnibus Trade and Competitiveness Act of 1988, Public Law No 100-418, 102 Stat 1107 (23 August 1998), s 1601].
[10] For details, see Aydin (n 5) 23-24; Greg Mastel, *American Trade Laws After the Uruguay Round* (ME Sharpe 1996).

negotiating objectives.[11] The Industry Trade Advisory Center (ITAC) is another body which provides a forum where government can interact with trade representatives from different industries.[12] In addition, the US Congress has devised a system of trade policy advisory committees that consists of 26 advisory committees appointed jointly by USTR and the Cabinet Members.[13] Different subject areas of international trade are allocated to these advisory committees.[14] With the help of this inter-ministerial committee system, USTR enjoys the advantage of securing need-based information, advice or expertise with respect to different areas of trade law.

The US has further strengthened its inter-ministerial handling of international trade disputes with what it claims is 'a "whole-of-government" approach'.[15] With the establishment of the Interagency Trade Enforcement Center (ITEC) in 2012, USTR can now benefit from the trade expertise and resources possessed by different government departments.[16] ITEC is empowered to form an 'expanded team of experienced trade litigators, language-proficient researchers, subject-matter experts, and economic analysts' to work together on specific trade matters.[17] ITEC can also assist USTR in handling Section 301 petitions through additional research and information-

[11] Office of the United States Trade Representative: Mission of USTR <http://www.ustr.gov/about-us/mission> accessed 12 February 2014.
[12] ITAC comprises sixteen industry trade advisory committees and over three hundred industry representatives. Jointly managed by the US Department of Commerce and USTR, ITAC is established to strengthen the government-industry consultation and inter-industry coordination. [Office of the United States Trade Representative, Intergovernmental Affairs, Advisory Committees: Industry Trade Advisory Committees (ITAC) <http://www.ustr.gov/about-us/advisory-committees/industry-trade-advisory-committees-itac> accessed 12 March 29014].
[13] Office of the United States Trade Representative: Mission of USTR <http://www.ustr.gov/about-us/mission> accessed 12 February 2014.
[14] Depending upon the allocated subject-matter, each committee is managed jointly by USTR and its subject-specific government department [Ibid].
[15] Office of the United States Trade Representative: Interagency Trade Enforcement Center <http://www.ustr.gov/trade-topics/enforcement/itec> accessed 12 February 2014.
[16] ITEC was established on 28 February 2012 with the Presidential Executive Order 13601. For more information, see n 15.
[17] Ibid.

gathering across concerned government departments during the Section 301 investigation and consultation phase.[18] ITEC therefore has the potential to serve as a forum for expertise building, information-gathering, inter-agency coordination and monitoring at the domestic level.

With the Advisory Committee, Advisory Center and Interagency Center, the US has provided multiple forums to enhance interaction among various government departments and between the government departments and industries.

3.1.2 Legal System

With the introduction of Section 301 procedure (Sections 301-310 of the US Trade Act 1974)[19], the United States has provided a legal gateway for the private sector to access governmental processes.[20] In the words of Shaffer, 'Section 301 constitutes a specific legal provision for private solicitation of public assistance on trade matters.'[21] The provision enables individual entities to petition USTR if and when a foreign measure injures their trade interests.

There are several possible steps and legal provisions through which a Section 301 petition can proceed. These steps are in consonance with the WTO dispute settlement stages examined with the help of a PPP model in the previous chapter.[22]

1. Administration and examination of petition: Any interested person[23] (most commonly a commercial entity) can file a petition with USTR to convey to the Government that its

[18] Ibid.
[19] Trade Act of 1974, Public Law No 93-618, 88 Stat 1978, 19 USC Ch 12, § 2411-2420 [As Amended Through Public Law No 112–208, Enacted 14 December 2012]. Full text at <http://uscode.house.gov/download/pls/19C12.txt> accessed 15 October 2012 [Hereinafter, the Act will be referred to as 'Trade Act 1974' in the thesis.]
[20] International Trade Administration, Ministry of Commerce <http://www.trade.gov/mas/ian/tradedisputes-enforcement/tg_ian_002100.asp> accessed 27 September 2012; Shaffer, *Defending Interests* (n 2) 19 [Author notes that the US is the first Member country which has legalised the procedures of interaction between the government and industry.]
[21] Shaffer, *Defending Interests* (n 2) 27.
[22] See chapter two (page 73).

economic interest is being infringed by a foreign practice.[24] The petition will often urge USTR to investigate a matter and seek the removal of an alleged barrier. USTR may also identify a possible violation and initiate an investigation on its own.[25] It is legally obliged to administer and preliminarily examine the petitions filed under Section 301.[26]

2. Investigation: On the conclusion of preliminary examination, USTR may either decide to initiate an investigation in the matter or not.[27] USTR enjoys a discretionary power to determine whether an act, policy or measure merits an investigation and further pursuance of a matter.[28] The investigation can be conducted through various procedures which may include public hearings[29], solicitation with concerned industry[30] and inter-ministerial consultations[31].

3. Consultations upon initiation of investigation: Upon the commencement of the investigation under Section 302, USTR can launch a request for bilateral consultation with the offending member country.[32] If the matter is not resolved during the period of consultation (150 days from its commencement or as mentioned otherwise in the agreement), USTR can invoke the formal dispute settlement proceedings provided under the concerned agreement.[33]

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[23] Trade Act 1974, s 301 (d) (9) defines 'Interested persons' as those that '…includes, but is not limited to, domestic firms and workers, representatives of consumer interests, United States product exporters, and any industrial user of any goods or services that may be affected by actions taken under subsection (a) or (b)'.
[24] Trade Act 1974, s 302(a)(1).
[25] Trade Act 1974, s 302(b).
[26] Trade Act 1974, s 301(a)(2).
[27] Trade Act 1974, s 302(a)(2).
[28] Trade Act 1974, s 302(c).
[29] Trade Act 1974, s 302(a)(4)(A).
[30] Trade Act 1974, s 302(a)(4)(B).
[31] Trade Act 1974, s 302(b)(1)(D).
[32] Trade Act 1974, s 303(a)(1).
[33] Trade Act 1974, s 303(a)(2).

4. Publication, hearings and internal consultations before determination of action: USTR publishes its determination to initiate (or its statement of reason for non-pursuance of a petition) an investigation in the Federal Register.[34] It is also obliged to publish its determinations regarding the existence of a barrier and the appropriate action it has determined in the matter.[35] In order to prepare for formal consultations and dispute settlement proceedings, USTR seeks advice and information from the petitioner (if any) and appropriate expert committees established under Section 135.[36] USTR provides opportunities to the petitioners and interested persons to present their views and provide information before it makes any determination upon the existence of a barrier.[37] If an expeditious action is required in a matter, public hearings and internal consultations can be carried out after the determinations are made under Section 304(a)(1).[38]

5. Determination of appropriate course of action (Decision-making): After investigation and consultation, USTR determines whether a trade barrier exists or not, and whether it merits an immediate formal or a gradual action.[39] The determinations are made within a prescribed time limit, and they are subsequently published in the Federal Register.[40] Mandatory action requirements are imposed on USTR in cases where the issues involve violation of a "trade agreement" and, generally, the violation of the "international legal rights" of the US.[41] However, USTR enjoys discretionary powers to determine the issue

[34] Trade Act 1974, s 302(a)(3); s 302(a)(4).
[35] Trade Act 1974, s 304(c).
[36] Trade Act 1974, s Section 303(a)(3); s 304(b)(1)(B).
[37] Trade Act 1974, s 304(b)(1)(A).
[38] Trade Act 1974, s 304((b)(2).
[39] Trade Act 1974, s 304(a)(1).
[40] Trade Act 1974, s 304(a)(2).
[41] Mandatory action requirements are provided in Trade Act 1974, s 301(a).

of action in non-violation cases where a foreign practice is either 'unreasonable' or 'discriminatory' and where it 'restricts' US commerce.[42]

6. Implementation of action: The actions determined under Section 304(a)(1)(B) are implemented by USTR within a prescribed time limit.[43] USTR is obliged to undertake softer actions in certain cases that do not merit the invocation of formal dispute settlement procedures but nevertheless affect the exporting interests of a domestic industry.[44]

7. Monitoring foreign compliance: In order to ensure that the US trade rights are enforced, USTR monitors the implementation of measures or agreements undertaken by foreign countries.[45] In the case where an offending country has not satisfactorily implemented a measure or agreement (including WTO Agreements), USTR will determine the appropriate course of action required to be undertaken against the offending member country. [46] Before making any determination upon such appropriate action, USTR consults the petitioners, other industrial representatives and interested persons upon the matter.[47]

8. Other related procedures: After consultation with the petitioners, industry representatives and interested persons, USTR can modify or terminate the action being undertaken under

[42] Discretionary action requirements are provided in Trade Act 1974, s 301(b). Section 301(c) lists the broad category of actions which USTR can undertake u/ss 301(a) and (b). For details, see Mark A Pollack and Gregory C Shaffer (eds), *Transatlantic Governance in the Global Economy* (Lanham MD: Rowman & Littlefield 2001) 100.
[43] Trade Act 1974, s 305(a)(1).
[44] Trade Act 1974, s 305(b).
[45] Trade Act 1974, s 306(a); Monitoring and prioritisation of unfair foreign practices are listed in the Special 301 and Super 301 Reports produced annually by USTR.
[46] Trade Act 1974, s 306(b)(1).
[47] Trade Act 1974, s 306(c).

Section 301.[48] USTR has other obligations which further facilitate the process of public-private solicitation, such as its obligation to provide information to the private sector on request[49], and to issue regulations concerning the filing of petitions, investigation and hearings[50]. In addition, USTR must keep the petitioner informed of all determinations and developments made in a dispute that has originated from a petition filed under Section 301.[51]

These legal provisions create a system of rights and obligations, which directs the interaction and exchange of resources between USTR and the affected private stakeholders at nearly every stage of dispute settlement. The Section 301 mechanism can therefore be described as a specialised legal framework established for the management of foreign trade disputes with the help of public private coordination. In the words of Shaffer, it 'represents a process of public-private collaboration in fact-gathering, strategizing, negotiating, and (potentially) litigating over foreign trade restrictions'.[52] The dedicated legal and institutional systems formalise the formation and functioning of PPP arrangements during WTO dispute settlement procedures, and hence, they confirm the presumption (laid down in the previous chapter) regarding the nature of formal PPP systems.[53]

3.1.3 The US's Political Economy and its Interaction with Dispute Settlement Partnerships

Formation of dedicated legal and institutional provisions and active participation of industries during the handling of trade conflicts can partly be attributed to the nature of political economy

[48] Trade Act 1974, s 307(a).
[49] Trade Act 1974, s 308.
[50] Trade Act 1974, s 309(1).
[51] Trade Act 1974, s 309(2).
[52] Shaffer, *Defending Interests* (n 2)30.
[53] Chapter two (page 63).

in the US. With active democracy and capitalist economy, the Presidential elections in the US are strongly influenced by the privatised economic sector. Protection and expansion of foreign market access are on the priority list of the Presidential Office as the voting share of the ruling party's candidate generally increases with the increase in the election year's gross national product in the country.[54]

Senior officials from powerful companies and high profile trade lawyers have often functioned as the 'leading lobbyists' in the US. The private companies, trade associations and their lobbyists have influenced the decisions of USTR by various political and diplomatic pressures applied through Congressmen and the Presidential Office.[55] The market players in the US receive such political favours because they often are involved in funding or managing electoral campaigns in the country.[56]

The US Congress can exercise significant influence over the functioning of USTR and its management of trade disputes.[57] This is possible mainly because, in accordance with the governance framework, the USTR depends upon Congress for the formulation of its policy goals and other operational requirements such as recruitment, funding and growth prospects.[58] Hence, there is a huge interplay between the political and economic operations in the US, and that interplay influences the nature and operation of dispute settlement partnerships formed in the US. In short, it spurs and shapes public private interaction.

[54] Alberto Alesina, John Londregan, Howard Rosenthal, 'A Model of the Political Economy of the United States (1993) 87 (1) The American Political Science Review 12, 13.
[55] Shaffer, *Defending Interests* (n 2) 38.
[56] For details, see chapter two (page 98).
[57] Shaffer, *Defending Interests* (n 2) 105. [It notes that the Congress Committees can call USTR officials to justify their actions relating to the management of trade disputes. If they are unsatisfied with USTR's response or actions, Congress has the power to issue legislations to force USTR to act in a certain manner with regard to international trade matters.]
[58] Shaffer, *Defending* (n 2) 25.

'We at USTR rely on industry'[59] is a strong explicit acknowledgment of the fact that USTR relies heavily on private resources for the investigation, preparation and litigation of trade disputes. USTR and the private sector, in various landmark disputes, have jointly managed and financed dispute settlement proceedings. The extent of resource exchange, resource interdependency and the manner in which they have coordinated and formed ad-hoc partnerships have varied from case to case.[60] But, as mentioned in chapter two, the private sector has been a constant driving force behind disputes that USTR has litigated at WTO.[61]

Industries, in landmark disputes, have assisted USTR with information-gathering and fact-finding during investigation and litigation phases. For example, in *Korea - Alcoholic Beverages*[62], the US distilled spirits trade association (DISCUS) assisted USTR with fact-finding and market research. They conducted field research and documented a comparative market analysis report which was required to support the litigation. It was subsequently used by USTR during Panel proceedings.[63] In *EC – Bananas III (US)*[64], Chiquita and its private lawyers were engaged in information-gathering and fact-finding activities. The information and evidential documents provided by Chiquita were extensively used by USTR during investigation and litigation of the dispute at the Panel stage.[65]

[59] Pollack and Shaffer, *Transatlantic Governance in the Global Economy* (n 42) 104.
[60] Interview with Niall Meagher, ACWL (Geneva, Switzerland, 11 April 2013).
[61] Interview with International Trade law scholar (9 September 2014) [Name Withheld]; Mark A Pollack and Gregory C Shaffer, *When Cooperation Fails: The International Law and Politics of Genetically Modified Foods* (Oxford University Press 2009) 50.
[62] Panel Report, *Korea – Taxes on Alcoholic Beverages*, WT/DS75/R, WT/DS84/R, adopted 17 February 1999, as modified by Appellate Body Report WT/DS75/AB/R, WT/DS84/AB/R, DSR 1999:I, 44.
[63] Shaffer, *Defending Interests* (n 2) 48.
[64] Panel Report, *European Communities – Regime for the Importation, Sale and Distribution of Bananas*, Complaint by the United States, WT/DS27/R/USA, adopted 25 September 1997, as modified by Appellate Body Report WT/DS27/AB/R, DSR 1997:II, 943.
[65] Shaffer, *Defending Interests* (n 2) 48.

Moreover, large multinational firms in the US have hired international law firms for the preparation and filing of Section 301 petitions. They have also hired law firms to assist USTR during investigation, consultations, preparation and litigation phases.[66] On several occasions, these law firms have been directly involved in the litigation proceedings in Geneva. At other times, privately hired law firms have assisted the team of government lawyers presenting a case at the WTO.[67] For example, in *Japan — Film*[68], Kodak (the petitioner under Section 301) hired Dewey Ballantine to assist USTR with the preparation of briefs and Panel submissions.[69] In *Korea - Alcoholic Beverages*, the US based distilled spirit associations hired Michael Hathaway of Nall, Frazier & Hathaway to assist USTR in the matter. In the *EC-Bananas* case, Chiquita hired Carolyn Gleason of McDermott Will & Emery to provide USTR with overall legal assistance during preparation and litigation of the case**.**[70]

In practice, the formal procedures of partnership in the US have frequently been influenced by informal approaches such as lobbying and political campaigning. On several occasions, the industries have exerted Congressional pressure to convince USTR to initiate an investigation or litigate a matter at the WTO.[71] For example, in the *EC – Hormones (US)*[72], the trade associations actively lobbied the Congressional representatives to exert pressure on USTR to initiate a legal battle at the WTO.[73] Subsequently, they (most prominently, the American Meat Institute, the

[66] Interview with Niall Meagher (n 60).
[67] Interview with International Trade law scholar (n 61).
[68] Panel Report, *Japan – Measures Affecting Consumer Photographic Film and Paper*, WT/DS44/R, adopted 22 April 1998, DSR 1998:IV, 1179.
[69] Shaffer, *Defending Interests* (n 2) 38; Christian Tietje and Karsten Nowrot, 'Forming the Centre of a Transnational Economic Legal Order? Thoughts on the Current and Future Position of Non-State Actors in WTO Law' (2004) 5(2) European Business Organization Law Review 321, 338.
[70] Shaffer, *Defending Interests* (n 2) 48; Tietje and Nowrot (n 69) 337.
[71] Empirical analysis conducted by Shaffer in *Defending Interest* (n 2).
[72] Panel Report, *European Communities - Measures Concerning Meat and Meat Products (Hormones)*, Complaint by the United States, WT/DS26/R/USA, adopted 13 February 1998, as modified by Appellate Body Report WT/DS26/AB/R, WT/DS48/AB/R, DSR 1998:III, 699.
[73] Shaffer, *Defending Interests* (n 2) 39.

National Cattlemen's Beef Association and the US Meat Export Federation) were engaged in campaigns for gaining countrywide support to convince USTR to retaliate against the EC for its failure to comply with the WTO Appellate Body's ruling.[74]

Pollack and Shaffer have clearly concluded that the US Government, in the case of *EC – Approval and Marketing of Biotech Products*[75], interpreted their international legal obligations in a manner which was favourable to the interests of the US farmers and biotechnology industry.[76] In *Japan – Film* case, the rumour was that USTR would have preferred not to pursue the case but it was persuaded by the affected private company to litigate the dispute at the WTO.[77] Hence, it can clearly be seen that the private sector in the US has been actively involved, through formal and informal procedures, in the government's handling of WTO disputes.

Several interesting features of the US's PPP arrangement can be observed in the above discussions.

First, there is a strong, influential and organised private sector community which has the required capacity to engage in the litigation of WTO disputes. There are resourceful sector-specific trade associations which represent the interests of specific industries.[78] For example, the International Intellectual Property Alliance works in coordination with its members to gather information on international intellectual property issues, policies and developments.[79] In the case

[74] Ibid.
[75] Panel Reports, *European Communities – Measures Affecting the Approval and Marketing of Biotech Prod*ucts, WT/DS291/R / WT/DS292/R / WT/DS293/R / Add.1 to Add.9 and Corr.1, adopted 21 November 2006, DSR 2006:III, 847.
[76] Pollack and Shaffer, *When Cooperation Fails* (n 61) 48.
[77] Interview with International Trade law scholar (n 61).
[78] A list of sector-wise trade associations and professional trade organisations based in the US can be accessed at Trade and Professional Associations <http://www.usa.gov/topics/consumer/trade-organizations.pdf> accessed 13 February 2014.
[79] For details, see International Intellectual Property Alliance <http://www.iipa.com/> accessed 10 March 2014.

of *US — Shrimp*[80], the organised shrimp industry in the US was well-equipped to support the government with the required information and evidential resources for litigating the case at the WTO.[81] Utilising the environmental legislations in the US, the industry association provided strong arguments based on environmental issues, and these arguments better enabled the government to successfully litigate the case.[82]

USTR has encouraged this trend by giving priority to the complaints that have been supported by a 'strong' private actor. A 'strong' private actor in the US has been described as an industry that is 'well-organized'[83] and which has the required capacity to 'present a strong case'.[84] This testifies the definition and importance of an "organised private sector", as laid down and explained in chapter two.[85] An additional acknowledgment of its importance is implicit in the fact that the government has supported the organisation of business communities with the help of advisory forums and interactive institutional procedures.

Second, the elements of resource exchange and resource interdependency based on reciprocity (earlier described as the common elements of PPP) can clearly be evidenced from the given examples.[86] USTR, on one hand, receives resource assistance from industries for the protection of their WTO rights. On the other hand, it grants protection to the business interests of the participating (and contributing) industries through consultations, negotiations and dispute settlement procedures.

[80] Panel Report, *United States – Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58/R and Corr.1, adopted 6 November 1998, as modified by Appellate Body Report, WT/DS58/AB/R, DSR 1998: VII, 2821.
[81] Interview with an official representative, ICTSD (Geneva, Switzerland, 11 April 2013) [Name Withheld].
[82] Ibid; Interview with an official representative, Fisheries & Fishing Communities in India (Mumbai, India, 17 June 2013) [Name Withheld].
[83] Shaffer has defined 'well-organized' actors as companies which can effectively operate through trade associations. [Shaffer, *Defending Interests* (n 2) 33].
[84] Ibid.
[85] Chapter two (page 90).
[86] Chapter two (page 64).

Third, the government has established an inter-ministerial procedure for the management of trade disputes.[87] The procedure has the advantage of accumulating subject-specific resources and expertise, as and when required, in a cost-effective manner. Hence, as argued in the previous chapter, an inter-ministerial system of dispute management can be more advantageous for developing countries as it can enable them to optimally utilise the available resources and build the government's resource capacity in a cost-effective manner.[88]

Fourth, the exchange of resources through the formalised Section 301 mechanism has occasionally meddled with informal strategies like lobbying and political campaigning by business entities.[89] Due to these informal approaches, the decisions of USTR can be influenced indirectly and informally by business actors through influential Congressmen's support. Hence, the nature of political economy in the US influences the manner and extent to which the USTR and industries exchange and conduct WTO litigations.

Fifth, the private sector community has often preferred to approach USTR through informal means and procedures.[90] USTR has also encouraged industries to make informal approaches to discuss the scope of their trade problems. It is often USTR that has advised industries on whether to file a 301 petition, and the industries have, in most cases, followed its advice.[91] Hence, the US's PPP arrangements, in practice, are not purely *formal* as they are frequently shadowed and accompanied by informal exchanges. The US example therefore supports the assumption that the

[87] See text to n 15 and 16.
[88] Chapter two (page 94).
[89] For example, see text to n 105 and 106.
[90] Ibid, 31.
[91] Ibid.

formal systems of PPP can overlap and converge with informal procedures of coordination, and it is therefore not possible to draw a clear line of distinction between the two.[92]

3.1.4 Performance Review: Shortcomings & Benefits

With the legal and institutional provisions in place, and with an organised business community able and willing to coordinate with the public sector, has the Section 301 mechanism been frequently utilised? Has it been effective in the settlement of disputes through government-industry coordination? Is the Section 301 mechanism a preferred means of coordination between the industries and USTR?

Literature review and empirical research suggest that the Section 301 mechanism is neither a preferred means of partnership nor a frequently invoked provision.[93] It has rather been considered as a 'weak', 'very infrequently invoked' and an 'ineffective' provision.[94] Two main concerns can be discussed as the key reasons for its infrequent utilization and ineffectiveness:

1. Mandatory Action Requirement: The Section 301 mechanism has a *compulsive element* which is notoriously known as a 'coercive' provision.[95] The mandatory action requirement is invoked where a measure relates to the violation of a bilateral, regional or multilateral trade agreement, or if USTR determines that the petition involves a foreign practice which is unjustifiably burdening or restricting the commerce of the United

[92] Chapter two (page 67).
[93] Interview with Niall Meagher (n 60); Interview with International Trade law scholar (n 61); Walter J Spak and David E Bond, 'Steel workers File Section 301 Petition on China's Support of its Clean Energy Sector' *White & Case: Alerts* (September 2010) <http://www.whitecase.com/alerts-09132010/#.UxRuTuN_uxl> accessed 3 March 2014.
[94] Spak (n 93); Interview with International Trade law scholar (n 61).
[95] Shaffer, *Defending Interests* (n 2) 19.

States. In such circumstances which are given u/s 301(a), the provision mandates USTR to invoke formal dispute settlement provisions provided in the concerned agreement.[96]

One of the reasons for the USTR's preference towards informal means could be its possible inclination towards circumventing the compulsive obligations. Any governmental authority will prefer to exercise its rights of scrutiny, investigation and litigation of trade disputes without the fear of losing its discretionary powers or having to undertake an action under the orders of a business entity.[97] That could be the USTR's key reason for not encouraging the industries to directly invoke the Section 301 mechanism.

Since the inception of WTO, the measure has been invoked by the private sector in a very limited number of cases. It was mostly invoked when USTR and the Congress were unwilling to examine or pursue a matter after informal discussions with industrial representatives.[98] The industries in the United States are closely regulated and supported by the government. Hence, industries have normally preferred not to invoke any confrontational procedure which may compel the government to act in a violation case.[99] In other words, industries arguably hesitate in filing Section 301 petitions as they may not want to convey to the USTR officials that "...we have a procedure that takes away your discretion to act and that you have to initiate the dispute for us if the matter meets the requirement u/s 301(a)". The industries will prefer to request the government for an

[96] Trade Act 1974, s 301(a) provides for the conditions in which USTR is obliged to take a mandatory action. S 301(c) lists the actions which USTR can take in respect of determinations made u/ss 301 (a) and (b).
[97] Interview with International Trade law scholar (n 61).
[98] Ibid; Spak (n 93).
[99] Interview with Niall Meagher (n 60); Interview with International Trade law scholar (n 61).

action but not order the government to act.[100] Therefore, mandatory action requirements of the mechanism have discouraged the industries from invoking Section 301 provisions.

The question of whether the mandatory action requirements should be dropped is not easy to answer as the provision can have a possible advantage. For example, it can empower the resource-constrained or otherwise un-influential industries to assert the mandatory obligations of an unwilling USTR in clear violation cases. Hence, its possible benefits need to be weighed against its argued disadvantages while the provision is reviewed for the improvement of its future utilisation.[101]

2. Evidential Requirements and Resource Dependency: The provisions of Section 301 have imposed an *evidential burden* on the petitioners. The formal provisions have laid down specific requirements for the filing of 301 petitions.[102] The petition has to be drafted in a given manner, and it must accompany the information and evidence required to support the allegations made.[103] Presentation of factually supported and legally examined documents has become a 'pre-requisite' for the examination and investigation of 301 petitions. The difficulty of collecting the information and evidential documents at the preliminary stages of a dispute may therefore hinder the filing of formal petitions. The expense involved in preparing the petitions and the supporting evidential documents may

[100] Ibid.
[101] Interview with Niall Meagher (n 60) ['It is not possible to say with certainty whether the US Parliament would approve the mandatory action provision if the 301 mechanism is subject to review today.' The interview suggests that there is a clear scope for reviewing the mechanism.]
[102] Trade Act 1974, s 309(1).
[103] Trade Act 1974, s 302(a)(1); Richard Cunnigham, 'Trade Law and Trade Policy: The Advocate's Perspective' in Alan V Deardorff and Robert M Stern (eds), *Constituent Interests in U.S. Trade Policies* (University of Michigan Press 1998) 282 [It notes that 'a petitioning company or industry must develop the facts necessary to demonstrate the existence and effect of foreign unfair practice'.] Presently derived from Shaffer, *Defending Interests* (n 2) 30.

also be substantial. In addition, the amount of private sector resources required for the conduct of formal dispute settlement proceedings can be substantial.

USTR officials have explicitly confirmed that a Section 301 investigation will mostly be set in motion if the affected industry is able and willing to support the process of investigation and dispute settlement. USTR's resource dependency upon the industry has been criticised by Sylvia Ostry. In her words, 'America does not have a trade policy. It has clients.'[104] It is also alleged that the US Government selectively protects the interests of wealthy business entities which can return this favour with substantial consideration. The *EC-Bananas* case has been given as an example to support this allegation. Carl Lindner, Chiquita's president, was a major donor to the Democratic and Republican parties in 1998. He enjoyed Congressional and executive support and this, arguably, made it easier to convince USTR to litigate the case at the WTO.[105] Similar favourable protection was allegedly accorded to the exporting interests of other powerful business interests in the US, such as Kodak's film, Cattlemen's beef and Pfizer's patents.[106] The discretionary powers of USTR to investigate a petition, coupled with its resource expectations and the explicit practice of being funded by the private sector supports the allegation as these reasons can exacerbate the possibility of discriminatory protection of private interests by USTR.

These discussions confirm the arguments raised in the previous chapter, i.e., Section 301 mechanism can be used by the resourceful business actors, but the resource-constrained, non-influential and small scale industries may not be able to utilise the mechanism in a

[104] Ibid, 23.
[105] Interview with International Trade law scholar (n 61).
[106] Shaffer, *Defending Interests* (n 2) 24.

similarly advantageous manner. This is because they may not be able to meet the evidential requirements at the time of petitioning the government. They may also not be able to provide additional resource assistance to the government during the conduct of dispute settlement proceedings.[107] As a result, it could be argued that the Section 301 mechanism is a tool prepared exclusively for the powerful, resourceful industries in the United States.

A similar situation of discriminatory protection of interests may also arise when the resources are exchanged in the absence of a formal law or regulation, but the informal nature of exchange may allow some flexibility, leniency and waiver in respect of the resource-demanding obligations imposed on the private complainants. Hence, the formalisation of evidential requirements may have a higher probability of hampering the resource-constrained entities' access to governmental processes. However, it could be counter-argued that the chances of discriminatory protection of interests in the case of formal PPP system may be mitigated due to its in-built regulatory provisions allowing for constant supervision and monitoring of the USTR's handling of trade disputes.

These arguments and counter-arguments should be considered by policy makers when analysing the dilemma of formal *versus* informal PPP. Due to its possible discriminatory impact and other challenges, should the argument of considering a formal PPP mechanism be abandoned by scholars and policy makers in the future?

It has long been argued that the formal 301 provisions should be dropped in the future as they no longer are the preferred means of partnership and the PPP is now more commonly achieved in an

[107] See chapter two (page 95). Shaffer, *Defending Interests* (n 2) 34. [It notes that the petitioner is required to present a strong legal case supported by factual evidence as USTR will mostly consider and pursue 'winning cases'.]

informal manner in the US.[108] However, the formal mechanism has certain advantages that should not be overlooked.

First, the provisions can guide petitioners and other interested non-State entities on how to approach the relevant government division through prescribed procedures and required documentation.[109] With the publication and public hearing requirements, the formal provisions also have awareness building potential, and they can arguably bring the public and the private sector together in a more transparent and unambiguous manner. Better transparency can be achieved as the public and private sector participants have a set of rights and obligations coupled with remedial provisions that are known to all participants and interested parties. The system can also reduce ambiguity and enhance predictability as the parties can refer to the statute whenever they need guidance in respect of dispute settlement procedures or coordination related aspects.

Second, the formal provisions may also be advantageous because they confer a right to the industries to approach the government if their business interests are infringed by a foreign practice.[110] The right can assist those small and medium level enterprises and associations which are not otherwise influential or resourceful enough to approach or influence USTR or Congress.

Third, the USTR's discretion to scrutinise, administer and investigate the petitions should arguably reduce the fears of mandatory action requirements.[111] A mandatory action requirement would only take birth if USTR administers a complaint and if it decides to investigate the matter.[112] Hence, it will not be entirely fair to say that USTR is dictated to by the industries in

[108] Ibid, 56.
[109] This is provided in Trade Act 1974, s 309(1).
[110] Trade Act 1974, s 302(a)(1).
[111] Trade Act 1974, s 302(a)(2).
[112] Trade Act 1974, s 301(a); Shaffer, *Defending* (n 2) 31. [It notes that there is a 'gaping hole in the procedure, since USTR retains discretion regarding whether to start an investigation in the first place'.]

certain violation and other matters, as the former enjoys the power to reject petitions (on several grounds including insufficient evidence and lack of industry's support) *before* finding violations or other circumstances mentioned u/s 301(a).

Fourth, Section 301 has devised multiple transparent channels for interaction and information exchange between the government and affected industry representatives with the help of several provisions including private sector consultations[113], publishing requirements[114], calls for public comments and public hearings[115]. Such public-private solicitation and transparency provisions have ensured and strengthened a regulated exchange of resources between the two actors. These arguments militate in favour of retaining Section 301 mechanism. However, it is important that the given obstacles are addressed by the government and the private sector together so that the mechanism is better utilised in the future.

In the light of these advantages and disadvantages, it may be concluded that the nature of the Section 301 mechanism and the discussed institutional framework can provide an interesting example for the developing world. The experience of the US (especially in terms of the establishment of a formal PPP mechanism, the institutionalisation of PPP, litigation of landmark disputes with the help of formal and informal procedures, and the weaknesses and benefits of its formal procedures) can act as a catalyst for the future researchers and policy makers of developing countries which are aiming to strengthen their WTO participation capacity.

[113] Trade Act 1974, s 303(a)(3); s 304(b)(1)(B).
[114] Trade Act 1974, s 302(a)(3); s 302(a)(4); s 304(c).
[115] Trade Act 1974, s 304(b)(1)(A). Interview with an official, ICTSD (n 81) [The interviewee states the following: 'Probably, a lot can be learnt from the US system of dispute management, as USTR has the obligation to publish, hold private consultations and public hearings, and issue calls for public comments.']

3.2 The European Union

The EU's PPP mechanism presents another example of a formal system which at times overlaps with informal procedures of coordination and exchange. The EU's Common Commercial Policy has established laws, regulations and institutions which have facilitated private and public sector officials during the management of market access problems. The European Commission has also employed certain informal procedures for public-private coordination and settlement of trade disputes. These formal and informal procedures have undergone significant changes over time.

The following sections briefly describe and examine the existing institutional and legal provisions in the EU that are established for the management of foreign trade disputes.

3.2.1 Institutional Framework

The counterpart to USTR in Europe is the Directorate-General for Trade at the European Commission.[116] It is the primary governmental authority responsible for the management of foreign trade disputes and the overall WTO participation of the European Union.[117] The WTO Dispute Settlement Unit at the Directorate General for Trade is the primary division responsible for the handling of WTO disputes. It investigates the petitions filed by private individuals and determines whether a legitimate complaint is being made, and whether it requires any further action.

In 1996, the EU's Market Access Strategy was established to ensure that multilateral and bilateral agreements are enforced, and the EU's foreign market access is protected and

[116] European Commission: Trade <http://ec.europa.eu/trade/> accessed 27 September 2012.
[117] European Commission, 'How the EU Works with the WTO' <http://trade.ec.europa.eu/doclib/docs/2013/april/tradoc_150988.pdf> accessed 19 March 2014.

enhanced.[118] The Market Access Unit was established (under the Office of DG Trade) to implement the Strategy. The Strategy identifies foreign trade barriers, prioritises them and devises procedures for their removal. The Strategy has a clear commercial outlook, and it was officially launched at a business symposium with major EU business actors as the main participants.[119] As its operational tool, the Market Access Database was created to ensure that information on tariffs, barriers, import formalities and documentary requirements can be made readily available to business communities and the EU Governments.[120] The online publication of the database has enabled the Commission, the European Member States and the businesses to gather the most updated information in a timely manner.[121] In addition, the Market Access Advisory Committee has been established to perform an advisory function, and it comprises representatives from the EU Member States and the Commission. Since 1996, the Market Access Strategy has undergone significant changes, and the present main focus of the revised Strategy is the formation of PPPs for the effective identification and removal of trade barriers.

A more strengthened 'Market Access partnership between the Commission, Member States, and business, based on extensive public consultation', is the new strategy for achieving better foreign market access.[122] It is also acknowledged that the '[f]ailure to improve coordination will make it

[118] Commission, 'The Global Challenge of International Trade: A Market Access Strategy for the European Union' (Communication) COM (96) 53 final.
[119] Directorate-General I Press Conference, 'EU Launches New Market Strategy' (*Eurocom Monthly Bulletin,* December 1996) <www.eurunion.org/news/eure-com/1996/ecom1296.htm> [presently derived from Shaffer, *Defending Interests* (n 2) 68].
[120] European Commission, Trade: Market Access Database <http://madb.europa.eu/madb/indexPubli.htm> accessed 19 March 2014.
[121] European Commission DG-Trade, 'Final Report: Interim Evaluation of the European Union's Trade Barrier Regulation (TBR)' (June 2005) 18 <http://trade.ec.europa.eu/doclib/docs/2005/october/tradoc_125451.pdf> accessed 25 September 2014.
[122] Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions of 18 April 2007 'Global Europe: a stronger partnership to deliver market access for European exporters' (Communication) COM (2007) 183 final; European Commission: External Trade, 'Global Europe: A Stronger Partnership to Deliver Market Access for European Exporters', 3 <http://trade.ec.europa.eu/doclib/docs/2007/april/tradoc_134591.pdf> accessed 19 March 2014.

much more difficult to detect, analyse and assess priority cases, and to achieve systematic success in eliminating barriers.'[123] The Commission has therefore adopted a 'concerted' approach of 'decentralised' partnership where local business communities and experts can help the Commission identify, analyse and eliminate the increasingly complex trade barriers.[124]

The Commission has proposed to decentralise the domestic procedures of dispute settlement to make them more 'effective' and 'transparent'.[125] It is believed that the 'trilateral discussions' at the local levels between the partners will result in better identification of trade barriers, the establishment of priorities for removal of barriers, cost-effective collection of databases and the creation of a network of specialists and experts. It is also assumed that the national embassies and businesses operating in foreign markets are best placed to identify barriers, analyse and provide initial reviews and information regarding the barriers. They are well placed to conduct field research and local searches which may be required to investigate a barrier or to prepare for potential consultation and litigation.[126] Therefore, the Commission proposes to establish local Market Access Teams in foreign (non-EU) jurisdictions.[127] The fundamental idea is to pool resources, contacts and expertise from different jurisdictions.

At the same time, the Commission acknowledges the need to monitor and regulate such decentralised partnerships, and it has therefore established the Market Access Advisory Committee to supervise the forums where Member States, Commission officials and the EU business actors will regularly meet and coordinate their efforts.[128]

[123] European Commission: External Trade, 'Global Europe' 4 (n 122).
[124] Ibid, 3.
[125] The concepts of effectiveness and transparency are defined in chapter two (page 61 and 95 respectively).
[126] Ibid, 9.
[127] Ibid.
[128] Ibid, 10. For importance of regulatory provisions, see chapter two (page 86).

With these institutional and procedural reforms, the EU's PPP has gained a fresh momentum of stimulation and growth. The revised Market Access Strategy has reaffirmed that PPP has an indispensable role to play in the EU's future management of trade disputes.

3.2.2 Interaction of Legal and Political System

Represented as a single entity at WTO, the European Union is a political and economic partnership between twenty eight countries (as on 14 June 2015) from the European continent. One of the main purposes for its establishment is the furtherance of economic cooperation and expansion of foreign market access by way of devising a single 'internal' market in the EU.[129] In order to achieve its economic goals, and to work with the private sector for achieving these goals, the Commission has devised various Commission-industry and government-industry partnership procedures in accordance with its democratic inter-State nature and active market economy. The partnership procedures, including Trade Barrier Regulation, are extensively coded in the EU regulations and notifications as the inter-governmental structure of the EU requires the Commission to function in a completely transparent, predictable and impartial manner. For this reason, the institutional evolution of dispute settlement partnership in the EU is supported by specific laws and regulations.

Dispute settlement partnerships between the Commission and industries can be formed via three alternative routes: a. the traditional route of Article 207 of the Treaty on the Functioning of the European Union ('TFEU')[130], b. the Trade Barrier Regulation (TBR) mechanism[131] and c. informal coordination[132].

[129] The European Union, 'How the WTO Works' <http://europa.eu/about-eu/index_en.htm> accessed 14 June 2015.
[130] Treaty on the Functioning of the European Union [26/10/2012] OJ C326/49 [ex Article 133 of the Treaty Establishing the European Community].

Article 207 procedure is the "traditional route" through which determinations over multilateral/bilateral actions for the removal of trade barriers are made. According to this provision, the Commission is obliged to work under the consultative supervision of the Advisory Committee appointed by the Council.[133] The Committee is known as the 'Article 207 Committee'. The provision requires the Commission to make recommendations suggesting appropriate actions, and to seek the prior approval (by qualified majority voting procedure) of the Council of the European Union to initiate an action.[134] The procedure therefore makes it possible for the EU Member States to restrict the dispute settlement related activities of the Commission. At the same time, it also allows the Member States to represent private commercial interests by raising issues at the Council meetings. For this reason, making recommendations and winning the Council's approval by a qualified majority vote may require a considerable amount of time and political negotiations. Therefore, the Article 207 process has been criticised for its politicised, complex and time-consuming approach as it can give rise to long-drawn political negotiations and economic trade-offs between the Member States before any trade negotiations, implementation actions or retaliatory measures can be initiated by the Commission.[135]

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[131] Council Regulation (EC) No. 3286/94 [22 December 1994] amended by Council Regulation No. 356/95 [20 February 1995] and Council Regulation No. 125/2008 [12 February 2008] and EU Regulation No. 654/2014 of 15 May 2014 (laying down Community procedures in the field of the common commercial policy in order to ensure the exercise of the Community's rights under international trade rules, in particular those established under the auspices of the World Trade Organization) [1994] OJ L349 <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CONSLEG:1994R3286:20080305:EN:PDF> accessed 24 October 2012. [Hereinafter, it will be referred to as 'Council Regulation' in the thesis].

[132] European Commission DG-Trade, 'Final Report' (n 121) 28; European Commission: Trade Barriers Regulation <http://trade.ec.europa.eu/doclib/docs/2013/april/tradoc_150984.pdf>accessed 3 July 2013.

[133] Treaty on the Functioning of the European Union, art 207(3).

[134] The Commission's mandate to make recommendation to the Council before implementing the commercial policy is expressed in the Treaty on the Functioning of the European Union, art 207.

[135] Article 207 procedure cannot be invoked directly by the private sector. The Commission officials also have not utilised this mechanism to form dispute settlement partnerships with the private sector. Hence, this mechanism will not be discussed and examined further in the case study. The case study will focus on the two commonly invoked PPP mechanisms: the informal procedures and the TBR.

The alternative legal route for the management of trade disputes is the Trade Barrier Regulation (TBR).[136] The Council Regulation[137] has provided individuals with the right to petition the Commission if and when their trade interests are infringed by a foreign practice. It is the legal interface between the EU industries and the international dispute settlement procedures of the EU Governments and the Commission. Under TBR provisions, the Commission can directly investigate an administered petition filed by a private entity and can invoke bilateral or multilateral dispute settlement mechanisms without prior approval from the Council. The TBR Committee is the primary unit responsible for the overall management of the entire TBR procedure. Its key functions include the examination and review of complaints, investigation of allegations, bilateral negotiations and determination and preparation of a formal course of action.[138]

The Commission's determination of appropriate action, under TBR provisions, can only be altered if the Council overturns the Commission's decision by a qualified majority vote.[139] The TBR is claimed to be 'an instrument which effectively provides industry with an indirect access to the rights deriving from the WTO Agreements.'[140] A TBR complaint can go through several potential steps, and these steps also reflect the potential role of private stakeholders during the WTO dispute settlement stages as initially outlined and described in the previous chapter:

[136] The TBR provisions are laid down in the Council Regulation (n 131). For details, see Robert M Maclean, *EU Trade Barrier Regulation: Tackling Unfair Foreign Trade Practices* (London: Thomson, Sweet & Maxwell 2006). Also see European Commission: Tackling Unfair Trade <http://ec.europa.eu/trade/tackling-unfair-trade/trade-barriers/> accessed 28 September 2012.
[137] See n 131.
[138] For details, see the sources mentioned in n 136.
[139] Council Regulation, art 13 and 14.
[140] European Commission 'Trade Barrier Regulation: Opening Markets for European Exporters' (2008), 15 <http://trade.ec.europa.eu/doclib/docs/2005/april/tradoc_122567.pdf> accessed 3 July 2013.

1. Filing of TBR Complaints: Individuals, companies, industries, associations or EU Governments can file a TBR complaint.[141] A TBR complaint should be accompanied by preliminary evidence to establish that a trade barrier or an unfair foreign practice is infringing the commerce of European Member State(s).[142] A complaint must address three elements in order to be considered for investigation: a. existence of a measure, b. evidence that a measure is violating international trade rules, c. evidence of commercial injury.[143]

2. Admissibility Review: Once a TBR complaint is filed and accepted, the Commission has to determine whether or not it merits an investigation of the barrier complained of.[144] This procedure is known as 'admissibility review' and is mainly carried out to 'test the water' of the complaint.[145]

3. Consultation Procedure: An Advisory Committee is established for the purpose of internal consultations.[146] Consultations can be initiated at the request of a Member State or on the Commission's own initiative.[147] At this stage, the information pertaining to a dispute is shared and exchanged between the Commission, Advisory Committee and the

[141] See Council Regulation, arts 2(5) and 2(6) for definitions of 'Community Industry' and 'Community enterprise'. Right to file a written complaint provided in Council Regulation, arts 3(1) and 4(1). An EU Member State's right to file TBR complaint provided in Council Regulation, art 6.
[142] Council Regulation, arts 3(2) and 4(2).
[143] Council Regulation, art 10; European Commission 'Trade Barrier Regulation' (n 140) 8-10. The European Commission has prepared written guidelines to explain the process of filing TBR complaints. The guidelines provide a link to a 'model TBR complaint' showing different components that are required to be addressed in the complaint. The guidance is provided at European Commission: Trade Barriers Regulation <http://trade.ec.europa.eu/doclib/docs/2013/april/tradoc_150984.pdf> accessed 3 July 2013.
[144] Council Regulation, art 5(4).
[145] European Commission 'Trade Barrier Regulation' (n 140) 9.
[146] Council Regulation, art 7(1).
[147] Council Regulation, art 7(2).

Member State(s). The findings and information are also referred to and supervised by the Committee established under Article 207 of the Treaty.[148]

4. Notice of Initiation: If the examination concludes that a complaint forms a prima-facie basis of a trade dispute and therefore merits investigation, a 'Notice of Initiation' of investigation is published in the EU's Official Journal.[149] This marks the commencement of a formal TBR investigation. The Commission provides a window of 30 days (from the publication date of the 'Notice of Initiation') to private sector entities to register interests in the TBR procedure.[150]

5. TBR Investigation: The TBR Committee investigates and determines whether a complained measure violates the rules of international trade or injures the commercial interests of its Member States.[151] The Commission communicates the investigation outcome and the determinations made at each stage to the complainants, and they are also subsequently published in the Official Journal of the EU.[152] At this stage, the Commission can coordinate with the EU Member States, the complainant(s), industrial representatives and other economic operators to seek the required information and advice.[153] The Regulation contains a confidentiality provision which assures the complainant that the business sensitive information provided by them to the Commission will remain confidential and will not be revealed without their prior approval.[154]

[148] Council Regulation, art 7(2).
[149] Publishing requirement provided in Council Regulation, art 8(1)(a).
[150] Council Regulation, art 8(1)(a).
[151] Council Regulation, art 8(1)(c).
[152] Council Regulation, art 8(4)(b) provides that the complainants and other interested persons can seek information and updates pertaining to the examination process from the Commission.
[153] Council Regulation, art (8)(2).
[154] Council Regulation, art 9; European Commission 'Trade Barrier Regulation' (n 140) 9.

6. Private Sector Consultation: Upon a written request made by a private party, the Commission can hold public hearings to seek the views of the parties concerned.[155] In addition, private sector meetings can also be organised by the Commission where concerned parties are given a forum to meet and present their views and share information.[156] The Commission, if required, can also seek additional information from the complainants and other interested parties during the course of the TBR procedure. It is not necessary that the stage of private consultation follows the investigation stage or precedes the stage of decision-making. In practice, public private consultations can take place at any stage of the TBR procedure.

7. Preparation of Examination Report: Once investigations are concluded, the Commission prepares a report of its findings that is officially known as an 'examination report'.[157] The report is sent to the Advisory Committee for consideration.

8. Determination and Implementation of Action: The Commission, through TBR procedure, aims to remove the obstacles to trade 'as quickly and as effectively as possible'.[158] The TBR procedure therefore provides a time window to the Commission during which it can try to settle the dispute through informal or softer means. Examination or investigation procedures can be suspended or terminated if the offending Member State has taken steps to eliminate the practice, or if it has agreed to negotiate a settlement with the Commission.[159] If the matter is not mutually settled, the Commission can invoke WTO dispute settlement proceedings or other mechanisms provided under the concerned

[155] Council Regulation, art 8(5).
[156] Council Regulation, art 8(6).
[157] Council Regulation, art 8(8).
[158] European Commission DG-Trade, 'Final Report' (n 121).
[159] Council Regulation, art 11

agreements.[160] Such decisions are made by the Commission after taking into account the inputs provided by the Advisory Committee and the concerned industry.[161] Unlike the mandatory obligations imposed on USTR in violation cases, the European Commission enjoys full discretion in deciding these matters.

With regard to the implementation of commercial policy measures, the Council Regulation has recently been amended by the new International Trade Rules Enforcement Regulation from July 2014. The new Regulation has revised the internal rules and procedures for strengthening the compliance and enforcement of multilateral, bilateral and regional trade agreements.[162] The amended rules have also accommodated the requirements of publication, private stakeholders' consultations, public opinion and confidentiality.[163]

These are the key procedural stages which a formal TBR complaint can go through. It can clearly be observed that the TBR procedure, with the given rules, has provided for a public private solicitation mechanism for the protection of the EU's foreign market access. These laws and institutions, shaped by the political environment of the EU and hence bonded together with stipulated time frames and procedures, provide another example of a *formal* system of PPP.

[160] Council Regulation, art 12; European Commission 'Trade Barrier Regulation' (n 140).
[161] Council Regulation, art 14.
[162] The Regulation (EU) 654/2014 has amended Article 13 (relating to the decision-making procedures) of the Council Regulation 3286/94. The amendment does not affect the TBR procedures, and it is therefore not explained further in the thesis. Regulation (EU) 654/2014 of the European Parliament and of the Council of 15 May 2014 concerning the exercise of the Union's rights for the application and enforcement of international trade rules and amending Council Regulation (EC) No 3286/94 laying down Community Procedures in the field of the common commercial policy in order to ensure the exercise of the Community's rights under international trade rules, in particular those established under the auspices of the World Trade Organization [2014] OJ L189/50. [Hereinafter referred to as 'Regulation (EU) 654/2014'].
[163] Regulation (EU) 654/2014, art 9.

3.2.3 The EU's Political Economy and its Interaction with Dispute Settlement Partnerships

The national institutions of the EU Member Governments (such as national trade gateways and concerned ministries) and the inter-governmental institutions of the EU (such as the European Commission), which function in a parallel, transparent and democratic manner, can occupy the position of key public sector participants in dispute settlement partnerships.[164] Hence, business entities in the EU Member States generally have a choice of multiple public sector avenues to approach if they face a market access problem. Although it is claimed that '...TBR is the only trade policy instrument which gives the right to an individual company to present a complaint to the European Commission'[165], it is not the only route through which an EU industry can, in practice, approach the Commission. The latter can be indirectly approached through the formal Article 207 process, or it can be approached rather informally through national trade units of the individual governments or through other divisions at the Commission.

For initial informal discussion and guidance, firms and associations have frequently approached the subject-specific divisions, dispute settlement unit or the country-specific divisions at the Commission. Industries have also indirectly approached the Commission through their state ministries and national trade gateways.[166] The Market Access Unit has also been their first point of contact in a significant number of trade conflicts, and the Unit in such cases has gathered information and analysed the matters from economic and legal perspectives.[167] For this reason,

[164] For the composition of PPP arrangements, see chapter two (page 67).
[165] European Commission 'Trade Barrier Regulation' (n 140) 6.
[166] Interview with an official representative, European Commission (3 June 2013) [Name Withheld].
[167] European Commission DG-Trade, 'Final Report' (n 121) 28; Interview with an official representative, European Commission (3 June 2013) [Name Withheld] [The interviewee confirms the following: 'The initial interaction, in practice, takes place through an informal process. The Market Access Unit is generally the first point of informal contact between an industry and the Commission….So, the channel through which industry contacts the Commission is not necessarily formal, and is often not formal. It can simply be through an email, a letter, or a meeting'.]

the Market Access Unit has often worked closely with the TBR Team while handling disputes and coordinating with the private sector. In practice, they have functioned in a 'complementary' manner in almost half of the WTO cases that have been handled by the TBR Team.[168]

The Commission invites and encourages the potential TBR complainants to make an initial informal contact with the Market Access Unit of DG Trade.[169] The Market Access Unit provides informal advice on the scope of the matter and on the available appropriate options for dealing with the barrier. If a matter necessitates filing a TBR complaint, the DG Trade's TBR unit can provide further assistance and guidance on drafting and filing to the complainants. However, it remains unclear whether the TBR unit also provides assistance to the potential TBR complainants at the stages prior to drafting and filing a TBR complaint, i.e., when the complainants are examining the barriers or when they are gathering required documentation.

The *Japan — Alcoholic Beverages II*[170] case is an example where an organised beverages industry worked closely with the Commission during pre-litigation and litigation stages. The key private participants included the United Kingdom's Scotch Whisky Association, French associations and the European Confederation of Producers of Spirits. They formed an alliance to work together for the protection of their converging market access interests. Jointly, they conducted market research and gathered information and documentary evidence to assist the

[168] European Commission DG-Trade, 'Final Report' (n 121) 28.

[169] The guidance is available at European Commission: Trade <http://trade.ec.europa.eu/doclib/docs/2013/april/tradoc_150984.pdf> accessed 3 July 2013. Another detailed guidance document issued by European Commission [which is perhaps a response to the findings made in 'Interim Evaluation of the European Union's Trade Barrier Regulation (2005)'] is European Commission 'Trade Barrier Regulation: Opening Markets for European Exporters' (2008) <http://trade.ec.europa.eu/doclib/docs/2005/april/tradoc_122567.pdf> accessed 3 July 2013. It provides guidance on the pertinent areas of TBR, such as: 'what is the Trade Barrier Regulation', 'who can use the TBR', 'how the system operates in practice, and 'how to prepare a complaint', along with a summary of past TBR complaints.

[170] Panel Report, *Japan – Taxes on Alcoholic Beverages*, WT/DS8/R, WT/DS10/R, WT/DS11/R, adopted 1 November 1996, as modified by Appellate Body Report WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, DSR 1996:I, 125.

Commission in litigating the case. The alliance was actively engaged in carrying out international campaigns with foreign industries, civil society organisations and foreign governments to generate pressure on Japan to remove the alleged barrier.[171]

Other landmark cases, for example, the *EC – Bananas III (US)*[172], *EC – Export Subsidies on Sugar (Australia)*[173] and *EC and certain member States – Large Civil Aircraft*[174] cases are remarkable examples where industries have actively participated at all stages of dispute settlement. These examples illustrate public private coordination during WTO litigations in which the Commission was acting as a respondent. Hence, these cases, to some extent, contradict the earlier observation (laid down in chapter two) that PPP arrangements may not work in defence litigations.[175] In these cases, the industries provided the required commercial information to the Commission.[176] The Airbus, the sugar associations and banana producers also hired lawyers to assist the legal team of the Commission.[177] The private lawyers hired by the industry, unlike those in the US examples, were not directly involved in the litigation process. They were not invited by the Commission to join the delegation of lawyers during consultations or Panel proceedings. However, they provided indirect support and additional legal assistance to

[171] Shaffer, *Defending Interests* (n 2) 84, 100.
[172] Panel Report, *European Communities – Regime for the Importation, Sale and Distribution of Bananas*, Complaint by the United States, WT/DS27/R/USA, adopted 25 September 1997, as modified by Appellate Body Report WT/DS27/AB/R, DSR 1997:II, 943.
[173] Panel Report, *European Communities – Export Subsidies on Sugar*, Complaint by Australia, WT/DS265/R, adopted 19 May 2005, as modified by Appellate Body Report WT/DS265/AB/R, WT/DS266/AB/R, WT/DS283/AB/R, DSR 2005:XIII, 6499.
[174] Panel Report, *European Communities and Certain Member States – Measures Affecting Trade in Large Civil Aircraft*, WT/DS316/R, adopted 1 June 2011, as modified by Appellate Body Report, WT/DS316/AB/R, DSR 2011:II, 685.
[175] Chapter two (page 85).
[176] Interview with trade lawyer, White & Case, Geneva (London, United Kingdom, 16 May 2013) [Name Withheld]; Interview with an official representative, European Commission (n 166).
[177] For more information on the participation of Airbus in the *EC and certain member States – Large Civil Aircraft* dispute, see Ozgur Caliskan, 'An Analysis of the Airbus-Boeing Dispute From the Perspective of the WTO Process' (2010) 10(4) Ege Academic Review 1129, 1135; Interview with trade lawyer, White & Case (n 176) [The interviewee confirms that the Banana industry and the sugar associations in Europe were actively pursuing the case with their governments and the Commission.]

the Commission lawyers by engaging in legal research and preparing legal arguments and responses. The Commission lawyers vetted the arguments, evidence and legal analysis provided by the privately hired lawyers, and finalised the briefs and responses themselves.[178]

These examples confirm that, like USTR, the EU Member States and the Commission rely heavily on private sector inputs throughout the procedure of WTO dispute settlement. The concerned business communities remain active throughout and are heavily consulted by the Commission at every crucial stage of dispute management.[179] But how and to what extent the private sector has participated in disputes has largely differed from case to case. The private sector's participation has ranged from meeting and discussing the disputes with the Commission officials, assisting the Commission to prepare actual drafts and responses to Panel questions, providing information and commercial evidence, to hiring of lawyers and financing the lawyers engaged by the governments and the Commission for litigating or defending a case.[180]

Notwithstanding these varied partnership dynamics, the Commission has constantly maintained its own 'policy line' and has not usually allowed the privately hired lawyers to dominate legal preparation or actual presentation of a case at the WTO.[181] An official representative at the Commission confirms that 'the official documents are drafted and finalised by the Commission and not by industry or their lawyers, though they can supply their drafts, information and suggestions which are almost always taken into account.'[182] A trade lawyer, who has worked as a privately hired lawyer with the Commission lawyers on a landmark WTO dispute, confirms the

[178] Interview with trade lawyer, White & Case (n 176); Interview with a trade lawyer (26 June 2016) [Name Withheld]; Interview with an official representative, European Commission (n 166).
[179] For a stage-wise analysis of PPP, see chapter two (page 73).
[180] Interview with a trade lawyer (26 June 2016) [Name Withheld]; Interview with an official representative, European Commission (n 166).
[181] Interview with a trade lawyer (n 180).
[182] Interview with an official representative, European Commission (n 166); also confirmed in interview with Niall Meagher, ACWL (n 60).

observation and cites an interesting example to further explain the relationship between the Commission lawyers and privately hired lawyers.

> In one of the disputes where I was hired by an industry, it was always clear to me that the Commission would check the arguments that I was proposing to ensure that they were in line with their policy interests. Thus, the Commission does not simply puts its stamp on a draft or a brief prepared by a privately hired law firm or an industry.[183]

The Commission is a dominant partner in the partnership, and it has led the process of dispute settlement with the help of its internal legal, political and economic expertise. There have, occasionally, been cases where the Commission has delegated the preparation and presentation of WTO case work to privately hired lawyers, but that has occurred on very rare occasions as the 'Commission does not want to be seen as a hired gun of private industry'.[184] The rationale behind the said dynamic of Commission-industry coordination during dispute settlement, as discussed before, is implicit in the nature of its political economy, i.e., the EU's inter-State governance structure, the internal market demands and the Commission's consequent need to maintain full impartiality between different States and industries.

In addition, several notable features of the EU's PPP emerge from the discussions above.

First, the PPP arrangements in the EU are based on resource exchange, reciprocity and resource interdependency, and these elements can further be observed in the following statement made by an official representative of the Commission:

> [N]one of our disputes are brought without there being an industry that is adamantly behind it and pushing for the case to be taken to the WTO.

[183] Interview with trade lawyer (n 180).
[184] Ibid.

> Governments do not have the resources to monitor the observance of the rules, so they prioritise to take up cases that are strongly supported by private sector.[185]

The observation testifies the preconditions of PPP that are discussed in the previous chapter.[186]

Second, as discussed before, the TBR outcomes and determinations can be subjected to review at the Council's level or the Advisory Committee's level. TBR decisions can be reversed by the Council through qualified majority voting. The examination report of the TBR Committee is reviewed and approved by the Advisory Committee before an action can be initiated bilaterally or multilaterally. The determinations made under the TBR provisions are additionally supervised by the Article 207 Committee. These screening provisions can ensure that the dispute settlement partnership balances the interests of the nation with the private commercial interests. The provisions can ensure that the domestic handling of international disputes by the Commission remains immune from potential regulatory threats that are outlined in the previous chapter.[187]

Third, interaction between the public and private sectors in the EU has frequently occurred through informal channels of coordination.[188] Moreover, the industries have also engaged in lobbying and pursuing other alternative actions along with the ongoing TBR procedure.[189] Hence, it may not be entirely accurate to portray the EU's PPP as a purely *formal* mechanism as it is frequently shadowed by informal exchanges. The EU's PPP example provides further

[185] Interview with an official representative, European Commission (n 166).
[186] Chapter two (page 64).
[187] Interview with an official representative, European Commission (n 166) [The interviewee observes the following: 'Capture may happen if the public interest is allowed to be substituted by the private interest in a trade dispute. But we have a system by way of which the Council of European Union, the Consultative Committee [Article 207 Committee] and the Advisory Committee established under the Council Regulation can ensure that both interests are balanced and protected.'] For discussion on potential regulatory threats, see chapter two (page 86).
[188] Interview with an official representative, European Commission (n 166) [The interviewee observes the following: 'The TBR complaints have never been the private sector's preferred route to access the Commission. In practice, TBR has mostly been used where informal exchanges have not been satisfactorily effective or where the Commission has encouraged an industry to invoke it.']
[189] European Commission DG-Trade, 'Final Report' (n 121) 40.

strength to the initial assumption that formal systems of PPP, in practice, can overlap and converge with informal procedures of coordination.[190] The EU's formal PPP mechanism and the Commission's substantial inclination towards informal means of cooperation bring the EU model closer to the US partnership mechanism.

Fourth, with increased globalisation in commerce and trade, the EU based companies have travelled beyond their national jurisdictions to establish their businesses in various overseas jurisdictions. It therefore became important to introduce mechanisms that could serve as an interface between such companies and the Commission. This requirement was addressed in the revised Strategy as it has proposed the establishment of local Market Access Teams in different overseas jurisdictions. This move towards decentralisation will enable the Commission to gather local information and expertise from companies operating in the jurisdiction of the offending Member States.[191]

3.2.4 Performance Review: Shortcomings & Benefits

With a renewed commitment towards engaging the private sector, and the institutional and procedural reforms allowing the same, the TBR mechanism seems to be occupying a prominent position in the future handling of foreign trade disputes. However, any projections concerning its future performance would be baseless without an evaluation of its past performance. The discussion therefore leads to the following questions: Are the provisions of TBR frequently utilised by the private sector? Is the TBR mechanism a preferred means of coordination between industries and the Commission? Has it suffered from any drawbacks?

[190] See chapter two (page 67).
[191] For discussion on the relationship between the EU's political economy and its decentralised partnership procedures, see chapter two (text to n 222).

From 1996-2008, TBR examination procedures have only been invoked in 25 cases out of 79 WTO cases in which the EU was involved as a complainant. Most of these complaints were filed by individual companies and industry associations.[192] Out of these 25 cases, WTO DSM was invoked only seven times. The other TBR complaints have either resulted in mutually accepted solutions through negotiations and agreements or have been terminated or kept in abeyance.[193] Records further indicate that the TBR mechanism has not been used even once in the last five years (i.e., 2009-2013).[194] An official representative of the Commission also confirms that a very small number of cases have been pursued at Geneva via the TBR mechanism.[195] 'The TBR mechanism is scantly used in practice, and it was last used five years ago.'[196] The figures clearly indicate that the TBR provisions are seldom used.

As discussed earlier, the private sector has preferred to approach the Commission through informal means and the Commission officials have encouraged this practice.[197] This is mainly because the TBR provisions have imposed a 'bureaucratic burden', 'additional procedural complexity' and 'documentary requirements' on the private petitioners and the Commission officials.[198] Moreover, the Commission has successfully managed and settled a majority of trade disputes without the TBR examination procedure.[199] The Commission, therefore, has little incentive and reasons to encourage the use of TBR provisions.

[192] From the year 1996 to 2008, 25 TBR complaints have been filed by four individual companies, nine national industry associations and twelve European industry associations. No complaints were filed by any Member State during this period. For further information, see European Commission 'Trade Barrier Regulation' (n 140).
[193] European Commission 'Trade Barrier Regulation' (n 140) 15-16.
[194] European Commission, 'General Overview of Active WTO Dispute Settlement Cases Involving the EU as Complainant or Defendant and of Active Cases under the Trade Barriers Regulation' <http://trade.ec.europa.eu/doclib/docs/2007/may/tradoc_134652.pdf> accessed 8 April 2014.
[195] Interview with an official representative, European Commission (n 166).
[196] Ibid.
[197] Ibid; Interview with trade lawyer (n 180); European Commission DG-Trade, 'Final Report' (n 121).
[198] Interview with an official representative, European Commission (n 166).
[199] Ibid.

The findings clearly suggest that the TBR mechanism is neither a frequently invoked provision nor a preferred means of coordination between the governments, the Commission and private stakeholders. A number of reasons have been considered for the underutilisation of TBR mechanism.

1. Evidential burden imposed on complainants: The Interim Evaluation Report on the TBR concludes that the provisions impose a high burden of evidential requirements on the complainant(s), and this is one of the key reasons for its underutilisation.[200] The presentation of factually supported and legally examined documents is a pre-requisite for the admissibility and examination of TBR complaints. The difficulty in collecting the information and evidence required to establish an injury, barrier and causation at the preliminary stages of a dispute may act as a major hindrance to the filing of formal complaints. Past users of the TBR have cited that the information needed for establishing adverse trade effects, injury and causation is the 'most burdensome' requirement of the TBR procedure.[201] There have been instances where industry associations and individual companies were discouraged from filing TBR complaints because of the substantial amount of information and evidential documents requested by the Commission officials for initiation of the examination procedure.[202] The expense, efforts and time required to prepare the TBR complaints can therefore be substantial, and this can potentially result in the abandonment of the TBR procedure.

[200] Council Regulation, arts 3(2) and 4(2) r/w art 10 imposes evidentiary requirements on the petitioners. The Regulation also states that a petition can be rejected if these evidential requirements are not met by the petitioners.
[201] European Commission DG-Trade, 'Final Report' (n 121) 51.
[202] Ibid, 44.

Once a complaint is filed, the complainant cannot 'sit back and wait for the European Commission to take the initiative'.[203] The Commission can continue to seek input and resources from complainants throughout the process. Additional evidence, information, translations, economic analysis and legal assistance may be required at any stage by the Commission, especially in complicated and resource intensive cases. In certain complex cases, additional resource assistance may also be required at each and every stage of the TBR procedure.[204] Hence, past users of the TBR have experienced difficulties in meeting the additional information requests from the Commission before, during and after the examination procedures.

However, it is important that TBR complaints should contain sufficient information on the basis of which they could preliminarily be examined. Moreover, affected private stakeholders are, as mentioned in the previous chapter, best placed to gather and provide such information and inputs which are required to investigate a barrier or prepare for consultation, negotiation or litigation.[205]

2. Bureaucratic burden and additional procedural requirements imposed on the Commission: One of the factors contributing to the underutilization of the mechanism could be the Commission officials' overt preference for informal procedures of coordination. An official representative at the Commission states that the TBR procedure is the Commission's least preferred option because it creates 'additional paper work', imposes a 'bureaucratic burden' and entails 'procedural complications'.[206] The official further confirms that the 'support for the additional procedural complexity arising from

[203] Ibid, 42, 51.
[204] Ibid, 51, 52.
[205] See chapter two (page 58).
[206] Interview with an official representative, European Commission (n 166); Interview with trade lawyer (n180).

the formal TBR mechanism remains low because the Commission has limited resources at its disposal'.[207]

In the past, the Commission used to encourage the filing of TBR complaints in cases where intensive fact-finding was required. Gradually, however, the practice has been dropped as the Commission has found it difficult to handle complaints as they add up to the procedural workload of the Commission. Its fact-finding utility has also diminished as the fact-finding and intensive investigation activities are now actively taken up by specialised divisions and local teams created under the Commission. In the words of an official, 'as the fact-finding is conducted automatically by various teams, there is practically nothing that cannot be done without the framework of TBR'.[208]

3. Possible discriminatory impact: It has previously been noted that the TBR has imposed an onerous evidential and resource burden on the past TBR complainants. In addition, complainants, in the past, have hired external lawyers and consultants for the preparation of complaints and required evidential documents. The TBR route can therefore become an unaffordable option for resource-constrained business entities or SMEs which cannot afford to collect information or 'buy in' the external expertise required for preparation and filing of TBR complaints.[209] Moreover, the data shows that the TBR mechanism has mainly been used by the resourceful and well-organised industries in the EU.[210] Hence, it can inferentially be argued that the resourceful companies and trade associations in the

[207] Interview with an official representative, European Commission (n 166).
[208] Interview with an official representative, European Commission (n 166); Interview with trade lawyer (n 180).
[209] European Commission DG-Trade, 'Final Report' (n 121) 46.
[210] The data (covering 1996-2008) indicates that the following resourceful industrial sectors have been repeat users of the TBR procedure: Spirits and wine (five), leather (twice), textiles (thrice), steel (twice), pharmaceuticals (twice), automobile (twice), fisheries, food products and agriculture (five). The quantity (in brackets) reflects the number of TBR complaints the industry has filed from 1996-2008. Data is obtained from: European Commission 'Trade Barrier Regulation' (n 140) 17.

EU are in a comparatively better position to meet the costs required for the invocation of the TBR mechanism. The formalised TBR mechanism can therefore lead to a possible situation of discrimination between resourceful and resource-constrained business stakeholders in the EU. This possible outcome, as discussed in chapter two, is a limitation of government-industry coordination during the settlement of trade conflicts.[211]

4. Lack of anonymity requirements: One of the key discouraging factors for companies (and even trade associations) is that the TBR procedure does not contain strict provisions for maintaining anonymity of complainants.[212] It is seen as 'one of the main reasons why companies, particularly SMEs, are hesitant to make more use of the TBR instrument'.[213] As discussed in chapter two, companies can be discouraged if the provisions do not grant a right to complainants to keep their identity anonymous.[214] TBR complainants are clearly identified in the Notice of Initiations published in the Official Journal and the newspaper reports.[215] TBR complainants can therefore face a real threat of future adverse retaliation by the offending countries or trading partners as the latter can effortlessly locate complainant's particulars.[216] The use of the TBR mechanism could possibly increase if the complaints procedure is made anonymous so that it allows the identity of complainants to be protected upon request.[217]

[211] The limitation is discussed in chapter two (page 88).
[212] This is different to the confidentiality of information and documents provided by complainants which is provided in Council Regulation, art 9.
[213] European Commission DG-Trade, 'Final Report' (n 121) 46.
[214] See chapter two (page 108).
[215] For example, see Official Journal of the European Union, Notice of Initiation of an examination procedure concerning obstacles to trade within the meaning of Council Regulation (EC) No 3286/94, consisting of measures imposed and practices followed by the Eastern Republic of Uruguay affecting trade in Scotch Whisky [2004] OJ C261/03 <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2004:261:0003:0005:EN:PDF> accessed 10 November 2014.
[216] European Commission DG-Trade, 'Final Report' (n 121) 46.
[217] Ibid, 46-47.

5. Complex and time-consuming procedures: The companies, trade associations and industry federations in the EU have found it simpler to approach their national governments or trade gateways instead of invoking TBR procedures which are 'complicated', 'time consuming' and 'costly'.[218] 'The private sector's interest in TBR has gradually diminished as it requires a whole procedure to be carried out before invocation of the WTO. You can add a whole year to an average WTO case that will be swallowed up by the TBR procedure.'[219]

   Time delays can happen on several occasions and for different reasons during the TBR complaints procedure. For example, delay can happen when the Commission officials need additional information for investigation or bilateral negotiation, or when TBR investigations are suspended, or when their determinations are reviewed or questioned by the Council or the Article 207 Advisory Committee. Certain changes are proposed to improve and simplify the procedures of registering, analysing and dealing with TBR complaints.[220] The Commission has proposed to ensure:

   a. that effective information-sharing between industries and the Commission should take place during the management of market access issues;
   b. that all market access complaints should be registered in the Market Access Database, and the Database should be linked to other databases of the EU Member States;

[218] Ibid, 64.
[219] European Commission: External Trade, 'Global Europe' 12 (n 122) ['The biggest gap between the expectations created in 1996 and the results achieved is in the time taken for the successful removal of trade restrictions even in the most clear-cut cases of breaches of multilateral or bilateral agreements. Feedback from businesses makes clear that they need quicker, more responsive action.'].
[220] Ibid, 12-13.

c. that TBR cases should be given a 'unique case number' so that the developments and the status of each case can be tracked by private stakeholders in a regular and transparent manner;
d. that local Market Access teams and overseas EU business actors should work closely with the Commission during the management of market access issues;
e. that the Market Access Database should be simplified and be made more user-friendly to help private stakeholders identify and report problems in a timely manner; and
f. that the reaction times to online, email and postal enquiries should be improved.

The above recommendations outline a number of practical procedures that can also be considered by developing countries to develop domestic procedures for the timely management of market access problems.

6. Confrontational elements and fear of retaliation: The general perception among the EU industries is that the invocation of the TBR mechanism will give rise to a 'severe course of action' which will be handled litigiously by the Commission.[221] Industries, therefore, would normally prefer not to invoke any confrontational procedure which may compel the Commission to act in a given manner and follow a cumbersome procedure. The industries will instead prefer to request the Commission to look into their problem and determine a suitable course of action without a litigious framework.[222] The TBR users have therefore referred to the TBR procedure as the 'last resort' or the 'nuclear option' which has seldom been used by industries facing market access problems.[223] Moreover,

[221] European Commission DG-Trade, 'Final Report' (n 121) 39.
[222] See chaper two (page 97).
[223] Ibid, 39.

foreign governments have perceived the TBR mechanism to be 'confrontational' and 'aggressive'.[224] This negative overseas perception may lead to undesirable trading complications for the affected industries as it may further jeopardise their trading relations with private trading partners or their governments. Hence, fear of unfavourable retaliation, as discussed in chapter two, can also been considered as a discouraging factor for the prospective TBR complainants.[225]

7. The comparative ease of using other alternatives: As mentioned earlier, TBR is not the only route for private stakeholders to approach the Commission. They also have informal, semi-formal and indirect avenues for addressing their market access problems.[226] Industries, enterprises and associations have in fact preferred to use these simpler, expeditious and cost-effective remedies.[227]

   The comparative ease of using other alternatives can be considered as one of the reasons for the underutilisation of the TBR, but it is, by no means, a shortcoming of the TBR mechanism. The industries cannot and should not be discouraged from pursuing the alternative routes for market access protection. The alternative options can, at times, be more suitable, especially in cases where barriers (complained of) are discriminatory or unfair but not illegal or where the disputes are perishable in nature.[228] Hence, the alternative avenues have their advantages, and their use should be encouraged to further develop and complement the TBR procedure in the future.

[224] Ibid, 39.
[225] Alfredo C Robles, *The Asia-Europe Meeting: The Theory and Practice of Interregionalism* (London: Routledge 2008) 106. See chaper two (page 97).
[226] See text to n 166 and 167. For further details on alternative solutions, see European Commission DG-Trade, 'Final Report' (n 121) 67-70.
[227] Robles (n 225) 106. [The author has argued that the existence of 'other routes for referring cases to the WTO' has also contributed to the underutilisation of TBR.]
[228] European Commission DG-Trade, 'Final Report' (n 121) 68.

On the other hand, there is one possible advantage which the TBR procedure could have over other informal and formal channels of partnership, i.e., its potential to be used as a threatening or a pressurising tool against the offending Member States. Much like the notorious mechanism of Section 301, TBR can be used to pressurise the offending countries to reduce or eliminate the barriers complained of before the commencement of WTO litigation. However, the Commission claims that it has not used the mechanism as a threatening or punitive weapon against any trading partner.[229] 'The EU has been impartial and objective in its use of the TBR' as it has not targeted any particular trading partner or a specific area of trade barrier.[230] Therefore, unlike the 301 procedure of the US, the TBR mechanism does not even have the advantage of exerting pressure on offending Member States. It is therefore argued that with the availability of 'softer' or informal options, there is hardly anything that cannot be done outside the framework of the TBR.[231] In that case, should the TBR procedure be abandoned altogether?

It has been argued that the formal TBR provisions could be dropped in the future because partnerships are more commonly formed in an informal manner in the EU.[232] However, industries and the TBR users have expressed the view that it is a desirable instrument even though it requires substantial reforms before it can be seen as an attractive option.[233] Accordingly, this research argues that TBR should be continued and developed as the mechanism has several advantages that cannot easily be overlooked.[234]

[229] Interview with an official representative, European Commission (n 166).
[230] European Commission DG-Trade, 'Final Report' (n 121) 38.
[231] Interview with international trade lawyer (n 180).
[232] Ibid; Shaffer, *Defending Interests* (n 2).
[233] European Commission DG-Trade, 'Final Report' (n 121) 63.
[234] Ibid, 31-32.

First, the TBR mechanism can serve as the negotiating forum where offending trade partners can be brought to the negotiating table to discuss the possibility of a mutually acceptable solution or negotiation of a trade agreement.[235]

Second, the TBR mechanism empowers industry.[236] It provides a right for private stakeholders to approach the Commission if and when their trade interests are infringed by a foreign practice.[237] It becomes particularly useful for 'industries which have no or marginal political or financial traction to attract the attention of their national government or the Commission'.[238] The mechanism can help such industries secure a share of government's or the Commission's resources for resolving their market access problems. Moreover, the mechanism is beneficial in situations where other softer or informal options (such as lobbying) have failed to persuade the Commission to act.[239]

Third, similar to the US's Section 301 mechanism, TBR provides for well-defined procedures of coordination and management of foreign trade disputes. These unambiguous procedures, as discussed in the previous chapter, are advantageous for encouraging and guiding private-public solicitation and resource exchange in a transparent, predictable and well-established manner.

Fourth, as discussed earlier, the TBR has its in-built system of regulatory governance.[240] The regulatory checks by the Advisory Committee, the Consultative Committee and the Council can ensure that the national interests of EU Member States are not captured and displaced by special private interests of the powerful, influential and strategic industrial actors.

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[235] Ibid, 39; Robles (n 225) 106.
[236] Interview with an international trade lawyer (n 180).
[237] Debra Johnson and Colin Turner, *European Business: Policy Challenges for the New Commercial Environment* (Taylor & Francis 1998) 319.
[238] Interview with an international trade lawyer (n 180).
[239] European Commission DG-Trade, 'Final Report' (n 121) 39.
[240] See text to n 187.

The revised institutional framework of the 2007 Market Access Strategy has provided an interesting case-study for the developed and developing world. The revised Strategy has also reinforced the commitment of the Commission, governments and industries towards formation of effective partnerships for the resolution of market access problems. In the light of the changes suggested in the Interim Review and the 2007 Strategy, it can be anticipated that the Commission, in the future, will strive to increase the utilisation and effectiveness of the TBR mechanism. Thus, the TBR mechanism needs to be retained, and its weak aspects can be addressed by the Commission, national governments and the private sector together so that the mechanism is better utilised in the future.

3.3 The US and the EU: Their Relevance for Developing Countries and Concluding Comments

There are several common features which can be identified in the PPP systems of the US and the EU. These common features can be considered and examined by developing Member States that are seeking to strengthen their domestic management of foreign trade disputes. *First*, both systems confer a legal right on the individuals to access governmental agencies for the protection of their trade interests. The governmental entities (USTR and the Commission) have a corresponding obligation to administer and examine the legitimate market access complaints filed by the private sector. They have a duty to protect the market access interests of their industries and the international trade rights of their respective nations. Hence, in light of the forms of PPP outlined in the previous chapter, the US and the EU's PPP can be described as formalised systems of partnership.[241]

[241] See chapter two (page 66).

Second, they have established a dedicated institutional framework for the management of disputes and coordination with the private sector. Specialised and independent focal points have been created for the enhancement of public private solicitation and resource exchange during dispute settlement procedures.

Third, industries in the EU and the US have integrated and coordinated their efforts and resources with the help of trade associations, cooperatives and federations. Most commonly, business entities have approached and partnered USTR or the Commission with the help of their trade associations or confederation of industries. Both developed countries realise that an indispensable requirement for an effective PPP mechanism is the presence of an organised private sector community which is willing and able to partner the government during the management of foreign trade disputes.

Fourth, formal partnerships in the US and the EU have frequently been accompanied by informal procedures like lobbying, political campaigning and pressure building techniques. Industries and the governmental agencies have shown an inclination towards informal procedures over formal ones. At the same time, their formal systems of PPP, though infrequently used, have not been completely abandoned. The findings contained in this chapter have therefore intensified the dilemma of a formal mechanism of PPP *versus* informal coordination mechanism. The dilemma cannot be analysed unless the functioning and effectiveness of informal procedures of partnership are also researched and evaluated. This will be undertaken in the forthcoming case studies of Brazil and India.

Amidst these commonalities, it is important to note that the European Union's TBR is different from the US's Section 301 procedure in many respects. *First*, as the European Commission is a

member driven commission, its Member States can interfere and impede the Commission's endeavours relating to investigation or litigation of a trade barrier through qualified majority voting at the Council. On the other hand, the US Congress Committees can call on USTR to justify its actions and proceedings relating to the management of trade disputes. They can, in very rare situations, issue legislation to force USTR to act in a certain manner if they are not satisfied with USTR's justification. Congress can also exert influence on the decisions and functioning of USTR as the latter depends upon the former for its various operational requirements. Hence, different nature of political frameworks in the US and the EU result in varied dispute settlement and regulatory procedures.

Second, it is argued that the US business entities are, as compared to the EU business entities, more 'aggressive' while approaching and persuading USTR and Congress to act for the protection of their economic interests.[242] Also, USTR, as compared to the Commission, is much more explicit in receiving assistance from the affected industries and overtly relying on their resources throughout the dispute settlement proceedings. As initially argued in the previous chapter, this can mainly be attributed to the state of political economy in the US.[243]

Third, USTR is under a mandatory obligation to initiate a formal bilateral or multilateral action in cases of violations where no agreement or settlement has been reached within a stipulated time limit. No such mandatory action requirement is imposed on the European Commission, and it has complete discretion on the issues of initiating, terminating or suspending actions.

Fourth, the Special and Super 301 procedures, with the help of their 'Watch List' or 'Priority Watch List', are allegedly used unilaterally by the US as pressurising devices against offending

[242] Shaffer, *Defending Interests* (n 2) 102; Olivier Prost, 'Can European Businesses Trust the WTO?'(2004) European Lawyer 22, 23.
[243] Chapter two (pages 105-106).

Member States engaged in unfair, unreasonable, discriminatory or illegal foreign practices. The TBR procedure, on the other hand, is used in an *objective* manner and has no such compelling or pressurising impact.[244] Hence, unlike the 301 mechanism, the TBR is not notoriously known and criticized for its unilateralism.

Notwithstanding these differences, transatlantic partnerships have frequently been formed between the two developed countries. Overlooking their own trade rivalries, the EU and the US have formed cross-border partnerships to challenge the practices of third countries wherever their interests have coincided. Although their national governments have shown some reluctance in working together, private stakeholders in these countries have formed frequent alliances to protect their overlapping and converging interests.[245] For example, during the cases of *Japan – Alcoholic Beverages* and *Korea – Alcoholic Beverages*, the US spirits association (DISCUS) was coordinating and working together with the European based Scotch Whisky Association during pre-litigation, litigation and post-litigation stages of dispute settlement.[246] The US and the EU based private law firms have also worked together during the investigation, preparation and litigation of WTO disputes.[247] Moreover, private firms and associations have, at times, 'bypassed' their national governments to form partnerships with public authorities in foreign jurisdictions.[248] These cross-border interactions have led to the formation of transatlantic public private partnerships between the public and private sector entities in the EU and the US.

[244] Robles (n 225) 106.
[245] Shaffer, *Defending Interests* (n 2) 139 [It notes that 'large firms have interests that extend well beyond the domestic sphere'.]
[246] Ibid, 140.
[247] Ibid, 9.
[248] For instance, the US trade associations have established foreign offices in Brussels to lobby and informally coordinate with the Commission officials at Brussels. [Shaffer, *Defending Interests* (n 2) 141-2].

The experiences of the EU and the US are centrally relevant to this research as they cast light on the important features of the formal PPP procedures. More importantly, they outline the intermingling of formal and informal procedures of PPP and the benefits and shortcomings of the formal procedures. This chapter also provides evidence to confirm the presumptions about the nature of formal PPP systems, informal coordination, common elements of PPP arrangements and the private sector's inclination towards informal over formal procedures.[249] The chapter also confirms the observations regarding potential regulatory challenges that PPP can face and how a system of regulation and monitoring can keep such regulatory constraints at bay.[250]

With the help of the available literature and research findings, the experiences of the US and the EU further clarify the concepts, issues and concerns that are initially outlined and discussed in chapter two. The two systems, which constitute the examples of formalised PPP arrangements operating under the shadow of informal procedures, provide useful practical insights to developing countries. In this manner, the chapter provides an extended theoretical foundation to the case studies contained in the following chapters. This additional contextual clarification is provided to help the readers better understand and appreciate the research findings laid down in the following chapters.

[249] Chapter two (pages 63-64).
[250] Chapter two (page 86).

4. CASE STUDY: CHINA

China is an interesting case-study as it presents the contrast of being an emerging world leader in international trade and a developing country at the same time.[1] As discussed in chapter two, this developing superpower is one of the most active DSU users among developing country Members of WTO.[2] From the years 1995 to 2015, it has in different capacities participated in 167 cases out of 496 cases filed at WTO DSU during this period. Hence, it has participated, in one way or the other, in over 33 percent of the cases filed at WTO.[3]

It is the first and the only developing Member State which has, through legal, institutional and procedural reforms, established a formalised mechanism of PPP. The formalisation of public private coordination for the effective management of foreign trade disputes, along with other strategies including third party participation and emergence of local trade law specialists, makes China a relevant case study for answering the research question as these reforms affirm China's commitment towards capacity building through PPP approach.

The transitioning outlook of the government and industry in China towards WTO litigation and public private coordination also makes the present case study particularly relevant.[4] With the advent of 'marketisation' and 'open door policy' in China, its Government has realised the need to coordinate with its private sector for the effective management of trade disputes, and this has been evident since the very first year of China's accession to the WTO. In 2002, Wang stated

[1] Han Liyu and Henry Gao, 'China's experience in utilizing the WTO Dispute Settlement Mechanism' in Gregory C Shaffer and Ricardo Melendez-Ortiz (eds), *Dispute Settlement at the WTO: The Developing Countries Experience* (Cambridge University Press 2010) 137, 138.
[2] See chapter two, Table 1 (page 40).
[3] The data includes the cases filed from January 1995 to June 2015. See chapter two, Table 1 (page 40).
[4] Bee Chen Goh, *Law Without Lawyers, Justice Without Courts* (Ashgate Dartmouth 2002); Xiaojun Li, 'Understanding China's Behavioral Change in the WTO Dispute Settlement System: Power, Capacity, and Normative Constraints in Trade Adjudication' (2012) 52(6) Asian Survey: University of California Press 1111.

that '… the government and firms should actively collect information on the developments in foreign trade policy as well as trade-related measures currently in force or which might be adopted.'[5] It is further affirmed that the government-industry cooperation has now become 'an important pre-condition' in China's 'battle against trade barriers'.[6] The growing perception is that the public sector entities should enhance mutual cooperation and information exchange with industries. The government believes that the public private cooperation has the potential to improve the domestic analytical skills and the litigation capacity which are required for defending the WTO rights.[7] The private sector's outlook in China has also undergone a similar change as its entities have gradually realised the indispensable need of partnering their government to seek the removal of foreign trade barriers.[8]

In short, the combination of China's expanding foreign trade, its developing nature, and the legal and institutional transformations it has undergone to enforce its WTO rights has made China a very important case study in relation to the current research objectives. Therefore, it is essential to explore China's experience in respect of utilising WTO DSM provisions, and to consider its evolving mechanism devised for enhancing dispute settlement coordination between the government and business communities.

The chapter will first present an overview of the laws, institutions and procedures established for the conduct of WTO disputes and their interaction with the nature of political economy in China.

[5] Wang Shichun, 'Yingdui Maoyi Bilei de Duice Jianyi' ['Strategies for Dealing with Trade Barriers'], Renmin Ribao [People's Daily] (27 May 2002) [Presently derived from Henry Gao, 'Taking Justice into Your Own Hand: The TBI Mechanism in China' (2010) 44 Journal of World Trade 633, 636].
[6] Ibid.
[7] Interview with an official representative, Permanent Mission of People's Republic of China to WTO (Geneva, Switzerland, 17 September 2013) [Name Withheld]; Interview with an international trade law scholar, Xiamen Academy of International Economic Laws (Xiamen, China, 6 December 2013) [Name Withheld].
[8] See, for example, the cases concerning the laver and renewable energy industries (text to n 64 and 87); Interview with an official representative, Permanent Mission of China to WTO (n 7); Liyu and Gao (n 1) 137, 161.

Following the overview, the case study will analyse the ways in which certain WTO disputes were jointly handled by the government and the private sector. Finally, in light of the political and economic climate in China, the case study will discuss the challenges China can face during the invocation of WTO DSU provisions and formation of PPPs. The main purpose of the present case study is to investigate the effectiveness of the *formalised* system of PPP in China, while identifying the features which have enabled its formal PPP to function smoothly during the conduct of WTO disputes.

With the help of selected semi-structured interviews and discussions with government officials and academics, the chapter mainly builds on and complements the existing literature on China's participation at WTO DSM.[9] The chapter is therefore based on primary and secondary sources.

4.1 Laws, Institutions and Political Economy: Management of Foreign Trade Disputes in China

4.1.1 Political Economy and its Interaction with the Legal Framework

China is a unique example of a national emerging economy that has undergone a transition from being a centrally planned economy to a market economy. From being a closed and state-run economy, it has become the largest recipient of foreign direct investment among developing countries and the most rapidly emerging player in international trade.[10] Since its accession to WTO in 2001, China has lowered its trade barriers and opened its market with a series of

[9] Henry Gao, 'Taking Justice into Your Own Hand: The TBI Mechanism in China' (2010) 44 Journal of World Trade 633; Liyu and Gao (n 1) 137; Pasha L Hsieh, 'China's Development of International Economic Law and WTO Legal Capacity Building' (2010) 13(4) Journal of International Economic Law 997.

[10] For discussion on China's 'open door policy' and economic reforms, see Lawrence J Lau, 'Gain Without Pain: Why Economic Reforms in China Worked' (1998) China's Political Economy 43.

sweeping economic reforms that include creation of non-state-owned models of organisation, emergence of joint-venture business models, and wholly foreign and private enterprises.[11]

However, its single-party governance, engrained with the remnants of authoritarianism and socialism, continues to interact with and regulate the industries. In an effort to reduce state intervention in business affairs and pursue the objectives of its 'open door policy', it has moved from a centralised to a decentralised form of political governance by vesting more powers in its provincial, state and local authorities and reducing the powers of the central government. However, political decentralisation and increasing powers of local authorities in China have created another problem, i.e., the local governments have received extensive powers to intervene and control the affairs of industries. This, in turn, has obliterated the objectives of political decentralisation.[12]

For this reason, the nation has realised that it is necessary to recentralise some of its power so that excessive intervention in the economic affairs of industries by local governments can be reduced.[13] To achieve this purpose and to balance its recentralisation with its objectives of political decentralisation, China has employed a mix of centralised and decentralised approach towards the management of foreign trade issues. The approach is centralised because it has conferred all powers of investigation and decision-making relating to WTO disputes in the Ministry of Commerce. However, in an effort to transform itself into a market economy and reduce state interventionism, the management of issues relating to trade defense remedies,

[11] For a discussion on its economic reforms and nature of political economy, see Hiroki Takeuchi, 'Political Economy of Trade Protection: China in the 1990s' (2013) 3 International Relations of the Asia-Pacific 1, 2-3. Also see Lau (n 10).
[12] For discussion on objectives of political decentralisation and need for recentralisation in economic affairs, see Zheng Yongnian, 'Will China Become More Democratic? A Realistic View of China's Democratisation' (1998) China's Political Economy 167, 181.
[13] Yongnian (n 12) 181.

foreign direct investments and other related matters have been decentralised as the powers to handle them are allocated among national, state, provincial and local authorities.

China has established government-industry coordination provisions to manage WTO disputes, but the provisions fall out of use when a foreign measure infringes upon the business interests of its state-owned industries. This is because the state-owned enterprises, which still encompass a large section of China's economy, would normally not require the defined PPP procedures to approach the Ministry of Commerce.[14] On the other hand, amidst the remnants of Confucianism that have created a psychological divide between government officials (who were often referred to as "masters" or "rules") and private individuals (who were referred to as "subjects"), private entities in China may find it difficult to approach the government in the absence of formalised PPP provisions.[15] China has tried to curb this obstacle with the establishment of *Trade Barrier Investigation Mechanism*[16] (TBIM).

The TBIM confers a right on the individual[17] to petition the Ministry of Commerce (MOFCOM)[18] if its trade interests are infringed by a foreign practice.[19] The Rules, on the other hand, impose a legal obligation on MOFCOM to administer and examine such petitions, and

[14] See chapter two (page 106).
[15] Yongnian (n 12) 173, 183.
[16] The mechanism was introduced in 2002 as the Provisional Rules. Revised rules were issued on 1 July 2004 and were known as the 'Rules on Foreign Trade Barrier Investigation'. They took effect on 1 March 2005. PRC Investigation Rules of Foreign Trade Barrier [promulgated by MOFCOM on 3 February 2005, effective on 1 March 2005]. Hereinafter, the Rules are referred to as the 'TBI Rules'. [Full translated text at Ministry of Commerce, People's Republic of China <http://co2.mofcom.gov.cn/aarticle/chinalaw/foreigntrade/200503/20050300029747.html> accessed 15 October 2012]. The concerned Articles are 1 – 37 of the Investigation Rules of Foreign Trade Barrier (2005). For more details, see Gao (n 9); Liyu and Gao (n 1) 137.
[17] They are referred to as applicants, and they can either be legal or natural persons, domestic enterprises, domestic industries or organisations. Details provided in TBI Rules, art 5. The article defines the 'domestic firms or industries'.
[18] It was originally known as the Ministry of Foreign Trade and Economic Cooperation (MOFTEC). It was restructured in 2003 as the Ministry of Commerce of the People's Republic of China (MOFCOM).
[19] See TBI Rules, arts 5 & 6.

investigate those that are legitimate.[20] In this manner, China has followed the PPP approach developed and practiced by the US and the EU for the management and settlement of trade disputes.

Domestic firms, organisations or associations which are affected by a foreign measure may file a petition with MOFCOM.[21] MOFCOM can launch a trade barrier investigation on either being petitioned by an individual or on its own initiative.[22] Once a petition (along with its supporting documents) is received, MOFCOM becomes obliged to examine the petition and make a determination on pursuance or non-pursuance of the matter within 60 days.[23] A trade barrier investigation, if launched, is normally concluded within six months (with the possibility of extension for three additional months) from the date of determining its launch.[24] If the investigation concludes that the foreign measure in question constitutes a trade barrier, MOFCOM will determine the appropriate course of action for the removal of the barrier. In such circumstances, MOFCOM may decide to initiate bilateral consultations with the offending Member State, or may invoke the provisions of WTO DSM, or may even raise the issue at the WTO Committee meetings, or employ any other appropriate measure.[25]

China's TBIM contains certain provisions similar to those of the EU's TBR and the US's Section 301 mechanism. These provisions guide the private applicants and government administrators in discharging their rights and obligations. Some of these provisions are of the following nature:

[20] TBI Rules, art 10 states that 'Ministry of Commerce *should* examine the application materials and make the decision on starting an investigation or not within 60 days at the receipt of the application letter and relevant evident materials'. Art 4 states that the 'Ministry of Commerce *may* place the case on file for trade barriers investigation on its free will as it deems necessary.'
[21] TBI Rules, art 5.
[22] TBI Rules, art 4.
[23] TBI Rules, art 10.
[24] TBI Rules, arts 18 and 32.
[25] TBI Rules, art 33.

1. Certain provisions guide the applicants on the procedure of filing petitions[26];
2. A number of provisions guide the administrators on receiving and examining the petitions, and investigating those that are legitimate[27];
3. One of the provisions relaxes the standard of evidential proofs and documents required by the applicants as it gives them the option to request a waiver in case of inability to provide the required evidence[28];
4. There are provisions that require the government to maintain confidentiality if the same has been requested by the applicant[29];
5. A provision allows the investigating unit to constitute an expert consultative committee for seeking advice and assistance during investigations[30];
6. Other provisions lay down procedures for termination of proceedings, suspensions, publication of determinations, issuing statements of reasons, withdrawal of complaints, launch of actions, decision-making and determining the appropriate course of action, and other related procedures.[31]

The TBIM has therefore provided a formal route for the private sector to approach its government if and when its interests require protection.[32] It has built a legal *interface* between the two sectors which in a way also facilitates the government to approach the concerned industry in situations where access to additional resources is required.

[26] TBI Rules, arts 6, 7 and 8.
[27] TBI Rules, arts 10, 11, 12, 13 and 16.
[28] TBI Rules, art 8.
[29] TBI Rules, arts 23 and 24. For the importance of this provision, see chapter two (page 108).
[30] TBI Rules, art 20.
[31] The relevant provisions are TBI Rules, arts 1-33.
[32] For definition of a 'formal' mechanism, see chapter two (page 66).

4.1.2 Institutional and Procedural Framework

Multiple public and private sector institutions are made responsible for the management of foreign trade disputes. Each public and private sector agency has its unique function to perform. For example, while the Bureau of Fair Trade for Import and Export is primarily responsible for conducting trade barrier investigations, the Department of Treaty and Law under the Ministry of Commerce is responsible for coordinating with the private sector, for decision-making and for the preparation and litigation of WTO cases.[33] A diagrammatic illustration of the existing institutional framework is provided in the figure below.

[33] Gao (n 9).

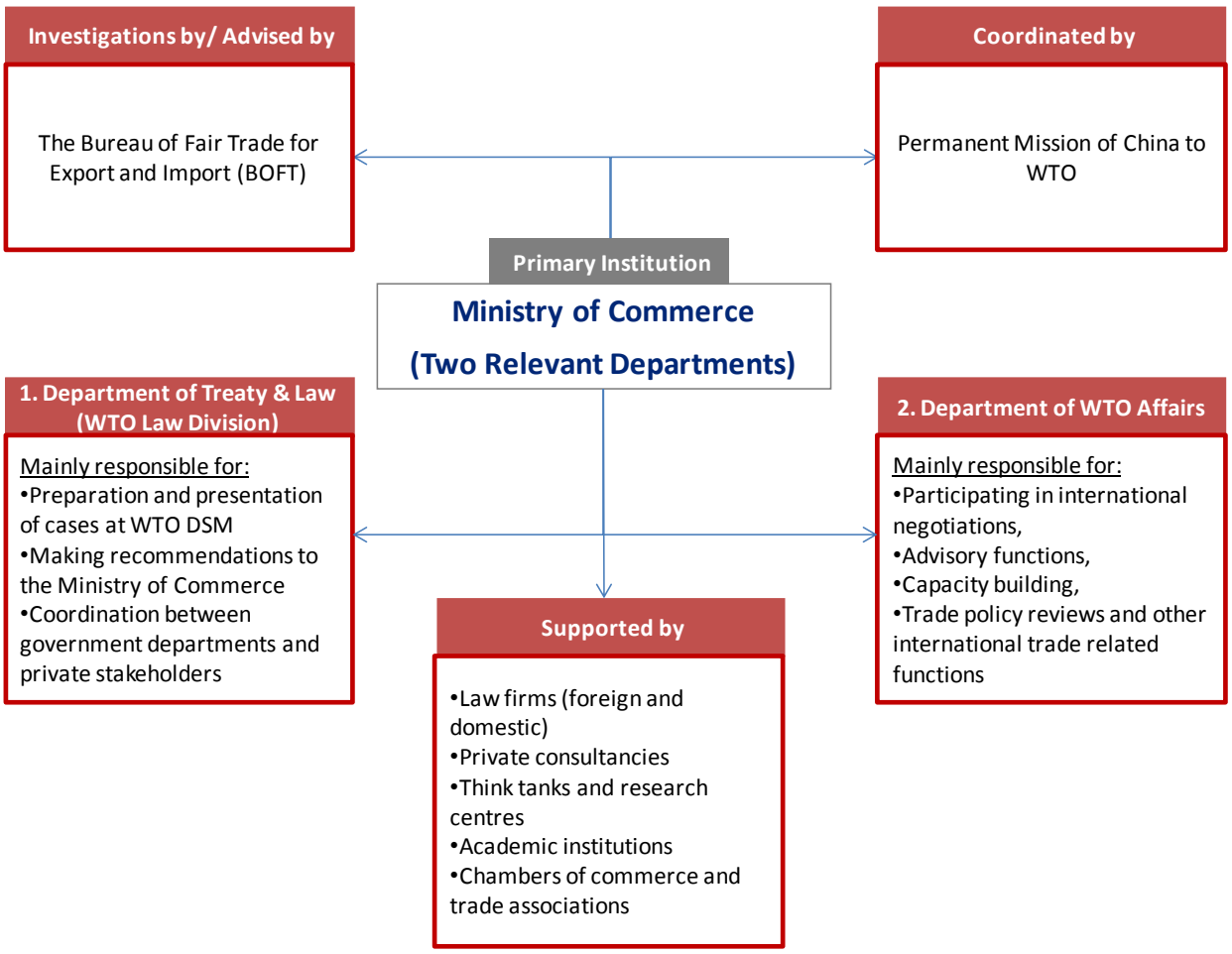


Figure 4: Institutional Framework in China

The figure identifies the key participating public and private sector institutions in China. A brief description of their functions and the procedures by which they discharge their functions is given below.

It is the Ministry of Commerce (MOFCOM) which is chiefly responsible for the management of foreign trade disputes.[34] Under MOFCOM, the two concerned units are the Department of WTO

[34] The Ministry was established in 2003, by merging the State Economic and Trade Commission with the Ministry of Foreign Trade and Economic Cooperation (MOFTEC). They were merged because '…the separate agencies could not cope with the market economy mechanism that the WTO mandates.' [Pasha L Hsieh, 'China's Development of International Economic Law and WTO Legal Capacity Building' (2010) 13(4) Journal of International Economic Law 997, 1016].

Affairs and the Department of Treaty and Law.[35] MOFCOM, with the help of these departments (and externally hired professionals), performs its core functions relating to the protection of WTO rights. These functions may include, but are not limited to: international negotiations, monitoring, legal research, drafting briefs, internal and external consultations, presentation of WTO cases, and decision-making (related to the settlement of trade disputes).[36]

The Department of WTO Affairs is responsible for undertaking and organizing multilateral and bilateral trade negotiations, along with assisting MOFCOM in the management of WTO disputes.[37] It is also obliged to discharge other international trade related functions. For example, it is engaged in the standardization process of import and export, notifications and trade policy reviews, and consultations in trade and investment policies at the WTO.[38]

The WTO Law Division, under the Department of Treaty and Law, is specifically responsible for the management of China's participation at the WTO DSM.[39] The lawyers working at the WTO Law Division are also responsible for preparing and litigating cases at the WTO. Depending upon the subject-matter of the case, the Division coordinates with other public sector departments during the stages of consultation, investigation or preparation of a legal case.[40] Interestingly, the lawyers at the Division have developed a practice of working (in pairs) with the externally hired (mostly overseas) legal counsels during the preparation and presentation of

[35] Ibid, 1016; Details can be accessed at the Ministry of Commerce <http://www.fmprc.gov.cn/eng/wjb/zzjg/tyfls/> accessed 7 October 2013.
[36] Ibid, 1018.
[37] The Department was primarily established by the then MOFTEC on 1 November 2001. Based in Beijing, the Department now comes under MOFCOM. Concurrently, it functions as China's WTO Notification and Inquiry Center.
[38] For details, see Ministry of Commerce of the People's Republic of China: Department of WTO Affairs (China WTO Notification and Inquiry Center) <http://english.mofcom.gov.cn/departments/sms2/> accessed 7 October 2013. No other details have been provided on the website.
[39] Hsieh (n 34) 1018.
[40] For a list of functions, see the Ministry of Commerce <http://www.fmprc.gov.cn/eng/wjb/zzjg/tyfls/> accessed 7 October 2013.

WTO cases.[41] The lawyer-pairing approach presents an example of the way in which the government had enhanced its in-house legal expertise.

The Department of Treaty and Law is responsible for the selection of legal professionals and economic consultants required for investigations, consultations, and the preparation and litigation of disputes.[42] As a matter of practice, the Department issues a call to various domestic and foreign law firms to invite their bids. Especially in cases dealing with foreign trade remedies, or in cases with high strategic or economic importance, the related chamber of commerce or the concerned trade associations organise a competitive event in which the bidding law firms are required to make presentations on their relevant expertise, experience and legal opinion on a given point of law.[43] The concerned private sector representatives and companies may also be invited to the 'bidding' event. The process enables the concerned private sector entities to make direct contact with suitable law firms and hire their legal services at competitive rates. The 'bidding' process has attracted a number of foreign law firms which have established dedicated teams and offices in Beijing.[44] These offices focus primarily on providing WTO-related consulting, drafting and litigation services to enterprises and the government in China.

The Bureau of Fair Trade for Import and Export (BOFT) is the principal governmental unit responsible for conducting foreign trade barrier investigations.[45] BOFT investigates the foreign

[41] Hsieh (n 34) 1018.
[42] Hsieh (n 34) 1023.
[43] Information is based on empirical research conducted in Hsieh (n 34) 1023.
[44] For example, White & Case (White & Case: Beijing <http://www.whitecase.com/beijing/#.UtUjRPRdX0c> accessed 14 January 2014), Winston & Strawn (Winston & Strawn: Asia <http://www.winston.com/en/where-we-are/asia/beijing.html> accessed 14 January 2014), Hogan Lovells (Hogan Lovells: Beijing <http://www.hoganlovells.com/beijing/> accessed 14 January 2014).
[45] Bureau of Fair Trade (BOFT) was established under MOFTEC (the then Ministry of Foreign Trade and Economic Cooperation, which was replaced by MOFCOM) on 1 November 2001. See MOFCOM <http://gpj2.mofcom.gov.cn/> accessed 12 November 2012.

trade measures which infringe the business interests of the complaining or affected industries.[46] It conducts investigation through a combination of methods: it collects information through questionnaires; it conducts public hearings, private sector consultations, expert consultations and field research; and it organises joint public-private workshops.[47] It is therefore considered as a focal point, responsible for conducting investigations and consultations with the private stakeholders.

The Permanent Mission of the People's Republic of China to the WTO plays an active role in the management of foreign trade disputes as it provides the government with relevant information concerning substantive WTO rules and procedures.[48] It helps the government to understand the substantive requirements of cases in the light of the WTO provisions and precedents, and it advises the government on the potential difficulties it may face while litigating the issue or conducting consultations. It also serves as a focal point of contact between its government, the government of other Member States involved in the matter, the WTO Secretariat and Dispute Settlement Body.[49] As compared to a number of other developing countries, the Mission is relatively well-staffed, forthcoming and responsive.[50]

The establishment of think tanks in China has also facilitated the process of public-private exchange. Some of these prominent think tanks are the Shanghai WTO Affairs Consultation

[46] 'Woguo Yicheng Chukou Chanpinshou Fanqinxiao Diaocha Zuiduo Guojia, Waijingmaobu Jiangwei Yingsu Qiye Tigong Zhengduixing Fuwu' ['China Has Become the Top Target of Antidumping Investigations, MOFTEC will Provide Corresponding Services to Firms Subject to Investigations'], Renmin Ribao [People's Daily] (13 December 2001) [As cited in Gao (n 9) 635]. For details on the functions and role of the Bureau of Fair Trade for Imports and Exports, see MOFCOM <http://gpj2.mofcom.gov.cn/> accessed 12 November 2012.
[47] Liyu and Gao (n 1) 161.
[48] The Permanent Mission of the People's Republic of China to WTO <http://wto2.mofcom.gov.cn/> accessed 14 January 2014.
[49] Interview with an official representative, Permanent Mission of China to WTO (n 7).
[50] Detailed discussions and semi-structured interviews with the official representatives at the Mission were conducted for the present research [Interviews with official representatives, Permanent Mission of China to WTO (n 7)].

Centre, the Beijing WTO Affairs Centre, the Shenzhen WTO Affair Centre and the China - WTO Dispute Settlement Mechanism Centre. These centres provide training in WTO laws, and also offer advisory services to small and medium sized companies concerning the use of government resources.[51] They organise seminars and conferences for the dissemination of WTO knowledge among students and trade officials working with the government and industries. They also assist private companies and the government in monitoring and identifying trade barriers and conducting domestic legal proceedings such as anti-dumping or anti-subsidy investigations.

WTO-related scholarship and teaching have also gained momentum in China, and this is partially evident from the establishment of the Chinese Society of International Economic Law.[52] The Society is based at Xiamen University, and it has been instrumental in disseminating international trade related legal training to practitioners, government officials, private sector entities and students.[53] Occasionally, academics from prestigious academic and research institutions (including the Xiamen Institute) are invited by the government to present opinion and analysis relating to international trade matters.[54] WTO-related training and research activities are also conducted by the Ministry of Justice and the Supreme People's Court of China with the aim of disseminating WTO awareness and expertise. The training sessions are conducted by a mix of foreign and domestic experts, and they are mainly focussed on the country's academic development in WTO laws.[55]

[51] Ibid.
[52] Hsieh (n 34) 1004; Interview with an international trade law scholar (n 7) [The interviewee notes that the 'WTO courses have occupied a significant place in the discipline of law, and doctoral research is being promoted by the Academy in trade related disciplines.']
[53] Interview with an international trade law scholar (n 7).
[54] Ibid.
[55] Liyu and Gao (n 1) 145.

Finally, China's 'lawyer-pairing' strategy employed for legal capacity building deserves a mention. It has been observed that the Government of China has consistently hired overseas law firms and required them to work with their domestic lawyers for the preparation and presentation of WTO cases[56].[57] The strategy has been explained in the following words by an official representative.[58]

> Most of the lawyers who have worked and are working on our WTO cases are foreign based lawyers. But at the same time, we give a parallel contract to China based lawyers. We ask them to work together with the foreign lawyers during the preparation and presentation of WTO cases. By way of this approach, we intend to expand our in-house legal expertise in the WTO dispute settlement system.[59]

With this approach, China based lawyers have cost-effectively developed their knowledge and experience in WTO legal disciplines. The Government has also strengthened its legal capacity and expertise through its third party participation in WTO litigation.[60] It has 'used the opportunity of third party participation to learn from other participants, and obtain a better understanding of the functioning, reasoning and views of Panels and the Appellate Body'.[61] This

[56] For example, in *China – Intellectual Property Rights*, MOFCOM hired Hogan Lovells (US based law firm) and King & Wood (China based law firm). [Panel Report, *China – Measures Affecting the Protection and Enforcement of Intellectual Property Rights*, WT/DS362/R, adopted 20 March 2009, DSR 2009:V, 2097]. In *China – Auto Parts*, Steptoe & Johnson (US based law firm) and Hylands Law Firm (China based law firm) were hired by the government. [Panel Reports, *China – Measures Affecting Imports of Automobile Parts*, WT/DS339/R / WT/DS340/R / WT/DS342/R / Add.1 and Add.2, adopted 12 January 2009, upheld (WT/DS339/R) and as modified (WT/DS340/R / WT/DS342/R) by Appellate Body Reports WT/DS339/AB/R / WT/DS340/AB/R / WT/DS342/AB/R, DSR 2009:I, 119]. The information is derived from Liyu and Gao (n 1) 148.
[57] Hsieh (n 34) 1024.
[58] Interview with an official representative, Permanent Mission of China to WTO (n 7).
[59] Ibid.
[60] Ibid. For data on China's participation at WTO DSU, see chapter two (table Table 1, page 40).
[61] Liyu and Gao (n 1) 160.

'learning by doing' approach has further enhanced the domestic legal capacity within the government departments and local law firms in China.[62]

4.2 Public Private Coordination: Analysis of Selected Trade Disputes

The present section introduces and analyses two trade disputes which were conducted through TBIM in China. The section describes the manner in which the public and private sector agencies coordinated in these disputes, and the extent to which they acted in accordance with the TBIM provisions. The primary purpose of this analysis is to identify the characteristics of TBIM that have introduced *effectiveness* into the domestic procedure of dispute settlement. Effectiveness of government-industry coordination, in the following disputes, will be determined and assessed against the benchmark for effective PPP mechanism provided in chapter two.[63]

4.2.1 Japan - Laver

The first attempt of the private sector to approach MOFCOM through TBIM is noted in *Japan – Quantitative Restrictions on Laver*.[64] In this dispute, China accused Japan of maintaining a discriminatory quota regime on the importation of laver. China alleged that Japan's practice disqualified its laver exports from entering the laver markets in Japan.[65] After receiving a petition from the laver industry, trade barrier investigations were formally launched in the matter. The DSU provisions were not invoked in the present instance as Japan withdrew its measure during bilateral consultations.[66]

[62] Hsieh (n 34) 999; Interview with an international trade law scholar (n 7).
[63] See chapter two (section 2.5.2).
[64] Selected Cases on Fair Trade in Imports and Exports, Fair Trade Bureau of MOFCOM (July 2006) at 87-95 [As cited in Henry Gao, 'China's Participation in the WTO: A Lawyer's Perspective' (2007) 11 Singapore Year Book of International Law 1-34].
[65] Liyu and Gao (n 1) 162.
[66] MOFCOM Announcement No 10 of 2005 [as cited in Liyu and Gao (n 1) 162].

The affected private interests were represented to the government by the Jiangsu Laver Association. The Association was established to pool the resources possessed by the affected companies, and to represent the business interests of these companies in an integrated manner.[67] The Association (the main TBI applicant in the matter) challenged the allegedly discriminatory practice of Japan on the ground that it violated the WTO non-discrimination obligations. It petitioned MOFCOM and urged that an investigation in the matter should be launched. On receiving the petition, MOFCOM examined the legitimacy of the complaint and initiated its first formal trade barrier investigation in February 2004.[68]

An investigation was subsequently carried out by BOFT.[69] BOFT notified the formal launch of investigation to the applicant and the Government of the offending Member State.[70] The notice of launch was subsequently published in the official gazette. Through this notification, BOFT sought comments and inputs from the interested persons. It collected the relevant information from the government and the private sector entities through questionnaires, field investigations and hearings.[71] During investigation, it often sought expert opinion from the Bureau of Fisheries of the Ministry of Agriculture, the China Chamber of Commerce of Import and Export of

[67] Ibid, 162.
[68] The launch of trade barrier investigation was formally announced in Announcement No. 16 in line with Interim Rules for Foreign Trade Barrier Investigation on 22 April 2004. It is officially noted that it was launched 'at the request of laver Association of Jiangsu Province…' [MOFCOM, Network Center <http://english.mofcom.gov.cn/sys/print.shtml?/newsrelease/significantnews/200503/20050300021005> accessed 9 October 2013]. Details about the applicant, application filed by the applicant, the investigation procedure and termination of the investigation are provided at FDI: Invest in China <http://www.fdi.gov.cn/1800000121_39_1019_0_7.html> accessed 9 October 2013.
[69] Liao Heng, Xu Aimin & Xu Jiada, 'Jiangsu Zicaishangyaoxiang Riben Tao Shuofa' ['Jiangsu Laver Producers Seeking Justice from Japan'] <www.china-fishery.net/01-hydt/news_disp.asp?ID¼3399> [Presently derived and as cited in Gao (n 9) 644].
[70] MOFCOM Announcement 65 of 2004 [as cited in Liyu and Gao (n 1) 162].
[71] Henry Gao (n 9) 645.

Foodstuffs, Native Produce & Animal By-products, and the China Aquatic Products Processing and Marketing Association.[72]

In addition, MOFCOM received written comments and consultation requests from several private stakeholders (other than the applicant).[73] During the investigation, MOFCOM organised several consultative meetings with its counterparts in Japan. It was directly assisted by the Jiangsu Laver Association during these bilateral consultative meetings.[74] Notably, the national delegation of China during bilateral consultations comprised MOFCOM officials and officials from the Jiangsu Laver Association.[75]

Throughout the investigation and consultation meetings, the Association (along with the affected private firms) supplied the required information, evidence and data sheets to MOFCOM.[76] The Association also sent its representatives to Korea and Japan for conducting field research and gathering additional information required by MOFCOM. The Association, at the conclusion of its field research, compiled the information and prepared a detailed factual report. This report was sent to MOFCOM for assisting the process of investigation.[77] The Association formed an in-house team of trade lawyers to help the participating private entities understand and follow the dispute. These privately hired lawyers also assisted the government lawyers at MOFCOM in legal analysis and investigation of the matter.[78]

[72] Ibid, 646.
[73] Ibid, 646.
[74] Ibid.
[75] Zhongguo Maoyi Bao, 'Japan Applies Discriminatory Measures against Chinese Laver Products. Chinese Producers Vow to Fight to the End' *China Trade Daily* (21 September 2004). [Presently derived from Gao (n 9) 646].
[76] Gao (n 9). Also see Liyu and Gao (n 1) 162.
[77] Ibid.
[78] Interview with an official representative, Permanent Mission of China to WTO (n 7).

Subsequently, on 21 February 2005, Japan announced the replacement of its challenged quota regime with the global quota system. The new system enabled the laver exports from China to enter the markets in Japan. Shortly after this announcement, MOFCOM terminated its trade barrier investigations on 22 April 2005.[79] It is argued that the termination of the investigation and the restoration of China's laver market access together constitute an important landmark as, for the first time in China, the industry utilised the provisions of TBIM and was subsequently successful in resolving the dispute during bilateral consultation.[80] Hence, even though the matter was resolved without having to litigate it at WTO DSU, PPP arrangement in this instance enabled the MOFCOM to negotiate a mutually agreed settlement with Japan, and hence, to self-enforce its WTO rights under the 'shadow of a potential WTO litigation'.[81] TBIM's contribution towards strengthening MOFCOM's conflict resolution capacity in this case, when read in light of the benchmark (for an effective PPP mechanism) provided in chapter two, provides a strong inference in favour of the formalised TBIM being an *effective* mechanism.[82] In addition, the dispute outlines certain interesting features of the TBIM enabled PPP arrangements.

First, there is a specialized legal and institutional framework in China which allows the business communities to petition and coordinate with the concerned government officials. In the present instance, the private and public sectors utilised these legal and institutional provisions. The industry utilised its right to petition the government, and the government departments discharged their respective obligations throughout the process of petitioning, investigation and consultation.

[79] MOFCOM Announcement No 10 of 2005 [Liyu and Gao (n 1) 162; Gao (n 9) 647].
[80] Ibid; Hsieh (n 34) 1017.
[81] The instance is referred to as 'litigotiation' by Gallanter. For details, see chapter two (n 7, page 32).
[82] See chapter two (page 61).

Second, the establishment of the Jiangsu Laver Association and the instrumental role it has played in the present example strengthens the argument, as initially laid down in chapter two, that an organised private sector is a vital requirement for PPP to function effectively.[83]

Third, the industry in the present instance utilised the representational authority of the government (China being a Member of the WTO and therefore having the authority to litigate disputes at WTO DSM) for the protection of its exporting interests. On the other hand, MOFCOM enjoyed wider access to the informational resources and legal expertise required for the smooth conduct of investigation and bilateral consultations. Hence, resources were exchanged on a reciprocal basis to eliminate a trade barrier, and the exchange was *effective* as it enabled MOFCOM to mobilise resources and thereby restore an industry's lost market access.

Fourth, the present interaction also demonstrates that the affected private stakeholders are a vital source of commercial information that is required to investigate the barrier and hold bilateral consultations. The private sector often has the capacity, motivation and the required pragmatic approach to gather information, for example, through field trips, questionnaires, symposia and global commercial alliances. Hence, coordination with the affected private sector can potentially be seen as a cost-effective approach to gathering commercial information.

Finally, it may be recalled that the private sector representatives were part of the national delegations during bilateral consultations between the two governments. They were active to the extent that they were constantly supplying the information and documents required during the consultation meetings. In addition, they used certain persuasive techniques to influence their Japanese counterparts. For example, it was noted that 'Jiangsu Laver Association delivered an

[83] For more information on the importance of organised private sector, see chapter two (page 90).

open letter to the head of the Japanese delegation'.[84] The letter, which was delivered at the conclusion of the second consultative meeting (on 17 September 2004), urged the Government of Japan to eliminate the barrier and to open its laver market for China.[85] The writing and delivery of an open letter, combined with other discussed strategies of coordination, were useful in enabling China to regain its lost market access.

The *effective* functioning of the PPP has been acclaimed as one of the key reasons behind China's success in the present instance.[86] But has the case outcome motivated other industries in China to invoke TBIM? Until 2010, *Japan-Laver* was the only instance where an industry had invoked TBIM to address its trade grievances to the government. However, following on, in 2011 a further TBI application was filed by a different industry. This is discussed in the following section.

4.2.2 US - Countervailing Measures (China)

The second noted dispute in which the provisions of TBIM were invoked is the *US - Countervailing Measures (China)* case.[87] The China Chamber of Commerce for Import and Export of Machinery and Electronic Products, together with the China New Energy Chamber of Commerce of the All-China Federation of Industry and Commerce, filed a TBI petition in October 2011.[88] In November 2011, MOFCOM launched its trade barrier investigation against the US support policies and subsidy programs which were allegedly granting beneficial treatment

[84] Zhongguo Maoyi Bao, 'Japan Applies Discriminatory Measures against Chinese Laver Products. Chinese Producers Vow to Fight to the End' *China Trade Daily* (21 September 2004) [Presently derived from Gao (n 9) 647].
[85] Ibid.
[86] Interview with an official representative, Permanent Mission of China to WTO (n 7); Interview with Professor Henry Gao, Singapore Management University (24 June 2013).
[87] Panel Report, *United States – Countervailing Duty Measures on Certain Products from China*, WT/DS437/R and Add.1, circulated to WTO Members 14 July 2014 [appeal in progress].
[88] Henry Gao, 'Public-Private Partnership: The Chinese Dilemma' (2014) 48(5) Journal of World Trade 983, 985.

to their local renewable energy industry.[89] The investigation was conducted by MOFCOM with the assistance of BOFT. MOFCOM found that the US practices supporting wind, solar and hydroelectric energy programs were in the nature of 'prohibited subsidies' and were therefore violating the WTO Subsidy and Countervailing Measures Agreement and the GATT 1994.[90] It also found that the US authorities had imposed countervailing duties on Chinese solar imports. This triggered the dispute further, and the Chinese government immediately launched a formal WTO challenge against the US.

The WTO dispute was known as *United States – Countervailing Duty Measures on Certain Products from China*. China requested WTO consultations with the United States on 25 May 2012. It alleged that the US practices violate the provisions of GATT 1994, the SCM Agreement, and the Protocol of Accession of China. China's main contention was that the US anti-subsidy duties were affecting $7.3 billion of exports of solar panels, thermal paper, wind towers and steel wire from China, and thereby violating the WTO rules.[91] The Panel upheld some of the China's allegations regarding the inconsistency of the US measures with the SCM Agreement. However, most of the claims made by China against the Department of Commerce's (USDOC) findings were fully or partially rejected by the Panel. Both Member States appealed this decision. The Appellate Body report was recently issued in favour of China as it reversed those findings of the

[89] Becky Beetz, 'China concludes US solar subsidies violate WTO rules' *PV magazine* (22 August 2012) <http://www.pv-magazine.com/news/details/beitrag/china-concludes-us-solar-subsidies-violate-wto-rules_100008155/#axzz2hDaykTXz> accessed 9 October 2013.
[90] Ibid.
[91] Jennifer M Freedman, 'WTO to probe U.S. Anti-Subsidy Duties on Chinese Imports' *Renewable EnergyWorld.Com* (Geneva, 28 September 2012) <http://www.renewableenergyworld.com/rea/news/article/2012/09/wto-to-probe-u-s-anti-subsidy-duties-on-chinese-imports> accessed 9 October 2013.

Panel that recommended that China had not established the alleged WTO-inconsistent practice of USDOC with respect to SCM Agreement.[92]

The case is an important instance where the concerned industry was visibly active in partnering the government through the TBI gateway. The trade barrier investigations were launched by MOFCOM on the basis of a written application filed by the local industry associations.[93] The affected companies and associations actively supplied the commercial information to MOFCOM.[94] The companies, through their trade associations, often interacted with MOFCOM and the hired lawyers. The associations conducted a commercial and legal analysis of the dispute with the help of their technical experts and in-house lawyers.[95] They were therefore fully equipped to provide the government with information, commercial inputs and legal analysis as and when required during investigation and litigation.

Alongside the investigation, the CEOs of the China based four largest photovoltaic companies established the Solar Energy Promotion Alliance. The Alliance provided a discussion and information-exchange forum to the affected companies which were looking to restore and expand their depleted exporting interests.[96] The formation of the Alliance by the largest energy companies during the dispute further establishes the argument that an organised private sector is

[92] For further details see World Trade Organization, Dispute Settlement: Dispute DS437 <http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds437_e.htm> accessed 12 November 2014.

[93] 'China says US violates WTO on renewable energy' *ahramonline* (AFP, 24 May 2012) <http://english.ahram.org.eg/NewsContent/3/0/42621/Business/0/China-says-US-violates-WTO-on-renewable-energy-.aspx> accessed 9 October 2013.

[94] Interview with an official representative, Permanent Mission of China to WTO (n 7).

[95] Ibid.

[96] Becky Beetz, 'China retaliates, finds US in violation of free-trade rules' *PV magazine* (25 May 2012) <http://www.pv-magazine.com/news/details/beitrag/china-retaliates--finds-us-in-violation-of-free-trade-rules_100006951/#axzz2XEW8pztO> accessed 9 October 2013; John Matthews and Hao Tan, 'China's Renewable Energy Revolution Has Global Implications' *Clean Technica* (8 April 2014) <http://cleantechnica.com/2014/04/08/chinas-renewable-energy-revolution-global-implications/> accessed 12 June 2014. [It notes that 'Chinas energy revolution […] underpins its transformation into the world's largest manufacturing system']; Jennifer Duggan, 'China sets new world record for solar installations' *The Guardian* (30 January 2014) <http://www.theguardian.com/environment/chinas-choice/2014/jan/30/china-record-solar-energy> accessed 12 June 2014.

vital for effective protection of economic interests. It also presents a sound example of how affected companies can form alliances and reduce the burden of cost imposed on each of them for the protection of their common exporting interests. Additionally, there are other features of the Chinese formal PPP which emerge from this instance.

First, the private stakeholders' act of petitioning the government led to the initiation of a WTO dispute. The concerned industry in the case filed an application under the TBI Rules, and WTO DSU provisions were triggered after the investigation (as requested in the petition) was concluded. The private sector's participation was therefore an instrumental factor in the government's decision to launch a WTO dispute.

Second, the interaction of the industry representatives with the government hired lawyers, and their initiative of hiring in-house lawyers, may be seen as a valuable strategy. With such strategies, industries can gain a clearer understanding of WTO law and they can track the progress and legal position of their cases. In addition, the approach can also enhance government's legal capacity as it provides the government with additional legal expertise for carrying out investigation, consultations and litigation procedures.

Finally, the case outlines certain basic elements which can commonly be identified in a PPP arrangement. These elements, as underlined in chapter two, are resource exchange, interdependency, reciprocity and share of labour.[97] The privately owned resources were utilised by the government to investigate the barrier, launch WTO consultations and litigate the dispute. The constitutional authority of the government was indirectly invoked by the industry with the help of a privately funded governmental action at the WTO. An *effective* exchange of resources

[97] See chapter two (page 64).

through formalised procedures resulted in the reciprocal protection of business and larger economic interests of the nation as it provided an enabling dispute settlement environment in China.

4.3 Challenges and Weaknesses: Emerging from China's Domestic Context

Before reaching any conclusions about the overall effectiveness of China's TBIM, it is important to see if TBIM has, in fact, encouraged and facilitated the formation of dispute settlement partnerships. The research findings show that the TBIM provisions have only been invoked twice from the year 2001 to 2013.[98] This clearly indicates that the business community in China is not frequently invoking TBIM. However, it has been observed that the '…private sector through the import and export chambers of commerce and trade associations has frequently participated with the government in the process of dispute settlement. The degree and type of coordination between the associations and MOFCOM have been different from case to case.'[99] Henry Gao further confirms that the Government of China has increasingly been seeking and receiving assistance from the private sector during the management of trade disputes.[100] In light of these findings, it may be inferred that the private sector in China has approached the government in ways other than the provisions mentioned under TBIM.

Why have the industries and the government in China not preferred the TBIM route? What are the problems that the government and industries have faced while using the provisions of TBIM?

[98] Gao, 'Public-Private Partnership: The Chinese Dilemma' (n 88) 984.
[99] Interview with an official representative, Permanent Mission of China to WTO (n 7).
[100] Interview with Professor Henry Gao, Singapore Management University (24 June 2013); Also see Gao (n 9).

In light of the political and economic conditions in China, a number of domestic factors can be blamed for the suggested infrequent utilisation of TBIM. These factors can also be seen as the obstacles that China faces (or may potentially face) at WTO DSM. They are as follows:

1. Due to China's *non-litigious culture*, the option of petitioning the government in a formal manner has often been the last option for business communities in China.[101] The non-litigious culture is very much engrained in the mindset of business entities and the government officials.[102] Litigation, according to the Confucianist philosophy, '…causes irreparable harm to relationships and should be pursued as a last resort, or better still, [be]…avoided.'[103] Therefore, it has often been observed that an exporter facing trade barriers would prefer to find a new market or a new product, or give up the trade, or change the location of business, or perhaps approach the government in an informal manner especially if it is losing its market substantially.[104] It has also been observed that the government has often been reluctant to use the WTO dispute settlement system largely as a complainant due to its long standing non-litigious tradition.[105]

   In addition, the private sector in China believes that the international trade laws and foreign trade policies are there to protect the interests of the government and are not concerned with private business interests.[106] With this perception, the industry in China

[101] Goh (n 4); Xiaojun Li, 'Understanding China's Behavioral Change in the WTO Dispute Settlement System: Power, Capacity, and Normative Constraints in Trade Adjudication' (2012) 52(6) Asian Survey: University of California Press 1111.
[102] Ibid; Michael Ewing-Chow, 'Are Asian WTO Members Using the WTO DSU 'Effectively'?' (2013) 16(3) Journal of International Economic Law 669, 677.
[103] Henry Gao, 'China's Participation in the WTO: A Lawyer's Perspective' (2007) 11 Singapore Year Book of International Law 72; Also see X Jiang and S Tan, 'Non-Litigation Tradition in China' (2008) 4 Legal System and Society 239.
[104] Interview with an official representative, Permanent Mission of China to WTO (n 7); Gao (n 9).
[105] Goh (n 4); Gao (n 9) 650. Also see Liyu and Gao (n 1)166 [Authors observe that the Chinese Government 'will often express its regret or unhappiness' while participating in a WTO dispute as a complainant.]
[106] Ewing-Chow (n 102) 693.

tends to distance its special economic interests from the common national interests. A combination of these non-litigious, uninformed and unaware attitudes of the public and private sectors respectively may therefore act as a major hindrance to the smooth functioning of TBIM in China.

However, the mindset of the government has undergone a change, and this is evident from the active participation of China as a complainant, respondent and a third party at the WTO DSU.[107] Before the year 2009, China demonstrated a strong preference towards avoidance of litigation.[108] But 2009 onwards, with an evident increase in its WTO-related legal capacity, most of the challenges launched against China have been litigated.[109] Also, the changing mindset of the private sector in China can be observed in the cases discussed above wherein they have actively participated in the dispute settlement process.

2. The provisions of TBIM have also arguably imposed an *evidential burden* on its applicants. They have laid down specific filing requirements for the TBI applications.[110] The application has to be drafted in a given manner, and it must accompany the information and evidence required under the Rules.[111] The difficulty of collecting the information and evidential documents at the preliminary stages of a barrier has arguably served as a hindrance to the filing of formal TBI petitions. The expense involved in preparing a TBI application and its supporting evidential documents may also be substantial. Hence, in accordance with the findings stated in the earlier chapters, a formal

[107] From the year 2007 to 2013, it has been a complainant in 11 cases and a respondent in 27 cases. For details, see World Trade Organisation: Member Information, China and the WTO <http://www.wto.org/english/thewto_e/countries_e/china_e.htm> accessed 16 January 2014.
[108] Ewing-Chow (n 102) 679. [It notes that out of 13 complaints initiated against China during the year 2002 to 2008, 6 were settled by way of negotiations.]
[109] Ewing-Chow (n 102) 679.
[110] See TBI rules, art 7.
[111] TBI Rules, arts 7 and 8.

procedure may impose an evidential burden, and hence it may become an unaffordable option, especially for the minimally organised or resource-constrained business entities.[112]

In addition, preparation of applications and accompanying documentation may often require expert legal assistance. Hiring external lawyers and consultants for the initial preparation of applications and documents might substantially escalate the cost, and make TBIM an unaffordable and unviable option for most businesses in China.[113] However, MOFCOM may eliminate or reduce this evidential requirement in cases where legitimate request of waiver is made by the applicant.[114]

3. Financial and evidential difficulties may to some extent be overcome with the help of waivers and resource integration through trade associations and chambers of commerce, but the fact remains that *not all industries in China are well organised*.[115] With its socialist market economy and nationalistic framework, both state-owned and non-state-owned enterprises in China continue to be regulated and controlled by the government at national, provincial and local levels. Accordingly, the industry representatives and trade unions in China are also governed and controlled by public sector authorities.[116]

   Gao confirms that one of the main reasons for the infrequent utilisation of TBI rules in China is 'the lack of industry associations truly representing the interests of private firms

[112] See chapter two (page 94); chapter three (page 130 and 153).
[113] Hsieh (n 34) 1017; Interview with an official representative, Permanent Mission of China to WTO (n 7); Junrong Song, 'A Comparative Study on the Trade Barriers Regulation and Foreign Trade Barrier Investigation Rules' (2007) 41(4) Journal of World Trade 799, 809; Chengyan Lu, 'Legal Services in China: Facing the WTO' (2003) 20 UCLA Pacific Basin Law Journal 278.
[114] TBI Rules, art 8.
[115] Ibid, 1018
[116] Yongnian (n 12) 181.

in China'.[117] Most of the industry representatives are fully constituted and regulated by the provincial or state authorities, and some trade associations and chambers of commerce, though recognised as independent legal entities, are semi-governmental in nature.[118] Most industry associations are often staffed with retired government officials who commonly are disconnected from the operational realities of businesses.[119] Their primary obligation is to assist the government in gathering required resources and regulating the industry.[120] Such nature of trade organisations and the extent of governmental intervention in their functioning have discouraged private enterprises from joining the representative organisations and turning to them when their interests are infringed.

In contrast, 'new generation' industry associations have now emerged in China with the help of private sector initiatives (like the Jiangsu Laver Association). However, these privately owned associations have different problems. *First*, they can be dominated and practically governed by the resourceful and influential firms in the sector. *Second*, if they have been established by small and medium scale industries, then their activities might get 'paralysed' due to insufficiency of funds or lack of adequate members willing to

[117] Gao (n 9) 650.

[118] These associations are semi-governmental in nature largely because they require the endorsement and constant supervision of certain governmental authorities for the purposes of registration and functioning. [Regulation on Registration and Administration of Social Organizations [1998] State Council Order No 250, arts 3, 9, 27, 28]. For details, see Hao Qian, 'Trade Associations and Private Antitrust Litigation in China' (16 April 2013) 4(1) CPI Antitrust Chronicle 2.

[119] For example, the China Council for the Promotion of International Trade (CCPIT) is a semi-governmental organisation, which comprises enterprises, trade organisations and chambers of commerce as its members. For details, see Asian Trade Promotion Forum (ATPF): Trade Promotion Organization in Asia, China Council for the Promotion of International Trade <http://www.atpf.org/en/org/china.html> accessed 11 October 2013.

[120] Gao (n 9) 650.

make annual contributions.[121] Hence, strategies need to be devised for overcoming these obstacles and for integrating and organising the industries in China.

4. The government has tried to create new avenues for interaction with business entities, but a traditional cultural barrier still draws an invisible line between the government officials and the rest of the people in China.[122] Private individuals still believe that *government officials are* '*unapproachable entities'* as they are equivalent to '*masters*' or '*lords*'.[123] Unlike the systems that follow "rule of law", China is closer to the governance model of "rule by law". The political climate in China is heavily influenced by its predominant tradition of 'Confucianism'. It means that political and bureaucratic officials cannot be controlled by any institutions and procedures. They control everything.[124]

   Gao confirms that one of the impediments to the utilisation of TBIM is the divide between the rulers and the ruled, and the consequent 'lack of direct access to the government by private firms in China'.[125] Gao also observes that the government officials can often be 'unapproachable' or 'non-receptive' to private sector requests.[126] Due to these cultural and psychological impediments, the private sector in China has preferred to find alternative business solutions in situations where foreign practices have diminished their business interests.

[121] Gao (n 9) 650.
[122] Interview with an official representative, Permanent Mission of China to WTO (n 7).
[123] Ibid.
[124] Yongnian (n 12) 181.
[125] Gao (n 9) 649.
[126] Ibid.

5. The private sector may also be discouraged because of the amount of *discretion granted to MOFCOM in launching investigations* under the TBI Rules.[127] The TBI Rules state that the government *may* initiate the investigations if 'it deems necessary' under Article 4.[128] Hence, the required investment of resources combined with an element of uncertainty caused by possible governmental discretionary intervention can act as a major deterrent to the filing of formal TBI complaints.

   However, the government is the guardian of national interests, and it should therefore be able to scrutinise and pursue legitimate applications that it thinks are in the best interest of the nation.[129] In the absence of a similar provision, the government may, at times, be compelled to pursue disputes that might favour a narrow business interest and diminish the wider economic or social interest of the nation.[130] On the positive side, the government's existing obligations under the TBI Rules to issue a statement of reasons (in case of non-pursuance of an application) and publication of determinations may offset the discouraging impact of the discretionary right of pursuance or non-pursuance.[131] In addition, a call for public opinion and a call for public hearings (on request) can also be introduced to further counter the problem concerning the lack of private sector's confidence in its government.[132] Also, a precise description of possible circumstances for

[127] Interview with an official representative, Permanent Mission of China to WTO (n 7).
[128] TBI Rules, art 4.
[129] Interview with an official, ICTSD (Geneva, Switzerland, 11 April 2013) [Name Withheld]; Interview with Rajan Sudesh Ratna, Ministry of Commerce, Government of India (Bangkok, Thailand, 3 May 2013).
[130] Interview with Niall Meagher, ACWL (Geneva, Switzerland, 11 April 2013); Interview with an official representative, Centre for WTO Studies, Indian Institute of Foreign Trade (New Delhi, India, 5 June 2013) [Name withheld].
[131] There are provisions for issuing statement of reasons and publication of determinations in TBI rules. See, for example, TBI Rules, arts 14, 17, 26, 29.
[132] Similar provision is provided in US Trade Act 1974, ss 302(a)(4) and 305(b)(1)(A) (right to request for public hearings); Similar provision is also provided in Council Regulation, art 8(6) which states that: 'the Commission shall, on request, give the parties primarily concerned an opportunity to meet, so that opposing views may be

non-pursuance of a matter, set out clearly in a legal text or a rule book, might also enable private stakeholders to develop more confidence and predictability in relation to TBI provisions.[133]

6. Empirical research suggests that the Government of China, at times, has maintained an element of *secrecy* in respect of its domestic proceedings and actions at the WTO. For instance, in the case of *China - Auto Parts*[134], a legal researcher's request to access the official briefs (filed in the case by the government) was denied by MOFCOM, despite the fact that the WTO Panel had by that time released its report.[135] The secrecy-favouring approach of the government, as argued in chapter two, can act as a serious deterrent as industries might be unwilling to share their trade knowledge and information with government entities that might act covertly in relation to such matters.[136]

7. The '*inappropriate location of the TBI Division*' and the *lack of a dedicated division* for the handling of TBI applications have also been put forward as possible reasons for the ineffectiveness of TBIM.[137] The TBIM Division is part of BOFT, and BOFT is also responsible for other trade related functions. For example, BOFT is responsible for

presented and any rebuttal argument put forward'. Currently, TBI Rules do not oblige MOFCOM to hold such public hearings during investigations.

[133] The US Trade Act 1974 has specified the grounds of pursuance and non-pursuance in sec 301(a). These provisions are mandatory, meaning that USTR does not enjoy any discretion in the matter. It is legally mandated to investigate and pursue an issue if any condition mentioned u/s 301(a) is met. But the mandatory nature of s 301 has often been seen as one of the main reasons for its underutilisation.

[134] Panel Reports, *China – Measures Affecting Imports of Automobile Parts*, WT/DS339/R / WT/DS340/R / WT/DS342/R / Add.1 and Add.2, adopted 12 January 2009, upheld (WT/DS339/R) and as modified (WT/DS340/R / WT/DS342/R) by Appellate Body Reports WT/DS339/AB/R / WT/DS340/AB/R / WT/DS342/AB/R, DSR 2009:I, 119.

[135] Liyu and Gao (n 1) 165.

[136] See chapter two (page 95).

[137] Gao (n 9) 652.

'conducting trade remedy measures investigations in the domestic market'.[138] It can therefore be argued that the lack of a specialised unit dedicated to the handling of TBI complaints can be seen as one of the reasons for its infrequent utilisation.

8. The *lower status* of Foreign Trade Barrier Investigation Rules in China's hierarchal legal system can also be considered as a weakness of the mechanism. The national constitution is the supreme and first tier of the legal system in China.[139] The second tier constitutes the laws enacted by the National People's Congress and its Standing Committee.[140] The third hierarchal tier comprises the regulations issued by the State Council.[141] This is followed by the local laws and regulations issued by the local People's Congress and its Standing Committee.[142] The lowest tier consists of the local laws issued by the local governments.[143] The regulations issued by the departments of the State Council occupy an equivalent status to that of local laws issued by local governments.[144]

   Since MOFCOM is a department of the State Council, the Foreign Trade Barrier Investigation Rules (as they are promulgated by MOFCOM) are subordinate to the Constitution and to the laws and regulations issued by the National Government and the State Council. The Rules therefore have to give way to the superior laws in case of

[138] Ibid. Also see the Ministry of Commerce of the People's Republic of China: Bureau of Fair Trade for Imports and Exports, Functions <http://english.mofcom.gov.cn/departments/gpj2/> accessed 10 October 2013.
[139] Law on Legislation 2000 (promulgated by the Standing Committee of the National People's Congress, 15 March 2000, effective on 1 July 2000) Standing Committee National People's Congress Gaz. 112 (PRC), art 78 [Presently derived from (and as cited in) Junrong Song, 'A Comparative Study on the Trade Barriers Regulation and Foreign Trade Barrier Investigation Rules' (2007) (4) 41 Journal of World Trade 799, 802.
[140] Ibid, art 79.
[141] Ibid.
[142] Ibid, art 80.
[143] Ibid.
[144] Ibid, art 82.

> conflict between them and the higher hierarchal sources of laws.[145] This arguably reveals an unimportant positioning of TBI Rules in the overall legal system of China, and this situation might also be a contributing factor to the infrequent utilisation of TBI Rules. The hierarchal status can also be seen as a probable reason for the lack of support the TBI Rules receive from 'other ministries' or 'higher political institutions'.[146]

It is important to address these problems if the mechanism is to attract the interest of business communities and the government. It is also important that the approach towards the management of WTO disputes is reviewed and revised in light of the above-mentioned economic-social-political-diplomatic limitations of the mechanism.

4.4 Additional Comments

In addition to the discussed impediments, there are other problems with China's participation at the DSU and the utilisation of TBIM, such as: the lack of WTO law understanding, lack of "common law" and litigation experience, insufficient in-house legal expertise, language constraints, and inadequate internal capacity to ensure compliance with WTO commitments.[147] If these problems impede the functioning of TBIM, how and what made it function smoothly and effectively in the cases of *Japan-Laver* and *US-Renewable Energy*? It may be recalled that the case of the Laver Association was exceptional. The seaweed industry had the required political influence on the government. The industry had personal and professional contacts with senior government officials, and it was one of the main exporting sectors for China.[148] These favourable circumstances are likely to have enabled the partnership to flourish. In the case of *US-*

[145] In case where the TBI Rules conflict with the higher hierarchal laws, the issue of prevailing law is decided by the State Council. Ibid, art 86.
[146] Liyu and Gao (n 1) 162.
[147] Interview with an international trade law scholar (n 7).
[148] Henry Gao (n 9) 653.

Countervailing Measures (China), TBIM could again be invoked as the solar enterprises and other enterprises dealing with renewable energy products in China are equally (or even more) resourceful and influential.[149]

The cases point to the conclusion that TBIM can enable resourceful business actors to protect their exporting interests through a governmental action at the WTO. But the same result may not be achieved in cases where the exporting interests of resource-constrained, developing and small scale industries are at stake. In other words, the formalisation of PPP may lead to a situation of *discrimination* between the '*haves*' and the '*haves not'* industries in China. This likely consequence is discussed as one of the limitations of PPP approach in chapter two.[150]

In response to these problems and limitations, Henry Gao has recently argued that TBIM is practically being replaced by a 'new system' as the Chinese government and the industries have preferred the use of 'Quadrilateral Coordination' mechanism which is based on the 'Regulations on Responding to Anti-dumping Cases against Exports'[151].[152] This mechanism, unlike TBIM, encourages a decentralised form of coordination between the central government, local government, private companies and trade associations. Gao argues that the 'Quadrilateral Coordination' mechanism 'is a better model of public-private partnership than the TBI mechanism' for several reasons, including its "bottom-up" approach, inclusion of local industry associations and local governments, better incentives of coordination, its inter-ministerial

[149] Interview with an official representative, Permanent Mission of China to WTO (n 7).
[150] See chapter two (page 88).
[151] Provisions on Responding to Antidumping Cases concerning Export Products, Decree of the Ministry of Commerce of the People's Republic of China [MOFCOM Order No 12 of 14 July 2006]. Hereinafter, the provisions are referred to as 'Regulations on Responding to Anti-dumping Cases against Exports'. [Full translated text at Ministry of Commerce, People's Republic of China <http://english.mofcom.gov.cn/aarticle/policyrelease/announcement/200712/20071205275181.html> accessed 20 September 2014].
[152] Gao, 'Public-Private Partnership: The Chinese Dilemma' (n 88) 984.

framework, better coordination potential and a new generation of industry associations it has given rise to.[153] He further argues that the 'mechanism provides the perfect remedy to the design flaw of the TBI mechanism'.[154]

It seems that there is a flaw in this argument, as the two different mechanisms address different situations of investigation, i.e., (i) the Regulation[155] on antidumping addresses a situation of unilateral antidumping investigation launched by a foreign government against a Chinese enterprise, and (ii) the TBI Rules address a situation concerning a domestic investigation launched by the home government to determine the possibility of initiating a bilateral or multilateral action against a foreign government. The 'Regulation on Responding to Anti-dumping Cases against Exports', as the title suggests, seeks to strengthen the responding capacity of the Chinese enterprises which are targeted by unilateral antidumping investigations in overseas jurisdictions. The Regulation prescribes a procedure to guide the industries, central and local governments to coordinate and respond to such unilateral actions for the better protection of the exporting interests. The 'Quadrilateral Coordination' mechanism based on the Regulation is therefore devised to ensure that no Member State is able to abuse the provisions of unilateral trade remedies (provided under WTO Anti-Dumping Agreement) against the Chinese exporting interests.

On the other hand, TBIM provides guidance to the government and industries for coordinating during the investigation of foreign trade barriers. It defines the rights and obligations of public and private sector entities for the bilateral and multilateral handling of trade disputes. Hence, the

[153] Ibid 997.
[154] Ibid.
[155] See n 151.

two mechanisms, based on different set of rules[156], address two different situations and have different functions to perform. Therefore, one cannot be seen as a mechanism that is replacing the other.

However, the model of 'Quadrilateral Coordination' has several advantageous features which can be considered while devising a PPP model for the handling of bilateral and multilateral trade disputes in other developing countries. For example, the Regulation clearly defines the rights and obligations of various public and private sector bodies; it provides procedures for the implementation of these rights and obligations; it engages industry associations, private firms, local governments and the MOFCOM as primary participants to ensure better coordination and communication; it provides an inter-ministerial framework at the governmental level; it makes industry associations responsible for monitoring the antidumping practices and for collecting information[157]; it obliges industry associations to create a special fund for assisting enterprises during unilateral investigations[158]; the Regulation is supported by various provisional rules which are simultaneously issued by the local provincial authorities in China.[159] These beneficial features can be considered for decentralising the process of dispute settlement and for devising multi-tiered PPP mechanisms in other developing countries. They can also be considered and examined by the Chinese policy makers for reviewing TBIM and addressing the problems it has faced so far. In some respects, as discussed in the previous chapter, a similar decentralised PPP

[156] Regulations on Responding to Anti-dumping Cases against Exports and the TBI Rules.
[157] Regulations on Responding to Anti-dumping Cases against Exports, art 12.1.
[158] Regulations on Responding to Anti-dumping Cases against Exports, art 11.
[159] Gao, 'Public-Private Partnership: The Chinese Dilemma' (n 88) 983.

model has already been employed by the European Commission under its revised Market Access Strategy.[160]

4.5 Concluding Remarks

In light of the above discussions, it may be concluded that the evolution of partnership provisions, institutions and procedures in China provides an interesting case study for the developing world. China has learned from the experiences of active WTO Member States (such as the US and the EU Members), and it has tried to evolve a formalised, legal and institutional PPP mechanism for the management of trade disputes. Its TBIM has enabled the MOFCOM to successfully negotiate trade conflicts and conduct trade litigations at WTO DSU. Hence, one could view TBIM as an *effective* government-industry coordination mechanism especially when its capacity-building potential (as demonstrated in the discussed trade disputes) is assessed against the benchmark for effectiveness provided in chapter two.[161] However, it is difficult to reach any definite conclusions regarding its effectiveness as it has not been invoked and utilised frequently. Nevertheless, other capacity-building strategies employed by China and its increasing participation at the WTO DSU testify to the fact that China is willing to protect and expand its foreign trade with the help of WTO adjudicatory provisions. The experience of China, especially in terms of TBIM Rules, third party participation, the establishment of think tanks, the 'bidding' process for the selection of lawyers (leading to the "pairing-up" of foreign and domestic trade lawyers), and other strategies discussed in this chapter can cumulatively act as a catalyst for future policy makers. Similarly developed developing countries, aiming to strengthen their WTO participation capacity, can learn from China's example.

[160] European Commission: External Trade, 'Global Europe: A Stronger Partnership to Deliver Market Access for European Exporters', 3 <http://trade.ec.europa.eu/doclib/docs/2007/april/tradoc_134591.pdf> accessed 19 March 2014.
[161] Chapter two (page 61).

5. CASE STUDY: BRAZIL

Brazil has emerged as a global leader in international trade.[1] As a part of major trading alliances including WTO, MERCOSUR[2], G-20[3], Cairns Group[4] and BRIC[5], it has played a significant role in bilateral and multilateral trade negotiations. It has also dedicated a significant amount of resources to WTO-related affairs including dispute settlement. After the US, the EU and Canada, Brazil is the fourth most active complainant at WTO DSM, making it the most frequent complainant among developing country Members of WTO.[6] From the years 1995 to 2015, it has in different capacities participated in 137 cases out of 496 cases filed at WTO DSU during this period. Hence, it has participated, in one way or the other, in over 27 percent of the cases filed at WTO.[7] Moreover, Brazil has gained international repute not only for the quantity but also for the quality of its participation at WTO DSU.[8]

[1] Brazil has established itself as the seventh largest economy in the world and the largest economy in the South America and also Latin America. It is one of the fastest growing economies in the world, and the credit largely goes to its export potential. Its gross domestic product has increased by six times from the year 1992 to 2012. This has mainly been caused by increase in exports. It is one of the world's largest exporters of iron ore. [The World Bank data]

[2] It is a regional trading bloc in South America. For more information, see MERCOSUR <http://www.mercosur.int/> accessed 8 July 2015.

[3] It is an international alliance of economies that collectively accounts for almost eighty percent of world trade. For more information on G-20, see John J. Kirton, *G20 Governance for a Globalised World* (Ashgate 2013) 1.

[4] It is a coalition of agricultural exporting countries. For details, see The Cairns Group <http://cairnsgroup.org/Pages/default.aspx> accessed 8 July 2015.

[5] It is a trading alliance of major emerging market economies. For more information, see The BRICS Post <http://thebricspost.com> accessed 10 November 2014.

[6] For data on Brazil's participation at WTO DSU, see chapter two (Table 1, page 40). Chad P Bown and Rachel McCulloch, 'Developing Countries, Dispute Settlement, and the Advisory Centre on WTO Law' (2010) The World Bank, Policy Research Working Paper 5168, 7, 34 <http://elibrary.worldbank.org/doi/pdf/10.1596/1813-9450-5168> accessed 9 November 2013; Chad P Bown and Bernard M Hoekman, 'WTO Dispute Settlement and the Missing Developing Country Case: Engaging the Private Sector' (2005) 8(4) Journal of International Economic Law 861; Gregory C Shaffer, Michelle Raton Sanchez Badin and Barbara Rosenberg, 'The Trials of Winning at the WTO: What Lies Behind Brazil's Success' (2008) 41(2) Cornell International Law Journal 383, 388.

[7] The data includes the cases filed from January 1995 to June 2015. [See chapter two (Table 1, page 40)].

[8] Archana Jatkar & Laura McFarlene, 'Brazil in the WTO Dispute Settlement Understanding: A Perspective' (2013) 1 Briefing Paper, Cuts International, at 1 <http:///C:/Users/Amrita/Downloads/Briefing_Paper13Brazil_in_the_WTO_Dispute_Settlement_Understanding-A_Perspective.pdf> accessed 10 July 2015.

Brazil has witnessed landmark WTO disputes where industries have actively worked with the government during pre-litigation, litigation and post-litigation stages. Unlike the previous case studies, there is no legal provision in Brazil which confers a right to petition on the individual and imposes a duty to examine petitions upon the Brazilian government.[9] For this reason, the nature of PPP formed during WTO litigations in Brazil is largely informal. But it may not be entirely accurate to label it as "purely informal" as the government has organised its structure to facilitate such partnerships with dedicated institutions and procedures. The Brazilian PPP arrangement may therefore be described as a system which has the elements of a formal mechanism (as it resembles the US, the EU and China PPP to some extent) and an informal coordination (as it operates without a legal or a regulatory framework).[10] An examination and review of this "semi-formal" or "imperfectly-informal" form of partnership in Brazil makes this case study an indispensably relevant part of the present research as it introduces a different form of partnership system. The case study therefore expands the horizons of this research.

The findings in the present chapter are gathered from semi-structured interviews and discussions with government officials, diplomats, privately hired lawyers and private sector representatives.[11] With this additional empirical investigation, the chapter builds on and complements the earlier works of Shaffer on the Brazilian participation at the WTO DSM,

[9] Interview with Eduardo Chikusa, Permanent Mission of Brazil to the WTO (Geneva, Switzerland, 16 September 2013) ['The private sector does not have a piece of legislation or regulation or a list of guidelines to follow or to refer to while approaching the government for the protection of its trade interests.'].
[10] For a definition of 'formal' and 'informal' PPP systems, see chapter two (page 64).
[11] All interview summaries are on file with the author.

formation of PPPs and the building of Brazil's pluralistic trade law community.[12] The chapter is therefore based on primary and secondary sources.

The chapter enunciates the strategies that Brazil has introduced and employed to manage foreign trade disputes. Following this, the case study analyses the ways in which several trade disputes were managed by the government and the private sector in Brazil. The chapter also outlines certain features of the Brazilian PPP mechanism which have enabled this developing country to overcome its WTO capacity-related challenges. Finally, it investigates the effectiveness of the informal yet institutionalised mechanism of PPP in Brazil, while identifying the benefits and the potential challenges that such partnerships have or may face in the future.

5.1 The Political Economy and Management of Foreign Trade Disputes in Brazil

Brazil enjoys a presidential representative democracy with a multiparty system of governance. It is run by a federal government, along with multiple states, federal districts and municipalities. However, it is important to note that Brazil, before becoming a democracy, followed an authoritarian form of governance with a largely state-owned or state-controlled economic sector. In the past three decades, it has undergone a huge transition from an authoritarian to a democratic nation. Although it has moved from a closed and protected economy to an open market economy with a capitalistic set-up, the remnants of its pre-1990s socialistic framework and its 'Import Substitution Industrialisation' policy are still visible in the existing regulations governing international trade.[13] The Brazilian Government continues to control many strategic

[12] Gregory C Shaffer, Michelle Raton Sanchez Badin and Barbara Rosenberg, 'Winning at the WTO: the Development of a Trade Policy Community Within Brazil' in Gregory C Shaffer and Ricardo Melendez-Ortiz (eds), *Dispute Settlement at the WTO: The Developing Countries Experience* (Cambridge University Press 2010) 21.

[13] 'Import Substitution Industrialisation' (ISI) was the cornerstone economic policy of the country since 1930s. Its aim was to protect the domestic industry through local production of high value goods and services and reduction of

sectors of the economy including power generation and telecommunications. Very complex and detailed set of rules still govern the registration and operation of businesses.[14] However, at the same time, the left-wing Governments (which have led the country since 2003 and were originally known for their state interventionist and nationalist policies) have recently used 'privatisation' and 'deregulation' as tools to move towards a moderately free market economy.[15]

International trade has acquired a significant role in the economic development and political transitions in Brazil. It has expanded its economy through international trade activities pursued mostly by private business entities, while the government has retained some powers to regulate foreign trade to achieve the ends of overall development and national welfare.[16] This shift from the 'Import Substitution Industrialisation' policy to 'export-oriented' trade-liberalising policies, which coincided with the establishment of WTO in 1990s, created new challenges and opportunities for the country.[17] In response to these changes, the government underwent a massive reorganisation. In order to respond to the demands of multilateral obligations after the establishment of WTO, and more particularly, to manage foreign trade disputes under the rule-oriented WTO DSM, Brazil established a 'three pillar' dispute settlement mechanism.

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importation. It was facilitated through state-owned industries, infrastructure investment and subsidies granted to domestic firms. For details on ISI and Brazil's socialism, see Carlos Pio, 'Brazil: Political and Economic Lessons from Democratic Transitions' (June 2013) Civil Society, Markets and Democratic Initiatives, 1 <http://i.cfr.org/content/publications/images/csmd_ebook/PathwaystoFreedom/ChapterPreviews/PathwaystoFreedomBrazilPreview.pdf> accessed 9 July 2015.

[14] For example, the Labor Laws regulate the operation of businesses in Brazil as they seek to protect the welfare of workers. [Consolidated Labor Laws (CLT) Decree-law 5452 (1943) arts 578 and 591]. Also see the Constitution of the Federative Republic of Brazil, art 7 and 8.

[15] Pio (n 13) 4; Shaffer Badin and Rosenberg, 'Winning at the WTO' (n 12) 28.

[16] World Trade Organization, 'Trade Policy Review-Brazil', Report of the Secretariat, WT/TPR/S/140 (1 November 2004), pp. 19, 37 [as cited in Shaffer Badin and Rosenberg, 'Winning at the WTO' (n 12) 27]. Jatkar (n 8) 2 [' These shifts highlight the reliance Brazil placed on the global markets and the usage of the private sector to increase economic growth, which ultimately led it to be a leader of developing countries in front of the WTO DSU.']

[17] Jatkar (n 8) 2 ['Brazil's emergence as a powerhouse at the WTO and especially within the DSU is often attributed to the economic and political changes in Brazil in the late 1980s through the early 1990s. During that time, Brazil moved from import substitution industrialisation polices towards export-oriented trade liberalising alternatives, which was, at the same time, that liberalised trade relations were institutionalised at the WTO.']

Shaffer's work indicates that the Brazilian 'three pillar' model 'consists of a specialized WTO dispute settlement division located in the capital, Brasilia (the "first pillar"), coordination between this unit and Brazil's WTO mission in Geneva (the "second pillar"), and coordination between both of these entities and Brazil's private sector, as well as law firms and economic consultants funded by the private sector (the "third pillar")'. [18] Furthermore, empirical investigation builds on this categorisation and confirms that the Brazilian model of dispute management is justifiably characterised as a 'three pillar' mechanism.[19] During semi-structured interviews, government officials have in a more specific manner characterised the Brazilian dispute settlement mechanism. The 'three pillars' are described by a government official in the following manner:

> The *first* pillar is the Government itself, and it mainly comprises the Ministry of Foreign Affairs, Ministry of Trade and Industry, Ministry of Agriculture, other concerned Ministries, the National Mission at the WTO, and the Dispute Settlement Unit known as the General Coordination of Disputes (CGC). The *second* pillar is the inter-ministerial Chamber which is known as CAMEX; it congregates the important departments of the government relating to foreign trade. Depending upon the subject matter of the issue, it connects and coordinates various relevant organs of the government. The *third* pillar is the private sector represented by trade associations and specific companies, and often supported by think tanks, research centres, lawyers, consultants, confederations, and NGOs.[20]

The establishment of this institutional framework has better enabled the government to manage trade disputes with the help of public private coordination.[21] A diagrammatic illustration of the

[18] Shaffer, Badin and Rosenberg (n 1) 423.
[19] Interview with Celso de Tarso Pereira, Permanent Mission of Brazil to the WTO (Geneva, Switzerland, 16 September 2013).
[20] Ibid.
[21] Bown and Hoekman (n 1).

present institutional framework established for the management of disputes in Brazil is provided in the figure below.

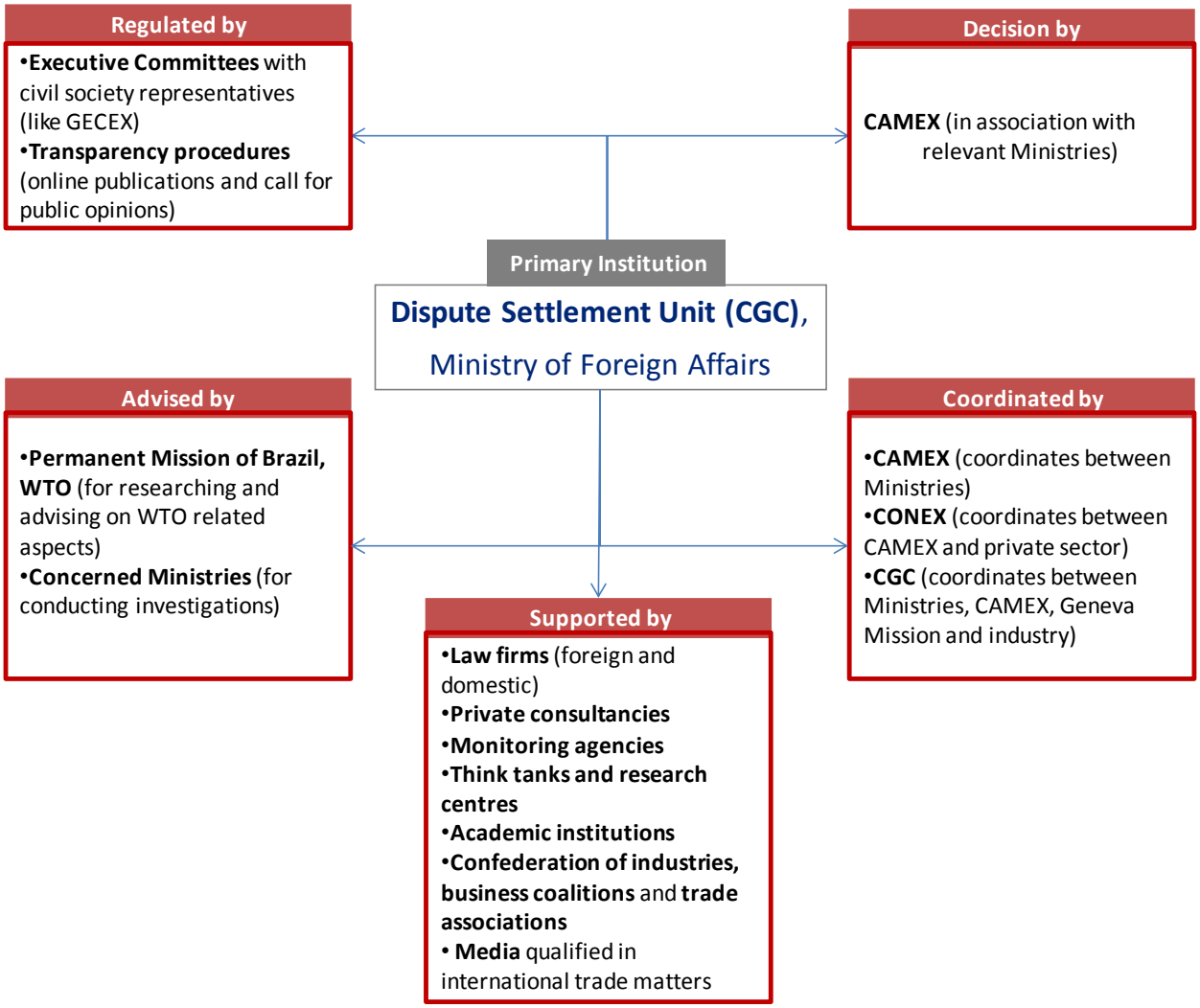


Figure 5: Institutional Framework in Brazil

The figure above identifies the key public and private sector participants and their respective interrelationship. A detailed discussion of their functions and inter-relationship procedures is given below.[22]

The Ministry of Foreign Affairs, since pre-WTO era, has been responsible for managing international trade matters, as the 'Union' (which is the official name for the Federal Government) in Brazil is responsible for all international affairs.[23] The Ministry's long standing interest and expertise accumulated over the past decades in international trade are the main reasons behind its continued central position in WTO matters including dispute settlement. The Ministry of Trade and Industry has also recently assumed some powers in the field.

The dispute settlement process is most commonly initiated when a company, either through its trade association or on its own, approaches the Ministry of Foreign Affairs or the Ministry of Trade and Industry (or its subject-specific Ministry) to convey or informally discuss a trade barrier.[24] Companies and trade associations, with the passage of time, have realised the importance of approaching the government with a well-researched and documented application (or legal memorandum) to request a governmental action in a matter. The private sector in Brazil has also frequently hired foreign and domestic lawyers for the preparation of applications and investigation of trade barriers.[25] This practice of filing well-documented and supported applications by affected private stakeholders and the government's initiation of investigation

[22] Detailed procedural analysis in Shaffer, Badin and Rosenberg (n 1) 429-432; Also see PDM Veiga, 'Trade policy-making in Brazil: Changing patterns in State-civil society relationship' in Mark Halle and Robert Wolfe (eds), *Process Matters: Sustainable Development and Domestic Trade Transparency* (Geneva, IISD 2007) 143, 178; findings further confirmed in interviews with Celso de Tarso Pereira and Eduardo Chikusa (n 19 and 9).
[23] The Constitution of the Federative Republic of Brazil, art 21.
[24] Interview with Celso de Tarso Pereira (n 19).
[25] Ibid.

upon receiving such complaints draws similarities between the Brazilian PPP arrangements and the ones in the US, the EU and China.

The dispute settlement unit, known as the 'General Coordination of Disputes' (CGC)[26], is the governmental agency which is mainly established for coordination with the private sector, initial examination of disputes, and presentation of cases at WTO DSM. Key functions of the CGC include: identification of potential disputes, administration of information and complaints from the private sector, preparation and presentation of cases at WTO, and coordination with the concerned private entities during investigation, preparation and presentation of a case.[27] The private sector in Brazil assists CGC during various stages of dispute settlement, mainly with the help of trade associations, consultancies and law firms.[28] The establishment of this specialised unit for the management of disputes and facilitation of public private coordination also resembles the formal provisions of the EU's TBR where the TBR division is established to coordinate with and register the complaints of the private sector.[29]

On administering a complaint from the private sector, or on identifying a barrier *suo moto*, CGC conducts an initial examination of the legal and economic viability of pursuing a dispute. Based on the findings of preliminary examination, CGC refers the dispute to the concerned unit within the Ministry of Foreign Affairs, and to other concerned Ministries, such as the Ministry of Development, Industry, Trade, Agriculture, or others.[30] It is at this stage that the concerned Ministries carry out a detailed investigation, wherein they further examine the legal, economic

[26] Unit for General Coordination of Disputes, Ministry of Foreign Affairs, Brazil <http://www.itamaraty.gov.br/temas/temas-multilaterais/desenvolvimento-comercio-internacional-e-financas/organizacao-mundial-do-comercio/solucao-de-controversias/cgc> accessed 15 October 2012.
[27] Ministry of Foreign Affairs, General Coordination of Disputes (CGC) <http://www.itamaraty.gov.br/temas/temas-multilaterais/desenvolvimento-comercio-internacional-e-financas/organizacao-mundial-do-comercio/solucao-de-controversias/cgc> accessed 15 October 2012.
[28] Ibid.
[29] See chapter three (text to n 138).
[30] Confirmed in interview with Celso de Tarso Pereira (n 19).

and political viability of pursuing the dispute. They prepare an investigation report, along with their recommendations and relevant information, which is subsequently forwarded to the Inter-Ministerial Foreign Trade Chamber (CAMEX)[31]. Based on the recommendations provided by the Ministries, and on the basis of its political-diplomatic analysis, CAMEX formally decides whether the government should pursue the dispute bilaterally or multilaterally. If formal dispute settlement procedures are invoked, it decides the course of action required at the pre-litigation, litigation and post-litigation stages of a dispute.[32]

Once CAMEX decides to pursue a dispute, CGC becomes obliged to launch consultation with the offending Member State(s), and if required, to prepare and present a given case at the WTO.[33] From this stage onwards, CGC officials work closely with the private counsels (frequently hired by the industry) and the concerned private sector representatives. Moreover, it 'encourages companies to hire counsel' and it often has 'conditioned the pursuit' of filing a WTO complaint on the private sector's willingness to finance the counsels fee.[34] It also shares updates and information about the settlement of disputes with the concerned Ministries and the officials at its Permanent Mission to the WTO.[35] Therefore, it can be argued that CGC serves as a contact point among the government, the Permanent Mission of Brazil to the WTO, participating business entities and private counsels hired in a case.

[31] CAMEX is the counselling chamber of the Government, and it is also known as the Foreign Trade Chamber. It is a part of Government Council of the Presidency. It comprises several government departments and is assisted by a common secretariat. For more information, see Ministry of Development, Industry and Foreign Trade, CAMEX <http://www.mdic.gov.br/sitio/interna/interna.php?area=1&menu=1920> accessed 24 August 2012.
[32] Shaffer, Badin and Rosenberg (n 1) 430; Interview with Celso de Tarso Pereira (n 19).
[33] Interview with Eduardo Chikusa (n 9).
[34] Shaffer, Badin and Rosenberg (n 1) 431.
[35] Ibid; Interview with Eduardo Chikusa (n 19).

CAMEX is constituted under the Ministry of Development, Industry and Foreign Trade, along with several other Ministries.[36] It interlinks these Departments and coordinates issues relating to trade (including the settlement of foreign trade disputes) among these departments.[37] This inter-ministerial approach allows the Brazilian government to act in a concerted, integrated and informed manner.

An institutional link between the ministries, CAMEX and business community has been provided with the establishment of the Private Sector Consultative Council (CONEX), a unit which is situated within CAMEX. It comprises around 20 private sector representatives which mainly focus on trade policy issues for export promotion. CONEX gathers required information and evidence from the concerned business entities during various stages of dispute settlement.[38] This development is similar to the EU's creation of the Market Access Advisory Committee, which provides an interface between the EU Commission and the private sector community.[39]

In addition, significant developments have enabled business communities in Brazil to respond to trade liberalisation and globalisation. For example, the National Confederation of Industry (CNI) has been established for 'defending and representing' industries in Brazil, and it directly engages industries in commercial policy and decision-making processes of the government.[40] The CNI is supported by the National Industry Forum and the Brazilian Business Coalition. The

[36] Other ministries are: Ministry of State Chief of Staff; Foreign Affairs; Farm, Agriculture, Livestock and Supply; Planning, Budget and Management; Land Development.
[37] For details, see CAMEX <http://www.camex.gov.br/conteudo/exibe/area/1/menu/67/A%20CAMEX> accessed 22 October 2013.
[38] World Trade Organisation, 'Trade Policy Review: Brazil' Report of the Secretariat [WT/TPR/S/140] 1 November 2004, 19, 37 <http://www.wto.org/english/tratop_e/tpr_e/tp239_e.htm> accessed 06 July 2012.
[39] See chapter three (text to n 128).
[40] It is a collaboration of twenty-seven industry federations, over a thousand employers' unions and around a hundred thousand industrial establishments in Brazil. For details, see CNI, Get to know the CNI: CNIs Performance <http://www.cni.org.br/portal/data/pages/FF80808121B629230121B62A6BE10349.htm> accessed 22 October 2013.

National Industry Forum is a consultative body which comprises private sector representatives.[41] The Brazilian Business Coalition (Coalizão Empresarial Brasileira, or CEB) comprises about 170 Brazilian business associations and enterprises.[42] Its members mainly are confederations of industries, trade associations, consumer groups, regional federations, sector specific associations, trade unions and the union of employers. The Coalition has been instrumental in organising symposia, workshops and working groups for the exchange of information between the government and industries.[43] It provides an informal and open forum for business organisations (from any economic sector) to participate voluntarily in the functions of the CNI.[44]

The private sector in Brazil has further organised itself with the help of well-funded trade associations and large individual companies. This has enabled the industries to overcome collective action problem and strongly partner their government during investigation of barriers or litigation of disputes at WTO. The emergence of strong trade associations is an exemplary development which is closely supported by Brazilian Constitution. The Brazilian Constitution and the Consolidated Labor Laws contain various favourable provisions to support the functioning of trade associations. For example, they provide for an annual tax which is mandatorily levied on the employers; the tax is known as 'Union Contributions'.[45] The union

[41] It is composed of representatives from national sectoral associations, CNI Standing Committees and representatives from other private sector organisations. For details, see CNI: National Industry Forum <http://www.cni.org.br/portal/data/pages/FF80808121B629230121B62A6BA50338.htm> accessed 22 October 2013.

[42] For details, see CNI: CEB <http://www.cni.org.br/portal/data/pages/FF80808121B517F40121B54C1068470D.htm> accessed 24 August 2012 [Presently derived from Shaffer, Badin and Rosenberg (n 1) 446-447].

[43] Ibid.

[44] For details, see CNI: Brazilian Business Coalition <http://www.cni.org.br/portal/data/pages/FF80808121B629230121B62A6BBA033D.htm> accessed 22 October 2013.

[45] It is provided in Consolidated Labor Laws (CLT) Decree-law 5452 (1943), arts 578 and 591; Constitution of Brazil, art 8. For details, see CNI: Contributions from Industry <http://www.cni.org.br/portal/data/pages/FF80808121B629230121B62A6BCF0345.htm> accessed 22 October 2013.

contributions are distributed among trade associations and confederations with the purpose of funding their representative activities. Ben Scheider confirms that 'over time the statutory provisions for financing compulsory associations bankrolled some of the wealthiest business associations in Latin America', and as a result, the associations have been able to accumulate massive resources.[46]

Private consultancies and non-governmental organisations have also played an instrumental role by assisting the government and concerned business entities, especially during the investigation and enforcement stages of dispute settlement. Leading private consultancies and NGOs in Brazil are: DATAGRO[47], the Brazilian Centre of International Relations (CEBRI)[48], the Brazilian Network for People Integration (REBRIP)[49], the Institute of International Trade Law and Development (IDCID)[50], and Prospectiva Consulting Firm on International Affairs[51]. These consultancies and NGOs have occasionally participated in the dispute settlement process by gathering information, analysing effective retaliation strategies and generating public support in the event of non-implementation of awards.[52]

In addition, think tanks and research centres in Brazil play an important role in international trade matters and dispute settlement. Some of them have been created by entrepreneurs for advising, informing and assisting the government and industry on various trade issues. For instance, one of the leading think tanks in Brazil is the Institute of Studies on Trade and

[46] S Haggard, S Maxfield and B R Schneider, 'Theories of Business and Business-State Relations' in S Maxfield and B R Schneider (eds.), Business *and the State in Developing Countries* (Ithaca, NY: Cornell University Press 1997) 36, 45. Also see Shaffer, Badin and Rosenberg (n 12) 32.
[47] For details, see DATAGRO <http://www.datagro.com.br/> accessed 25 June 2013.
[48] For details, see CEBRI <http://www.cebri.org/cebri/> accessed 25 June 2013.
[49] For details, see REBRIP <http://www.rebrip.org.br/> accessed 25 June 2013.
[50] For details, see IDCID <www.idcid.org.br> accessed 25 June 2013.
[51] For details, see PROSPECTIVA <http://www.prospectiva.com/> accessed 22 October 2013.
[52] Gregory C Shaffer, Michelle Ratton Sanchez Badin and Barabara Rosenberg, 'Brazil's Response to the Judicialized WTO Regime: Strengthening the State through Diffusing Expertise' (ICTSD South America Dialogue on WTO Dispute Settlement and Sustainable Development, Sao Paolo, Brazil 22-23 June 2006) 41-45.

International Negotiations (ICONE).[53] It provides technical analysis and research support relating to agriculture and agribusiness to the government and the agriculture industry. Some of the think tanks are directly linked to universities and are run by academics. For example, the Brazilian Center of International Relations (CEBRI)[54] is a non-profit based think tank which seeks to 'foster dialogue between different actors, public and private…'.[55] It is mainly engaged in sponsoring research programs, commissioning studies on international issues, and organizing roundtables, symposia and debates. It is also interesting to note that the Center is fully sponsored by exporting companies, trade associations and private law firms in Brazil.[56]

The government, think tanks, trade associations and law firms have introduced several internship opportunities for students, trade lawyers, private sector and government officials. These internships are offered at various locations.[57] The Ministry of Foreign Affairs, in association with the Law Firm Study Center, offers a four month internship program at the Brazilian Permanent Mission to the WTO to private lawyers, government officials and to the officials from trade associations.[58] Similar internship programs have been introduced by the Dispute Settlement Unit, the National Missions at Geneva and Washington DC, various government departments and prominent consultancies and research centres in Brazil.[59] These internships have enabled

[53] For details, see ICONE <http://www.iconebrasil.org.br/> accessed 25 June 2013.
[54] For details, see CEBRI: About Us <http://www.cebri.org/cebri/materia/sobre-o-cebri/quem-somos;jsessionid=157430DDD57D874A1191703CF0433754#.UmkiJ3C3_fI> accessed 23 October 2013.
[55] Ibid; Shaffer, Badin and Rosenberg (n 1) 452 [The authors note that CEBRI has been founded by a 'group of intellectuals, businessmen, government authorities, and academics'.]
[56] Shaffer, Badin and Rosenberg (n 1) 449.
[57] For example, they are offered at its Permanent WTO Mission, at the Brazilian embassy at Washington DC and at the Brasilia Dispute Settlement Unit.
[58] Interview with an official, Government of Brazil [Name and details withheld].
[59] Interview with Celso de Tarso Pereira (n 19) [The interviewee confirms the following: 'The Permanent Mission of Brazil at Geneva had organised an internship programme in the year 1994 with more than 200 participating lawyers. Most of these lawyers, after the internship program, returned to Brazil and served industries and the government. Therefore, it has gradually become easier for the government to analyse private claims and disputes. The provision of internships has also helped our industries in approaching these trained lawyers to investigate barriers and prepare applications for registering their trade grievances with the government.']

professionals to gain experience and expertise in WTO laws. The growth of interns and young professionals has in turn assisted the private sector entities and the government to conduct disputes in a cost-effective manner.[60]

The growing interest of the Brazilian media in international trade affairs has served as an important information interface between the government, business community, academia, think tanks, law firms and other interested parties. As journalists in Brazil are increasingly being trained in WTO-related aspects, their enhanced understanding of trade issues has resulted in effective and intelligible reporting of WTO-related issues.[61] This change suggests that national media can play an instrumental role in the enhancement of WTO-related awareness and information dissemination in a developing country. An educated and free media can also discharge watchdog functions by monitoring the activities of the government and the interaction between the public and private sector entities. As discussed in chapter two, the importance of media in managing WTO matters can mainly be realised in democratic countries where democratically elected governments are particularly responsive to the needs of individuals and they seek to achieve public support and, hence, political advantage through media reports.[62]

The Brazilian Government has also made significant progress in assisting the private sector to identify trade barriers. Various departments of the government are engaged in monitoring foreign practices. These departments create databases to help exporting companies identify and

[60] Interview with Celso de Tarso Pereira (n 19); Shaffer, Badin and Rosenberg, 'Winning at the WTO' (n 12) 54-55 [Authors note that interns were hired by the industries in the *EC-Bananas* arbitration hearings and the *Brazil-Tyres* Panel hearings.]

[61] Foreign trade disagreements and potential and ongoing WTO disputes are extensively covered and analysed by media nowadays. See, for example, 'EU Violates WTO Rules With Out-Of-Quota Sugar Exports, Say UNICA' *UNICA News* (17 December 2011) <http://www.unica.com.br/news/7064751920334804993/eu-violates-wto-rules-with-out-of-quota-sugar-exports-por-cento2C-says-unica/> accessed 12 June 2014; 'Brazilian Sugarcane Industry Association Calls on European Commission Not to Authorize Sugar Exports Above WTO Ceiling' *7KPLCtv.com* (Sao Paulo, 25 January 2014) <http://www.kplctv.com/story/11878241/brazilian-sugarcane-industry-association-calls-on-european-commission-not-to-authorize-sugar-exports-above-wto-ceiling> accessed 13 June 2014.

[62] For discussion on the role of media, see chapter two (page 100).

understand the foreign trade barriers that are or might affect their trade interests. This monitoring practice, which is similar to the EU's Market Access Strategy, enables the government and industries to interact and exchange information concerning trade barriers and practices. The strategy has introduced transparency in the government's management of trade issues, a development which is in line with the huge political transition the country has undergone from being an authoritarian to a representative democracy. Moreover, this development strengthens the monitoring capacity of the country, which is a key requirement for the effective enforcement of WTO rights.

Brazilian trade law firms are now among the largest and most experienced firms in South America.[63] Although foreign law firms have been hired by the government for most of the WTO cases it has litigated as a complaint, the government has encouraged domestic law firms to work concurrently with foreign based lawyers during the preparation and presentation of most WTO cases.[64] This practice bears a very close resemblance to the "lawyer-pairing" approach employed by the government of China.[65] Similar to the experience of China, this practice has enabled domestic law firms in Brazil to significantly expand their expertise and experience in WTO-related matters. 'This arrangement is more prevalent especially when the government is paying the legal fees, as it often becomes difficult to convince the industry to pay for a foreign and a domestic law firm hired in tandem for the same task.'[66]

[63] For example, Veirano Advogados and Demarest Advogados are Brazil-based world renowned law firms with experienced WTO lawyers.
[64] Ibid; Interview with a Brazil based trade lawyer (Sao Paulo, 24 April 2014) [Name withheld].
[65] See the case study of China (text to n 41).
[66] Interview with Celso de Tarso Pereira (n 19); Shaffer, Badin and Rosenberg, 'Winning at the WTO' (n 12) 89 [Authors note that such a 'tender' was issued by the Ministry of Foreign Affairs in the case of *Brazil-Retreated Tyres.*]

The democratic nature of governance and an organized economic climate in Brazil have triggered the formation of public-private alliances during the management of WTO disputes. The governmental institutions, private sector bodies, monitoring institutions, law firms, research centers and scholarships, as discussed above, have better enabled this developing Member State to engage the private sector for the smooth management of WTO disputes. Selected trade disputes, which were jointly handled by the Brazilian Government and the industry, are discussed in the following section.

5.2 Public Private Coordination: Analysis of Selected Trade Disputes

The selected cases in this section illustrate the procedures through which dispute settlement partnerships are commonly formed and facilitated in Brazil. The main purpose of this analysis is to identify the characteristics of Brazilian PPP that have introduced effectiveness to the process of dispute settlement and have thereby expanded Brazil's dispute settlement capacity.

5.2.1 The Aircraft cases

The *Canada – Aircraft*[67] and *Brazil - Aircraft*[68] cases were a wake-up call for the Government of Brazil as they outlined the need to expand its domestic dispute settlement capacity.[69] Shaffer confirms that these disputes are significant as they have changed the outlook and approach of the government towards the WTO dispute settlement.[70] These cases illustrate the potential role which can be played by the affected industries in WTO litigation and therefore the capacity building potential of PPP mechanism.

[67] Panel Report, *Canada – Measures Affecting the Export of Civilian Aircraft*, WT/DS70/R, adopted 20 August 1999, upheld by Appellate Body Report WT/DS70/AB/R, DSR 1999:IV, 1443.
[68] Panel Report, *Brazil – Export Financing Programme for Aircraft*, WT/DS46/R, adopted 20 August 1999, as modified by Appellate Body Report WT/DS46/AB/R, DSR 1999:III, 1221.
[69] Interview with Celso de Tarso Pereira (n 19).
[70] Shaffer, Badin and Rosenberg, 'Winning at the WTO' (n 12) 34.

These challenges were initiated by Canada and Brazil (against each other) to protect the interests of their respective aircraft industries.[71] Canada, in the *Brazil – Aircraft* case, challenged the export subsidies granted to foreign purchasers of Embraer aircraft with the contention that these subsidies were inconsistent with the SCM Agreement.[72] The pursuit was shortly followed by a similar challenge from Brazil in *Canada – Aircraft* case, against certain subsidies which were granted by the Government of Canada to support their export of civilian aircraft. Brazil also contended that these measures were inconsistent with the SCM Agreement. The Panel and Appellate Body in these cases substantially upheld the challenges and found that both Brazil and Canada were acting in violation of their commitments under the SCM Agreement.[73]

The private and public sector entities in Brazil had overlapping interests in litigating/defending these disputes. Embraer was seeking the removal of subsidies granted to its competitor so that it could maintain a profitable business of manufacturing and exporting aircrafts. For the Government of Brazil, successful litigation of the case against Canada and strong defensiveness to the challenge from Canada were important for political, economic and symbolic reasons.[74] Embraer, a state-owned company until 1994, was privatised during the period when many state-owned enterprises in Brazil were being privatised. Shortly after its privatisation, Embraer started emerging as a leading aircraft provider (for commercial, corporate and military use) in the international market. Brazil therefore had an important technological sector to protect as it was preparing itself for international competition. Moreover, the complex and costly litigation

[71] The leading exporter of aircraft in Canada was Bombardier and in Brazil was Embraer. It has therefore been argued that the aircraft disputes were largely initiated to protect the special exporting interests of these two companies.
[72] Agreement on Subsidies and Countervailing Measures (15 April 1994) LT/UR/A-1A/9 arts 3, 27, 27.4, 27.5.
[73] For details, see WTO, Dispute Settlement: Dispute DS46 <http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds46_e.htm> accessed 28 October 2013; Dispute DS70 <http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds70_e.htm> accessed 29 October 2013.
[74] Jatkar (n 8) 2.

procedure of these disputes acted as a strong warning to the Brazilian Government which led to the reorganisation and evolution of institutions, procedures and new dispute settlement strategies in Brazil.[75]

During the handling of these disputes, the government realised that an institutional reorganisation, additional resources and legal expertise were required for their successful conduct and for ensuring compliance. Procedures were therefore evolved to coordinate with the private sector; a specialised Dispute Settlement Unit was established for facilitating PPPs and managing trade disputes. An inter-ministerial Chamber was also created for managing disputes in a concerted manner. Government departments, especially the Ministry of Foreign Affairs, were reorganised to further facilitate the settlement of disputes.[76]

During the two aircraft disputes, the strategies and nature of partnership formed between the government and the aircraft industry in Brazil were very similar. Foreign-based lawyers and economic consultants in these disputes were hired by Embraer.[77] The Permanent Mission of Brazil to the WTO worked closely with the privately hired lawyers and economic consultants during the litigation and post-litigation stages of the disputes. Moreover, the privately hired lawyers, for the first time, were allowed to join the national delegation and participate directly in the WTO adjudicatory proceedings. Hence, unlike earlier cases where only diplomats were allowed to present and respond to legal arguments, the present cases witnessed a new era where private lawyers were presenting the cases at the formal WTO hearings. The private lawyers were

[75] Ibid.
[76] Interview with Celso de Tarso Pereira (n 19); PDM Veiga (n 22) 143-4; Shaffer, Badin and Rosenberg, 'Winning at the WTO' (n 12) 41-55.
[77] Graham & James LLP/Gowling, Strathy & Henderson, Shaw, Pittman, Potts & Trowbridge/Powell, Goldstein, Frazer & Murphy LLP were the privately hired lawyers [Shaffer, Badin and Rosenberg (n 1) 491]; Canada-based economic consultants were hired by Embraer during the *Canada-Aircraft* dispute [Shaffer, Badin and Rosenberg, 'Winning at the WTO' (n 12) 78].

closely monitored and guided by the government officials. Moreover, the company representatives supervised and assisted the private and the government lawyers through regular meetings and phone calls.[78] Therefore, these cases could aptly be seen as a *turning point* as the government arguably began to delegate the WTO litigation work to private sector entities.

The gradual delegation of functions from government officials to privately hired service providers, accompanied by transfer of resources from the private company (Embraer) to the government, resulted in the evolution of PPP in Brazil. However, the smooth interaction in this case should be seen with a caveat, i.e., the company was originally state-owned and the government, after privatisation, continued to retain some control in its functioning. This state of affairs resulted in open *channels of communication* and a relationship of *confidence* between the government and company officials. These elements, as outlined in chapter two, are essential for the functioning of an effective PPP mechanism.[79]

In conclusion, the exposition outlines certain basic elements of PPP, namely, resource exchange, reciprocity and interdependency between the partners. The privately owned resources were utilised by the government to successfully protect its WTO rights. The constitutional and diplomatic authority of the government was indirectly invoked by the profit-motivated industry through a privately-funded governmental action at the WTO. At stake were the exporting and national interests of the industry and the government, and they were dependent on each other's resources for the protection of their respective overlapping interests. Their respective interests were protected with the help of a reciprocal exchange of resources through an ad-hoc and informal partnership formed between the two.

[78] Interview with Celso de Tarso Pereira (n 19).
[79] For the importance of these elements, see chapter two (page 95).

5.2.2 EC-Export Subsidies on Sugar (Brazil)

The *EC — Export Subsidies on Sugar (Brazil)* [80] provides another striking example of coordination between the CGC, the Permanent Mission of Brazil to the WTO, the sugar industry, lawyers and economic consultants in Brazil. In this case, Brazil challenged the EC's provision of export subsidies to its sugar industry. Brazil alleged that the EC's Common Agricultural Policy (under Council Regulation[81]) was providing subsidies to sugar and sugar containing products above the agreed commitment limit specified in the Schedule of Concessions. It was therefore contended that the EC's export subsidies were violating the Agreement on Agriculture[82], the SCM Agreement[83], and the GATT 1994[84].

In addition, collateral challenges were initiated against the EC's subsidisation of its sugar sector by Australia and Thailand. Owing to the common nature of these challenges, a single panel was composed. With respect to these three cases, separate but identical reports were recommended by the Panel. The Panel found that the EC's practices were inconsistent with WTO rules as they violated the Agreement on Agriculture. The AB upheld the findings of the Panel. The AB also gave its observations on the claims filed under the SCM Agreement as they were not addressed in the Panel report.[85]

[80] Panel Report, *European Communities – Export Subsidies on Sugar*, Complaint by Brazil, WT/DS266/R, adopted 19 May 2005, as modified by Appellate Body Report WT/DS265/AB/R, WT/DS266/AB/R, WT/DS283/AB/R, DSR 2005:XIV, 6793.
[81] Council Regulation (EC) No 1260/2001 of 19 June 2001 on the Common Organization of the Markets in the Sugar Sector [2001] OJ L178/1.
[82] Agreement on Agriculture (15 April 1994) LT/UR/A-1A/2 arts 3.3, 8, 9.1(a), (c), and 10.1.
[83] Agreement on Subsidies and Countervailing Measures (15 April 1994) LT/UR/A-1A/9 arts 3.1(a) and 3.2.
[84] General Agreement on Tariff and Trade 1994 (15 April 1994) LT/UR/A-1A/3 arts III:4 and XVI.
[85] For details, see WTO, Dispute Settlement: Dispute DS266 <http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds266_e.htm> accessed 23 October 2013.

Sidley Austin (law firm) and Datagro (private economic consultants) assisted the CGC during the investigation, preparation and litigation of the dispute.[86] Their services were paid for by the industry, i.e., the sugar cane associations (mainly UNICA)[87]. 'The sugar industry in Brazil is a resourceful one and is well-represented by wealthy and organised trade associations. Therefore, the industry was forthcoming in the case and paid for most of the litigation expenses.'[88] Besides that, Oxfam and the Netherlands Economic Institute conducted a detailed analysis of the matter.

The Ministries engaged in the matter coordinated with the foreign lawyers and consultants throughout the case. Several meetings were held between the Ministries, lawyers, consultants and private sector representatives during the preparation and litigation of the case. This is described as a situation 'where the lawyers were not preparing the case on their own, but they were helping the government and the private sector to prepare the case'.[89] The lawyers and consultants were marshalling the legal and commercial arguments and briefs; the Ministries were vetting, editing and finalising them; and the industrial representatives were being consulted extensively by the Ministries throughout the entire process.[90]

During the disputes, Pedro de Camargo and Elisabeth Serodio, both former government officials, worked as consultants with UNICA. Their past experience in the field and pre-established contacts with government officials helped the association to coordinate with the government.[91] They enabled the industry and the government to *confide* in each other as they provided a *trustable* channel of interaction between the industrial associations and the ministries.

[86] Shaffer, Badin and Rosenberg (n 1) 383.
[87] See UNICA: Sugarcane Industry Association, About Us <http://english.unica.com.br/> accessed 7 November 2013.
[88] Interview with Celso de Tarso Pereira (n 19).
[89] Ibid.
[90] Ibid.
[91] Shaffer, Badin and Rosenberg, 'Winning at the WTO' (n 12) 67, 80.

The case identifies certain interesting elements which further characterise the nature of the Brazilian PPP.

First, the Dispute Settlement Unit and the Chamber's inter-ministerial nature have provided an institutional gateway for industries in Brazil to approach the government for the protection of their trade interests. These developments have transformed the nature of informal and ad-hoc coordination formed during the previous cases (such as in *Brazil – Aircraft*[92]) into an institutionally prescribed partnership.

Second, the case affirms the elements of resource exchange and interdependency between government and industry. The industry in the present case financed the services of lawyers and consultants, and it also assisted the government with technical analysis and information. The government, on the other hand, launched a formal complaint at the WTO and succeeded in restoring the lost profit margins of the Brazilian sugar exporters. Therefore, the government and industry were dependent on each other's resources for the removal of the trade barrier, and they deployed these resources for the effective conduct of dispute settlement proceedings.

Third, the composition of PPP could neatly be observed in the case as the Ministry of Foreign Affairs, the Ministry of Agriculture, the Permanent Mission of Brazil to the WTO, UNICA, Sidley Austin and Datagro were the key participants involved in the overall litigation process. The arrangement also clearly reflects that although the dispute was financed by the industry, the government was the leading partner in the dispute as it was closely monitoring and coordinating the works of privately hired service providers and private sector representatives.

[92] Panel Report, *Brazil – Export Financing Programme for Aircraft*, WT/DS46/R, adopted 20 August 1999, as modified by Appellate Body Report WT/DS46/AB/R, DSR 1999:III, 1221.

Fourth, the media once again played an important role in this dispute. The case was extensively covered by journalists, and this initiative made the public aware of the ongoing international trade developments.[93] Moreover, successful litigation of the case was also exhibited as one of the main achievements of the democratic government during electoral campaigns that were concurrently taking place in the country.[94]

5.2.3 US – Upland Cotton

The *US — Upland Cotton*[95] is a landmark case which exemplifies how a resource-constrained private sector and a developing country's government can successfully litigate a complex and a long drawn-out WTO case with significant international ramifications. Brazil initiated this WTO dispute against the US on the grounds that the US was granting prohibited subsidies, actionable subsidies and other forms of assistance to the US producers, users and exporters of upland cotton. It contended that the US subsidies to the "upland cotton industry" were inconsistent with the SCM Agreement[96], the Agreement on Agriculture[97], and the GATT 1994[98]. The Panel upheld the challenge. At the stage of appeal, the AB substantially upheld the Panel's findings.[99]

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[93] 'WTO raps EU over sugar subsidies' *BBC News* (London, 4 August 2004) <http://news.bbc.co.uk/1/hi/business/3536710.stm> accessed 24 October 2013. The ongoing recent developments and updates are also covered by the Brazilian media. See for example, 'Brazilian Sugarcane Industry Association Calls on European Commission Not to Authorize Sugar Exports Above WTO Ceiling' *7KPLCtv.com* (Sao Paulo, 25 January 2014) <http://www.kplctv.com/story/11878241/brazilian-sugarcane-industry-association-calls-on-european-commission-not-to-authorize-sugar-exports-above-wto-ceiling> accessed 13 June 2014.

[94] Ibid.

[95] Panel Report, *United States – Subsidies on Upland Cotton*, WT/DS267/R, Corr.1, AND Add.1 to Add.3, adopted 21 March 2005, as modified by Appellate Body Report WT/DS267/AB/R, DSR 2005:II, 299.

[96] Agreement on Subsidies and Countervailing Measures (15 April 1994) LT/UR/A-1A/9 arts 5(c), 6.3(b), (c) and (d), 3.1(a), 3.2.

[97] Agreement on Agriculture (12 April 1994) LT/UR/A-1A/2 arts 3.3, 7.1, 8, 9.1, 10.1.

[98] General Agreement on Tariffs and Trade 1994 (15 April 1994)LT/UR/A-1A/3 art III:4.

[99] For details, see WTO, dispute Settlement: Dispute DS267 <http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds267_e.htm> accessed 25 October 2013; Ray Goldberg, Robert Lawrence and Katie Milligan, 'Brazil's WTO Cotton Case: Negotiation Through Litigation' in Charan Devereaux, Robert Lawrence and Michael Watkins (eds), *Case Studies in US Trade Negotiation: Resolving Disputes*235 (Volume 2, Peterson Institute Press 2006).

Research indicates that the actual expenditure incurred in the dispute was approximately two million US dollars.[100] In order to meet these costs, the government and the industry collected financial and informational resources through various sources. A newspaper has reported that the main sources of funding the dispute included the affected private companies, Export Promotion Agency, the government's budget and proceeds from a lottery sale.[101]

The Dispute Settlement Unit (Unit) worked closely with the Ministry of Agriculture during the initial examination and investigation of the dispute. The information and statistical analysis was provided by the cotton industry which was mainly led by the Brazilian Association of Cotton Producers (ABRAPA)[102].[103] The Unit was sharing the information (provided by the industry) with the Ministry of Agriculture, and hence it was serving as a communication link between the government departments and the industry. Besides that, ABRAPA hired a former official from the Ministry of Agriculture to work as a consultant.[104] It is likely that the prior experience and contacts of this consultant helped in the formation of 'the Brazilian public-private partnership' in the present case.[105]

The complex nature of the case made it difficult for the government to collect the required factual evidence. It therefore reached out to the industry (producers, manufacturers, exporters of

[100] Calculations based on empirical investigation conducted in Shaffer, Badin and Rosenberg (n 1) 460.
[101] PC Mello, 'Cotton producers are raffle to fund the WTO panel' *PC Estado De Sao Paulo* (18 September 2003) <http://www.scielo.br/scielo.php?script=sci_nlinks&ref=000166&pid=S0104-44782007000100006000016&lng=es> 28 October 2013.
[102] ABRAPA: About Us <http://www.abrapa.com.br/institucional/Paginas/A-ABRAPA.aspx#quemsomos> accessed 28 October 2013.
[103] Interview with Celso de Tarso Pereira (n 19); Venilson Ferreira and Angelo Ikeda, 'U.S. suspends compensation to Brazilian producer' *Economia & Negocios* (Brasilia & Sao Paulo, 8 August 2013) <http://www.estadao.com.br/noticias/impresso,eua-suspendem-indenizacao-a-produtor-brasileiro-,1061750,0.htm> accessed 28 October 2013 [The news article notes that ABRAPA paid the cost of litigation that was incurred during the Panel proceedings.].
[104] Pedro de Camargo Neto, Former Deputy Minister in the Ministry of Agriculture. For details see Shaffer, Badin and Rosenberg (n 1) 449.
[105] Shaffer, Badin and Rosenberg (n 1) 449.

varying sizes) to convince them to 'coordinate and pool their resources through a trade association' in order to help pay for outside legal and economic consultants and gathering of information.[106] The cotton industry at this stage was insufficiently resourced to finance the litigation and to assist the government throughout the case.[107] A government official confirms that 'the cotton industry was fragile and not very organized during these years'[108]. The cotton industry therefore incurred only a part of the initial costs spent on hiring lawyers, consultants and gathering information during the initial stages of the dispute.[109] Due to the fact that the litigation lasted for several years (2002-2005), and the post-litigation proceedings were also carried out for a considerable period of time (2005-2012), the cotton industry 'ran out of their available yet limited funds' and eventually discontinued its resource support to the government.[110]

With the available funding, the industry (together with the government) hired the US based law firm, Sidley Austin. It also hired a US based economist to conduct the economic analysis. The economist was hired to explain and interpret the economic formulas and calculations used for providing subsidies to the US cotton industry.[111] The litigation work, i.e., preparing briefs and submissions, attending hearings, assisting the government to answer the issues raised during adjudication, analysing the legal and economic position of the case, marshalling commercial and legal arguments and related tasks, were jointly performed by the law firm and the economist.[112]

[106] Ibid, 459.
[107] Interview with an official, Government of Brazil [Name and details withheld] [The interviewee observes the following: '…the cotton producers allegedly were concerned about the cost of the case and asked the government to fund it, but the government refused, stating that it lacked funds'.]
[108] Interview with Celso de Tarso Pereira (n 19).
[109] 'U.S. must break pay to Brazil relative to cotton, says Secretary of Agriculture of the country' (*ABRAPA*, 8 October 2012) <http://www.abrapa.com.br/noticias/Paginas/EUA-deve-romper-pagamento-ao-Brasil-relativo-a-algodao-diz-secretario-de-Agricultura-do-pais.aspx> accessed 28 October 2013 [The webpage notes that 'the Abrapa...underwrote the costs of the panel against the U.S. in the WTO...'.]
[110] Interview with Celso de Tarso Pereira (n 19).
[111] Shaffer, Badin and Rosenberg (n 1) 459-60.
[112] Ibid, 460; confirmed in interview with Eduardo Chikusa (n 9).

Their working was closely supervised and guided by the government lawyers at the Dispute Settlement Unit.[113]

Furthermore, considerable support from voluntary organisations (such as Oxfam) was given during the post-litigation phase. Oxfam was engaged in international campaigning which helped to generate some pressure on the US authorities to remove its subsidies. They also monitored the implementation performance of the US and helped the Brazilian Government to prepare its submissions and gather evidence on non-implementation as was required for the compliance proceedings.[114] The voluntary sector therefore played an important role, especially during the post-litigation stage through campaigns, monitoring and research.

The case was a long fought battle between a developed and a developing country, the latter with a resource-constrained industry at stake. Nevertheless, the case strengthens the argument, as initially laid down in chapter two, that PPP is a vital requirement for conducting WTO litigations, especially when the complainant or the respondent is a resource-constrained developing country.[115] The commercial information can most viably be gathered by the affected business entities, and the governments cannot perform this task effectively without support from the affected private sector.[116] The developing country governments might also struggle to hire lawyers and consultants for preparing and litigating a case without the private sector's financial support.

[113] Interview with Eduardo Chikusa (n 9).
[114] Shaffer, Badin and Rosenberg (n 1) 463.
[115] Chapter two (page 61).
[116] Chapter two (page 58).

Moreover, the case confirms that an organized private sector is an essential requirement for the formation of effective PPPs.[117] The cotton industry, for instance, was insufficiently organized, and it could form an initial partnership with the government only after establishing its trade association (ABRAPA). But due to inadequate financial means within this new association, and the complexity and length of the case, the Association could not provide resources to the government throughout the stages of Panel, Appellate and Compliance proceedings. Hence, as initially described in chapter two, the developing country governments can face severe constraints in enforcing their WTO rights if they lack an organized business community or if a trade barrier is affecting the interests of a less-organized business community.[118] The phenomenon of less-organized industries with limited resources is more prevalent in developing countries. Therefore, it is important to devise ways for organizing business interests in developing countries for the effective formation of PPPs and the successful conduct of WTO disputes.

It is worth mentioning that the collaborative work of the team of lawyers, economists and subject-specific consultants provided the government with strong and comprehensive arguments. It may not be possible for legal experts to comprehend and translate commercial data and economic formulas from the legal point of view.[119] Similarly, it may not be possible for economic and technical experts to interpret and incorporate commercial information and analysis into the legal texts.[120] A successful litigation, especially in cases with a complex or technical nature, may therefore require a team consisting of lawyers, economists and subject-specific

[117] For discussion on the meaning and significance of an organised private sector, see chapter two (page 90).
[118] Chapter two (page 90).
[119] Interview with Moushami Joshi, Luthra and Luthra (Delhi, India, 21 June 2013).
[120] Interview with an official representative, TEXPROCIL (Mumbai, India, 27 June 2013) [Name withheld].

experts. Collaborative work by different experts ensures that the gaps between legal analysis, economic explanations and commercial evaluation are not left unfilled.

Finally, the case puts into focus a situation where a WTO action was initially launched with the help of private sector resources. But subsequently, the government had to finance the later stages of the dispute (mainly the stages of appeal and compliance) as the industry fell short of the required funds. This may indicate that, especially in complex cases with expected longer time frames for settlement, the government should not rely entirely on private funding or a small reserve of resources available with the government department. Additional financial arrangements should be made to finance the litigation that can possibly go beyond a calculated time frame. To this end, the governments can create an exigency fund or a standing budget for meeting such additional expenses.

5.2.4 EC - Measures Affecting Soluble Coffee

In *European Communities — Measures Affecting Soluble Coffee*[121], the Brazilian Government, at the request of its soluble coffee industry, launched formal consultations with the EU. Brazil's main contention was that the EU's Preferential Tariff Scheme (under the Generalised System of Preferences) was injuring the exporting interests of the Brazilian soluble coffee industry, and the practice was inconsistent with the Enabling Clause and Article I of GATT 1994. The dispute did not reach the stage of Panel as it was settled between the parties during consultations.[122]

[121] *European Communities — Measures Affecting Soluble Coffee*, WT/DS209, in consultations on 12 October 2000.

[122] For details, see WTO, Dispute Settlement: Dispute DS154<http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds154_e.htm> accessed 12 October 2014; M Osava, 'Commodities: Brazil-EU Dispute over Instant Coffee Goes to WTO' *Inter Press Service* (Rio De Janeiro, 16 February 1998) <http://www.ipsnews.net/1998/02/commodities-brazil-eu-dispute-over-instant-coffee-goes-to-wto/> accessed 10 September 2013; Also see Marislei Nishijima and Maria Sylvia Macchione Saes, 'Tariff Discrimination on Brazil's Soluble Coffee: an Economic Analysis' (2010) 30(2) Brazilian Journal of Political Economy 293 [The article confirms that the EU's discriminatory tariff had an adverse impact on the foreign market access of the Brazilian soluble coffee industry.]

The industry association partnering the government in this matter was the Brazilian Soluble Coffee Industry Association (ABICS).[123] The cost incurred during the investigation and consultation stage was mainly borne by the coffee industry.[124] It provided information and commercial evidence to the government as required during the investigation and preparation of consultation requests. In addition, ABICS hired private legal consultant (Veirano Advogados) to provide assistance to the government to carry out the legal analysis of the dispute.[125]

Shortly after the commencement of formal consultations, the EU made a conditional proposal. It proposed lifting the alleged tariff from the Brazilian coffee exports on the condition that Brazil would not proceed with the dispute.[126] Once the condition was accepted by the Government of Brazil, the EU removed the alleged tariffs from coffee exports and therefore granted a larger market access to the coffee industry in Brazil.[127] The seemingly favourable concession was accompanied with an understanding that the '....."sensitive" farm imports will continue to be restricted through quotas and other non-tariff barriers. These products include sugar, cereals, dairy products, tobacco, meat and some fruits – all of which are Brazilian exports.'[128]

The concession offered by the EU, along with its accompanying condition, was accepted by the Brazilian Government. Hence, the coffee industry managed to restore its lost market access in the EU with the help of the privately funded inter-governmental consultations. On the other hand, the Brazilian Government allegedly chose to selectively defend the exporting interests of

[123] ABICS <http://www.abics.com.br/#> accessed 24 October 2013.
[124] Interview with Celso de Tarso Pereira (n 19).
[125] Shaffer, Badin and Rosenberg (n 1) 491.
[126] M Osava, 'EU lifts tariffs on Brazilian soluble coffee' *Third World Network* (Rio de Janeiro, 11 July 2001) <http://www.twnside.org.sg/title/soluble.htm> accessed 05 July 2012; European Commission, 'The EU and Brazil solve dispute over soluble coffee' IP/01/987 (Brussels, 11 July 2001) <europa.eu/rapid/press-release_IP-01-987_en.pdf> accessed 24 October 2013.
[127] Osava (n 126).
[128] Ibid.

its coffee industry in a situation where the EU's protectionist policies were also injuring the interests of its other industrial sectors.[129] No manifest attempts were made by the government to protect the interests of the other affected sectors as Brazil was implicitly refrained from further challenging the EU's GSP scheme. Shaffer describes this as a situation where 'the EU agreed to increase the import quotas for the Brazilian soluble coffee sector and Brazil agreed to refrain from further challenging this aspect of the EU's GSP program'.[130]

The present dispute demonstrates some of the identified features of a PPP, such as mutual exchange of resources, reciprocity and an organized private sector. However, it also exemplifies the possibility of certain regulatory threats which such partnerships can face. It illustrates an instance of a possible clash of interests, i.e., a conflict between the special economic interests of the soluble coffee industry *versus* wider economic interests of various farm based sectors, where the former prevailed over the latter interest. This instance could also be seen as a case of 'private capture' or 'corporate regulatory capture' where the coffee industry, to some extent, captured the governmental authority for the protection of its market interests.[131] The possibility of corporate regulatory capture is discussed as a limitation of PPP approach in chapter two.[132]

5.2.5 Other Examples

Industries have also participated in other disputes (that have not been discussed above) litigated by the Brazilian Government. For instance, in the case of *Argentina – Poultry Anti-Dumping*[133],

[129] Ibid.
[130] Shaffer, Badin and Rosenberg (n 1) 474.
[131] Abigail C Deshman, 'Horizontal Review between International Organizations: Why, How, and Who Cares about Corporate Regulatory Capture' (2011) 22(4) European Journal of International Law 1089 [The article demonstrates a situation of corporate regulatory capture with the help of a case study of World Health Organization.]
[132] See chapter two (page 86).
[133] Panel Report, *Argentina – Definitive Anti-Dumping Duties on Poultry from Brazil*, WT/DS241/R, adopted 19 May 2003, DSR 2003:V, 1727.

the poultry industry led by the Brazilian Poultry Producers and Exporters Association (ABEF)[134] assisted the government with informational and financial resources.[135] It hired Veirano Advogados as its legal consultant for preparing and litigating the case.[136] Furthermore, the ABEF played a significant role in the case of *EC-Chicken Cuts*[137] as it provided the Dispute Settlement Unit with the information and commercial analysis required in the case.[138] Hence, the private sector in Brazil, most commonly through trade associations, has evidently partnered the government in various other trade disputes.[139] The chapter has only analysed selected cases as these cases outline certain distinguishable features of the Brazilian PPP arrangement. In addition, one of the cases (*EC-Coffee*) illustrates the regulatory challenges which such PPPs can face, especially in developing countries with poor observance of "rule of law".

It should further be noted that the instances of public private cooperation have often become evident in the cases where Brazil was acting as a complainant or where an issue had a direct and substantial impact on a specific private interest. The private sector has often remained unwilling to participate in those cases in which the Brazilian Government was required to defend its action/practices.[140] For instance, the private sector in the case of *Brazil – Retreaded Tyres*[141] was not motivated to help the government, and the government therefore had to finance the entire

[134] ABEF <http://www.abef.com.br/English/default.asp> accessed 28 October 2013.
[135] Interview with Celso de Tarso Pereira (n 19).
[136] Shaffer, Badin and Rosenberg (n 1) 490.
[137] Panel Report, *European Communities – Customs Classification of Frozen Boneless Chicken Cuts*, Complaint by Brazil, WT/DS269/R, adopted 27 September 2005, as modified by Appellate Body Report WT/DS269/AB/R, WT/DS286/AB/R, DSR 2005:XIX, 9295.
[138] Interview with Celso de Tarso Pereira (n 19).
[139] For example, in the case of *US — Gasoline*, the state owned company (Petrobas) funded the entire preparation of the case including the hiring of DC-based lawyers. [Panel Report, *United States - Standards for Reformulated and Conventional Gasoline*, WT/DS2/R, adopted 20 May 1996, as modified by Appellate Body Report WT/DS2/AB/R, DSR 1996:I, 29.]
[140] Shaffer, Badin and Rosenberg, 'Winning at the WTO' (n 12) 85. The rationale behind this observation is discussed in chapter two (page 85).
[141] Panel Report, *Brazil – Measures Affecting Imports of Retreaded Tyres*, WT/DS332/R, adopted 17 December 2007, as modified by Appellate Body Report WT/DS332/AB/R, DSR 2007:V, 1649.

litigation on its own.[142] There have also been cases where the government launched and litigated a case on its own because the concerned private sector entity was not capable of partnering the government.[143] Hence, the formation and functioning of dispute settlement partnerships are highly susceptible to the nature of disputes, willingness and capacity of affected industries, stakes involved in the matter, and a multiple number of other domestic conditions discussed in chapter two.[144]

5.3 Further Comments & Concluding Remarks

5.3.1 Nature and Elements of PPP

With the help of the above exposition, the case study has conceptualised the nature and elements of PPP arrangements in Brazil. The PPP in Brazil is *flexible*, *semi-formal* and *dynamic* in nature. It is *flexible* as the government and private sector can coordinate and exchange resources through varied procedures and channels, depending upon the requirements of each case. The private sector can either approach the Dispute Settlement Unit or their subject-specific Ministry through a trade association or on its own. Government officials can approach private sector representatives and seek their assistance in any way at any stage of dispute settlement. Moreover, there are no fixed guidelines for financing litigation as the issues of financing mostly depend upon multiple factors including the nature of a dispute.[145] A government official confirms that 'it

[142] Interview with Celso de Tarso Pereira (n 19); Shaffer, Badin and Rosenberg, 'Winning at the WTO' (n 12) 86 [The authors note that the government hired and paid for the services of the law firm and consultants engaged in the dispute, though the government was provided with partial information and evidence support by civil society organizations.]

[143] One of such cases, for instance was *United States – Domestic Support and Export Credit Guarantees for Agricultural Products*, WT/DS365, in consultations on 11 July 2007 [Panel established, but not yet composed].

[144] See chapter two (section 2.7).

[145] Interview with Celso de Tarso Pereira (n 19). For a list of factors that may influence PPP, see chapter two (section 2.7)

has been possible to adjust and revise our approach and financing procedures with every case we have conducted'.[146]

The PPP arrangement is *semi-formal* in nature as it is guided and facilitated by specialised procedures and institutions established for the management of trade disputes. These procedures have not been documented or published officially, and this differentiates them from those in the US and China. In other words, the Brazilian PPP is institutionalised, but not entirely formalised, because:

1. it does not confer a right on the private sector to file trade grievances in the form of written complaints, and
2. it does not impose any obligation on the government to examine and consider such complaints from the industry.[147]

It is *dynamic* as the procedures have gradually evolved according to the nature of disputes litigated and defended by the government. Different strategies of dispute settlement and PPPs have evolved at different times. Some of the strategies which have introduced *effectiveness* to the process include: the creation of business coalitions, the creation of think tanks, academic networks and research groups working in international trade law, the direct participation of private counsels in WTO hearings, the reorganisation of the governmental framework, and development of domestic legal expertise through the provision of internships and training. When assessed in light of the benchmark (for effectiveness) provided in chapter two, read together with the findings laid down in this chapter, it can be observed that the above-mentioned developments have facilitated *effective* exchange between the government and industries as they have played a

[146] Ibid; Interview with Eduardo Chikusa (n 9).
[147] Ibid; Veiga (n 22) 178.

capacity-building role.[148] Hence, these developments and strategies can be considered by other developing countries which are seeking to establish such flexible and semi-formal PPPs.

Shaffer argues that it is the combination of a 'professionalised Ministry of Foreign Affairs', an 'inter-ministerial Chamber', a 'specialised Dispute Settlement Unit', and a 'relatively well-organised business sector' with 'large, export-oriented companies' and trade associations that has enabled Brazil to become a leading developing country at the WTO DSM.[149] As mentioned before, the Ministry of Foreign Affairs has become professionalised (and specialised) in handling foreign trade matters. Officials there are experts in international trade and are appointed through a competitive selection process.[150] With the creation of specialised units having dedicated and well-qualified staff members, the Ministry has been able to tap and retain relevant expertise and experience in international trade law and policy it has developed over time.

CAMEX is also an interesting development as it has enabled the government to consolidate its approach on trade matters and proceed in an informed and coordinated manner to achieve expertise and an optimum utilisation of resources. A professionally qualified, well-staffed and responsive Permanent Mission of Brazil to the WTO can also be seen as one of the key reasons for its success at the WTO. Brazil has utilised its WTO Mission to enhance its organisational and cultural knowledge of WTO; this has partly been done by the appointment of its Foreign Affairs Ministers as the Ambassadors to WTO and through the secondment of its government officials and lawyers at the Mission.

[148] See chapter two (page 61).
[149] Shaffer, Badin and Rosenberg (n 1) 404 [The study presents the ways in which the private sector in Brazil has organized itself.]
[150] Ibid.

Moreover, one of the most widely proposed reasons for Brazil's success at WTO DSM is its organised private sector. Its WTO participation is 'strengthened by the size of its industries', such as oil and aircraft, as large entrepreneurs with significant trading stakes can better participate in the management of disputes.[151] Moreover, its 'pluralistic' private sector community, which consists of strong trade associations, confederation of industries, multinational private companies, well-resourced business coalitions, private consultancies and law firms (accompanied by various supporting agencies such as monitoring institutions, think tanks and research networks), has further strengthened the dispute settlement capacity of Brazil. Shaffer confirms that the 'willingness of Brazil's private sector to organize, engage with the government and fund outside counsel has been critical to Brazil's successful use of the dispute settlement system'.[152]

'Brazil epitomises the ideal of a developing country in its utilisation of the DSU of the WTO.'[153] Its PPP experience should therefore prompt other developing countries to seriously consider establishing effective procedures of PPP for the enforcement of international trade rights.[154] The argument here is based on the premise that the present case study has illustrated certain strategies that can be employed by public and private sector entities for *effective* management of trade disputes. However, similar dispute settlement strategies cannot simply be employed by all developing countries because the political and economic conditions in other countries may not be as conducive for the functioning of similar PPP arrangements as they are in Brazil.

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[151] Jatkar (n 8) 3. For discussion on the relation between size of industries, trading stakes and their likelihood of engaging in dispute settlement, see chapter two (pages 89 and 104).
[152] Shaffer, Badin and Rosenberg, 'Winning at the WTO' (n 12) 75.
[153] Jatkar (n 8) 5.
[154] World Trade Organization, 'Eighth WTO Ministerial Conference' Report by the Director-General [WT/MIN(11)/5] 18 November 2011 <http://www.wto.org/english/thewto_e/minist_e/min11_e/min11_5_e.pdf> accessed 28 March 2012.

5.3.2 Regulatory Threat: A Possible Shortcoming

The case study has exemplified a potential challenge to the functioning of an institutionalised PPP. The challenge has been acknowledged by a Brazilian government representative who has referred to it as the problem of 'clashing interests' between private and public sectors.[155] As discussed in chapter two, a privately-funded action can possibly lead to a situation of *private capture* or *corporate regulatory capture* where government officials can be inclined (for various reasons) to uphold private interests as against the national interest. A similar situation arose in the *European Communities — Measures Affecting Soluble Coffee* case where it was seemingly difficult for the Brazilian government to balance the national interest with the special economic interest.

A critical look at these observations raises a further *question*: Can the PPP mechanism protect the interests of all economic sectors of the country, irrespective of their wealth, scale and influence?

Answering this question may not be a straight forward task, but certain arguments can certainly be considered. The above examples demonstrate that PPP has frequently been formed between the government and different industrial sectors in Brazil, and the partnership has often enabled its participants to achieve their respective goals. Different industries in Brazil, such as coffee, sugar, poultry and aircraft have managed to restore their lost market access. The government, partially with the help of these successful litigations, has gained the status of an emerging global economy having an effective system of governance.[156] However, the partnership has not been

[155] Interview with Government Representative, Brazil [Name and details withheld].
[156] 'Globalisation and Emerging Economies' (March 2009) Organisation for Economic Co-operation and Development Policy Brief <http://www.oecd.org/tad/tradedev/42324460.pdf> accessed 30 October 2013; Knowledge @ Wharton: Finance 'Lessons from Brazil: Why Is It Bouncing Back While Other Markets Stumble'

able to survive when an industry has fallen short of resources, such as in the *Cotton* case, where the partnership disappeared after the initial stages of dispute due to shortage of resources within the private sector. The government, especially after the Panel stage, had to finance the case and gather additional information on its own.[157] Moreover, the existing literature and the empirical investigation have not identified any dispute in which small scale industries (such as footwear, wood products and clothing sectors) in Brazil have been able to approach and partner the government in any WTO litigation.[158]

A possible counterargument is that such economic sectors often do not have the potential to operate at international levels and therefore would have had no or only insignificant concerns relating to international trade. Alternatively, the small or unorganised industries may not be able to afford investigation and litigation of disputes as they may not have the required resources and capacity to survive for the duration of dispute settlement proceedings at the WTO. It has also been observed that 'the smaller companies and industries often require immediate results and they mostly expect financial compensation as an effective remedy due to the size of their businesses'[159]. Immediate results and financial compensation are their desirable outcomes, but they cannot possibly be achieved through WTO DSM. For these reasons, it may be argued that WTO DSM might not be an appropriate and viable avenue for smaller businesses.

There may be companies in Brazil that are facing economic problems due to China's growing export market and diminishing prices of products. Some of these companies may not even be

(*Wharton University of Pennsylvania*, 11 November 2009) <http://knowledge.wharton.upenn.edu/article/lessons-from-brazil-why-is-it-bouncing-back-while-other-markets-stumble/> accessed 30 October 2013.

[157] Interview with Government Representative, Brazil [Name and details withheld].

[158] Rajshri Jayaram and Peter F Lanjaw, 'Small Scale Industry, Environment Regulation and Poverty: The Case of Brazil' (2004) 18 (3) The World Bank Economic Review 443, 447; Matleena Kniivila, 'Industrial Development and Economic Growth: Implications for Poverty Reduction and Income Inequality' in Department of Economic and Social Affairs, *Industrial Development for the 21st Century*: *Sustainable Development Perspectives* (United Nations 2007) 295, 316-7.

[159] Interview with Celso de Tarso Pereira (n 19).

able to come to Brasilia to speak with the government officials. This may be because their stakes are small, or the disputes are perishable and non-litigable in nature, or because they have insufficient resources (such as evidence) to approach the government. Hence, one could argue that no purpose would be solved by formalising PPP and giving all (including such companies) a legal right to approach and petition their government.[160] However, on the other hand, there are clear benefits that can arise from the formalisation of PPP. These benefits are discussed in chapter two and three.[161] Hence, there are no easy or definite answers to the difficult question raised above.

These arguments, counterarguments and observations point to the fact that the formation of PPPs without a regulatory framework may result in a discriminatory protection of economic interests. More so, amidst the stark wealth inequality in Brazil, its PPP arrangement can fall short of granting an equal *right of access* to all economic sectors because the treatment of "rule of law" remains 'tilted' in favour of wealthy and politically influential businesses in Brazil.[162] Hence, as initially argued in chapter two, and subsequently illustrated in this case study, it is important for a partnership arrangement (especially in countries with poor observance of "rule of law" and high rate of corruption) to have established regulatory provisions that can possibly reduce such instances of discrimination and ensure that the governments make strategic choices in the interests of the nation.[163] It is also important that the government should always take the leading role in such partnerships, and it should be able to filter and prioritise claims and disputes in relation to their potential scope, overall impact, and their harmony with the wider economic, social and environmental interests.

[160] Ibid.
[161] Chapter two (page 63); Chapter three (pages 133-134).
[162] Poi (n 13) 4.
[163] See chapter two (page 86).

The EC Guidelines for Successful Public Private Partnerships acknowledge that 'the development of effective regulatory and watchdog mechanisms' is a vital condition for an effective regulation of PPP arrangements.[164] Brazil has also realised the need to deal with potential regulatory challenges, and this is evident from several transparency provisions and practices employed by the government. For example, transparency practices devised for regulating such partnerships in Brazil are: (a) seeking public opinion on proposed policies, bilateral negotiations, disputes and resolutions [165] ; (b) online publication of resolutions, regulations and trade proposals[166]; (c) appointment of representatives from civil societies and social service agencies to various committees, including the Management Executive Committee (GECEX)[167]. These procedures can act as incentives for other developing countries (which are intending to form partnerships with industries) to examine and employ best practices for regulating such partnerships.

5.3.3 Formal *versus* Informal PPP Arrangements

The issue of informal *versus* formal PPP system also deserves comment. It has been seen that a flexible arrangement of PPP in Brazil has worked well in various WTO cases. Nonetheless, the Brazilian government is discussing the potential benefits and viability of introducing formal procedures of PPP.[168] The question of whether a formal mechanism of PPP (similar to the ones

[164] European Commission, 'Guidelines for Successful Public-Private Partnerships' (March 2003) 39 <http://ec.europa.eu/regional_policy/sources/docgener/guides/ppp_en.pdf> accessed 29 July 2013.
[165] A recent example is the call for public comment: CAMEX 'Secex opens public consultation on negotiating agreements with the EU and Canada' (26 September 2012) <http://www.camex.gov.br/noticias/ler/item/218> accessed 29 October 2012.
[166] CAMEX <http://www.camex.gov.br/> accessed 29 October 2012.
[167] For the composition of GECEX, see CAMEX, GECEX <http://www.camex.gov.br/conteudo/exibe/area/1/menu/4/Comit%C3%AA%20Executivo%20de%20Gest%C3%A3o%20-%20GECEX> accessed 29 October 2012.
[168] Interview with Eduardo Chikusa (n 9).

in China, the US and the EU) will be more effective than the present informal means of PPP is difficult to answer. A government official has observed the following:

> [t]he private sector is satisfied with the present informal ways of coordination, and they have had almost no problems with it. We receive applications from the private sector very often, they identify barriers, assist us in various tasks, and the issues are resolved in close coordination with them. Seven different Ministries compose CAMEX, and each Ministry has close contacts with their industries. Therefore, industries know the right channel and authority to contact when they are faced with a foreign barrier. Hence, it is difficult to find a concrete reason for establishing formal provisions of PPP in Brazil. But the debate is still very much ongoing.[169]

It is believed that such informal and ad-hoc partnerships provide industries with an opportunity to express their interests to the government in an informal, non-litigious and casual manner.[170] A formal piece of legislation may limit the ability of the government to scrutinise and filter claims for an action, and seek information and other resources from the industry when required. It may further increase the industries' burden of proof and the government's burden of administration and costs required for conducting trade disputes.[171]

Some of these observations have been confirmed during an interview with a private sector representative from Brazil. The representative states that '...approaching the government officials for such matters is not a difficult task as we live in a highly democratic society. If we have a problem, we may approach the government officials by a phone call or an email or a visit to

[169] Ibid.
[170] Ibid.
[171] Ibid.

Brasilia, to which they are often very responsive.'[172] The experiences shared by government officials and private sector representatives relate to companies and trade associations which have approached the government and have partnered them during the settlement of disputes. Therefore, these opinions may not represent the concerns and problems which small and medium scale industries could face in approaching the government and registering their trade grievance.

Solving the dilemma of the effectiveness of a formal PPP system over an informal system of coordination is beyond the scope of this research. However, the case study can act as a catalyst for future investigation of this contested issue.

[172] Interview with Private Sector Representative (28 October 2013) [Name and details withheld].

6. CASE STUDY: INDIA

India has actively participated in multilateral and bilateral trade negotiations, WTO Ministerial Meetings and WTO Committee System. It has also participated numerous times in the WTO dispute settlement process as a complainant, respondent and third party.[1] From the years 1995 to 2015, it has in different capacities participated in 151 cases out of 496 cases filed at WTO DSU during this period. Hence, it has participated, in one way or the other, in over thirty percent of the cases filed at WTO.[2]

India's case study is significant for this research as it sheds light on a variety of WTO cases that were handled through varying levels of coordination between the government and the industry. Additionally, unlike the case studies of the US, the EU and China, there is no *formal* provision or procedure (like the EU's TBR, the US's Section 301 mechanism or China's TBIM) or a dedicated institution (like Brazil's CGC, CONEX and inter-ministerial CAMEX) which allows an industry to register a trade grievance with the Government of India if and when its trade interests are vitiated.[3] Hence, India's case study provides additional insights as it examines a different form of dispute settlement arrangement.

The domestic procedures for the handling of trade disputes and for coordinating with private sector entities have gradually evolved in India. They are employed on an informal and ad-hoc basis as they are neither published nor established formally in the form of a legislation or

[1] From the year 1995 to 2013, it has acted as a complainant in 21 cases, as a respondent in 22 cases and as a third party in 90 cases. For details, see WTO website: India and the WTO <http://www.wto.org/english/thewto_e/countries_e/india_e.htm> accessed 4 September 2013.
[2] The data includes the cases filed from January 1995 to June 2015. [chapter two, Table 1, page 40].
[3] Email from Ujal Singh Bhatia, Former Ambassador/WTO Permanent Representative of India to author (9 April 2010).

regulation.[4] These procedures, their evolution and the information relating to the WTO cases discussed in the case study are not extensively researched or described in the existing literature. The facts, information and the evidence provided are almost exclusively based on empirical research conducted by the author.[5]

The author has conducted interviews with officials, practitioners and bureaucrats working in various public and private sector authorities in India and abroad. Mainly, these officials are from the Ministry of Commerce, Ministry of law & Justice, Permanent Mission of India to WTO, Centre for WTO Studies (IIFT), WTO, law firms based in India and Geneva, Fisheries and Fishing Communities in India, and trade associations based in India such as TEXPROCIL, MPEDA and SEAI.[6] Subsequently, these findings are verified with the help of other primary sources including a written statement provided by the Ministry of Commerce, Government of India (as a response to the Right to Information Application filed by the author under India's Right to Information Act 2005).[7]

The chapter presents an overview of India's political and economic conditions and their interaction with the emergence of existing institutional framework established for the management of foreign trade disputes. It then provides an overview of the existing procedural framework employed by the government for managing disputes and coordinating with the private sector. In addition, the chapter analyses the WTO disputes which were jointly litigated by the Government of India and the business entities. With these examples, the chapter explores the

[4] Interview with an official, Ministry of Law & Justice, Government of India (Delhi, India, 3 June 2013) [Name Withheld].
[5] All interview summaries are on file with the author.
[6] Ibid.
[7] The information was requested by the researcher via RTI application dated 17 September 2013. The RTI reply was received on 5 December 2013 vide Document No. 1/27/2013- TPD. [The RTI responses are enclosed as Appendices E].

nature and elements of informal PPP arrangements formed in India. Finally, it outlines the potential challenges which PPPs in India may face and the obstacles that India may generally face during the conduct of foreign trade disputes.

6.1 India's Political Economy and the Evolution of Domestic Procedures and Institutions: Key Developments

India is a parliamentary democracy. It enjoys a dual polity system of governance, with central and state governments discharging their functions in accordance with the constitutional provisions. In certain respects, India's political system is similar to Brazilian political system as it enjoys representative democracy with multi-party and federal system of governance.[8] Moreover, there are certain similarities between the transitions Indian and Brazilian economies have undergone during the past three decades.[9] This, to some extent, explains the similarities between the Brazilian and Indian handling of WTO disputes.[10]

Before the year 1991, India followed a socialist and closed model of economy which was largely controlled by the national government. The policy of 'License Raj' was employed to control and regulate the business endeavours, and the policy of 'export promotion import substitution' was created to manage India's balance of payment and protect domestic industries against international competition.[11] Dominant state-owned industries in a mixed economy and

[8] For a discussion on the possible impact of democracy and multi-party system of governance on PPP arrangements in a country, see chapter two (page 98).
[9] For a discussion on the relationship between a country's economic climate and its management of foreign trade disputes, see chapter two (page 103).
[10] The similarities are outlined in this chapter.
[11] 'License Raj' was abolished with 1991 economic reforms. It was an economic policy in India which aimed to create a state-controlled, state-owned and state-regulated economy. The 'export promotion import substitution' was another economic policy prevalent in India before 1990s, and it aimed to achieve economic development through expansion of exports and minimisation of imports. For a detailed discussion on these policies, see Aseema Sinha, *The Regional Roots of Developmental Politics in India: A Divided Leviathan* (Bloomington: Indiana University Press 2005); Jagdish Bhagwati, *India in Transition: Freeing the Economy* (Clarendon Press 1993)

discretionary powers of the government over the regulation of trade and commerce made India one of the most controlled economies in the "non-communist" world.[12]

In 1990s, India's political economy underwent a major transition. With the conditionality requirements imposed by International Monetary Fund (IMF) during the economic crises of 1990s[13], and with the advent of WTO, India started to liberalise its economy.[14] As India moved towards an export-oriented market economy with lower trade barriers, deregulation and a capitalist framework, it started to emerge as a major economic power. Today, it is one of the fastest-growing economies in the world.[15] Through various economic reforms, including the creation of 'Special Economic Zones' and 'Export Processing Zones', and reduction of state-intervention and trade barriers in India, the economy has moved towards deregulation, privatisation and globalisation.[16]

In order to prepare itself for a new economic climate, and to meet the multilateral obligations it had undertaken under the WTO agreements, India had to reorganise its approach with regard to the management of domestic and international trade. To facilitate the process of reorganisation, the Ministry of Commerce was given the responsibility of reaching out to the exporting

[12] For discussion on pre-1990s import control and other protectionist policies in India, see Jagdish Bhagwati and T N Srinivasan, Foreign Trade Regimes and Economic Development: India (NBER Publications 1975).

[13] During the economic crisis of 1991, India applied for an emergency aid from IMF and IMF imposed several conditions to its financing. The conditions required that India should open its economy to foreign trade, competition and investment; it should reduce the intervention of state in the operation of trade and commerce; it should abandon its licensing requirements and eliminate subsidies. Bernard Weinraub, 'Economic Crisis Forcing Once Self-Reliant India to Seek Aid' *New York Times* (New Delhi, 29 June 1991) <http://www.nytimes.com/1991/06/29/world/economic-crisis-forcing-once-self-reliant-india-to-seek-aid.html> accessed 12 July 2015. For further details, see Francine R Frankfurt, *India's Political Economy 1947-2004: The Gradual Revolution* (Oxford University Press 2005) 603.

[14] For a discussion on the nature of India's economy pre and post 1990s, see Shalendra D Sharma, 'From Central Planning to Market Reforms: India's Political Economy in Comparative' (1997) 23 (1/2) Humboldt Journal of Social Relations 175. Also see Frankfurt (n 13) 603 and 625.

[15] In terms of GDP (purchasing power parity), India was the fourth largest economy in the world in the year 2012. [The World Bank Data 2013]. From 1991 to 2014, the GDP annual growth rate in India (in percentage) has increased from 1.1 to 7.4 percent. [The World Bank Data 2015].

[16] For details on 'Special Economic Zones' and 'Export Processing Zones', see Special Economic Zones in India, Ministry of Commerce and Industry <http://sezindia.nic.in/index.asp> accessed 14 July 2015.

communities and conduct discussions and training programmes with different export promotion councils around the country. The purpose of the outreach programme was to inform the private sector entities about trade liberalisation, the changes involved and their impact, the new national commitments and rights, gradual removal of trade barriers, and the global pact of promoting trade between nations resulting from the ratification of WTO Agreements.[17] The outreach exercise was carried out throughout the country for around two to three years.[18]

By the end of 1990s, state control over economic sectors was substantially reduced; industries were being privatised; trade barriers were being reduced and the government was committing itself to trade without discrimination. International trade had assumed greater importance and it became the backbone of economic growth and development in India. During these years, the export promotion councils became very popular with the exporting sectors. They became the primary agents of private industries for approaching the Ministry of Commerce whenever the interests of their industry were infringed by a foreign policy.[19] Since then, they have continued to play a very significant role in the management of trade disputes, by integrating the exporting interests and representing them to the government. In addition, several other developments could be traced during these evolutionary years.

First, the Ministry of Commerce was designated as the nodal ministry for WTO negotiations, policy-making and dispute settlement. Three specialised departments were established (under the Ministry) to handle WTO-related matters: a. Department of Industrial Policy & Promotion (DIPP); b. Tariff Commission; c. a reorganised Directorate General of Anti-Dumping & Allied

[17] For details on these workshops and consultation meetings, see Centre for WTO Studies, 'India, WTO and Trade Issues' (July-August 2008) 1(1) Bi-monthly Newsletter of the Centre for WTO Studies, IIFT 4-5 <http://wtocentre.iift.ac.in/NewsLetters/NewsLetter_01.pdf> accessed 20 September 2013.
[18] Interview with an official, Ministry of Law & Justice (n 44).
[19] Ibid.

Duties (DGAD). Subsequently, in 1996, Trade Policy Division (TPD) was created as a specialised division to handle trade disputes. The staff strength and their appointment procedures were also modified to increase the expertise and WTO-related capacity of the Ministry.[20]

Second, following the reorganisation of the Ministry of Commerce, and a series of litigations filed by the US and the EU against India during the initial years of WTO, the government significantly increased the size of its WTO mission at Geneva. From 1995 to 2012, the number of officers deputed at the Mission was increased from four to eleven.[21]

Third, the establishment of ACWL was a significant development which took place at a crucial time when the government was searching for cost-effective legal service alternatives. The Government of India became a founding member of the ACWL and has since been seeking its legal assistance in various WTO disputes.[22] Since then, the practice of hiring expensive overseas lawyers has decreased as the government is actively utilising the ACWL's subsidised legal services.[23]

Fourth, the increasing involvement of India in multilateral negotiations and dispute settlement activities created the need to enhance trade policy expertise within the government. To this end, the government established the Council of Economic Advisers in 2004. It was obliged to meet periodically to discuss and report on the developments in international trade laws.[24] The Advisory Council was divided into subject-specific groups. Each group was responsible for

[20] Ibid.
[21] See Permanent Mission of India, Geneva, List of Officers <http://www.pmindiaun.org/pages.php?id=851> accessed 12 June 2014.
[22] ACWL 'The ACWL at Ten: Looking Back, Looking Forward' (WTO Conference, Geneva, Switzerland, 4 October 2011) <http://www.acwl.ch/e/documents/reports/ACWL%20AT%20TEN.pdf> accessed 20 September 2013.
[23] For the list of lawyers hired by the Government of India, see Table 2 and Table 3.
[24] Details on its constitution and functions can be accessed at Prime Minister of India: PM's Committees and Councils <http://www.acwl.ch/e/documents/reports/ACWL%20AT%20TEN.pdf> accessed 20 September 2013.

handling claims and concerns relating to its allocated subject, and for making recommendations to the National Advisory Council.[25]

Fifth, due to the increasing number of proposals and recommendations made by these subject-specific subgroups, there arose a need to create a specialised advisory council for WTO affairs only. Hence, in the year 2004, the central government established a Cabinet Committee on WTO Matters (CCWTO).[26] The newly constituted Committee was obliged to analyse and make decisions concerning important trade disputes, negotiations and issues with a focussed, expert-driven approach.[27]

Sixth, in order to improve bilateral relations and enhance foreign investment, the government created country-specific divisions, under the Ministry of External Affairs, to handle bilateral trade relations with important trade partners. For example, the Europe West Division was one such unit which was obliged to monitor the trade relations of India with the countries in West Europe. It was also obliged to investigate and recommend an appropriate course of action to resolve trade disagreements arising with these countries.[28]

Seventh, the Cabinet Committee on WTO Matters soon became dysfunctional and the foreign trade matters started to be referred to the Cabinet Committee on Economic Affairs.[29] During the years 1999 to 2005, the Commerce Secretary was the competent authority to make

[25] Interview with an official, Ministry of Law & Justice (n 44).
[26] The CCWTO was constituted on 9 June 2004 with the Prime Minister of India as its Chairman. [Press Releases, 'Cabinet Committee on WTO Matters constituted' (*Prime Minister of India*, 9 June 2004) <http://pmindia.nic.in/press-details.php?nodeid=11> accessed 20 September 2013].
[27] For information on roles assigned to the Committee, see Cabinet Secretariat: Cabinet Committees <http://cabsec.nic.in/showpdf.php?type=council_cabinet_committees> accessed 20 September 2013; 'Cabinet panel on WTO to discuss revised offer on services this week' *The Hindu: Business Line* (New Delhi, 25 May 2005).
[28] Details can be accessed at Ministry of External Affairs, Government of India, EW Division <http://meatel.nic.in/?690210> accessed 20 September 2013.
[29] Details on the composition and the working of the Cabinet Committees can be accessed at Cabinet Secretariat: Cabinet Committees <http://cabsec.nic.in/showpdf.php?type=council_cabinet_committees> accessed 20 September 2013.

determinations on the appropriate action. The decisions were taken on the basis of recommendations made by the subject-specific and country-specific advisory groups under the Ministry of Commerce. In cases of high importance, the Commerce Secretary was obliged to refer the case file to the Cabinet Minister of Commerce for final approval. The file could travel further up to the Cabinet Committee on Economic Affairs in cases of highest importance.[30]

Eighth, with recent democratic changes in the political leadership in India, the Cabinet Committee on WTO Matters has been disbanded and WTO matters will now be handled either by the Cabinet Committee on Economic Affairs or (if required) by the full Cabinet.[31] The decision is taken to fast track the process of dispute management by minimising the layers of decision-making in the matters of WTO.[32] However, in practice, it is expected that the Ministry of Commerce will continue to be the decision-maker in most WTO matters.

These developments have resulted in the evolution of institutions and procedures that are currently employed by the Government of India for handling foreign trade disputes.

6.2 Current Institutional Framework: Management of Foreign Trade Disputes in India

Currently, there are multiple public and private sector entities in India that are commonly engaged in the management and resolution of foreign trade disputes. The institutional framework for the same has gradually evolved, and the key entities involved in the process have assumed specific (yet overlapping) functions. A diagrammatic illustration of the institutional framework established in India is provided in the figure below.

[30] Interview with an official, Ministry of Law & Justice (n 44).
[31] 'PM disbands four Cabinet panels, to set up four key committees' *Times of India* (Delhi, 11 June 2014) <http://timesofindia.indiatimes.com/india/PM-disbands-four-Cabinet-panels-to-set-up-four-key-committees/articleshow/36369253.cms> accessed 12 June 2014.
[32] Ibid.

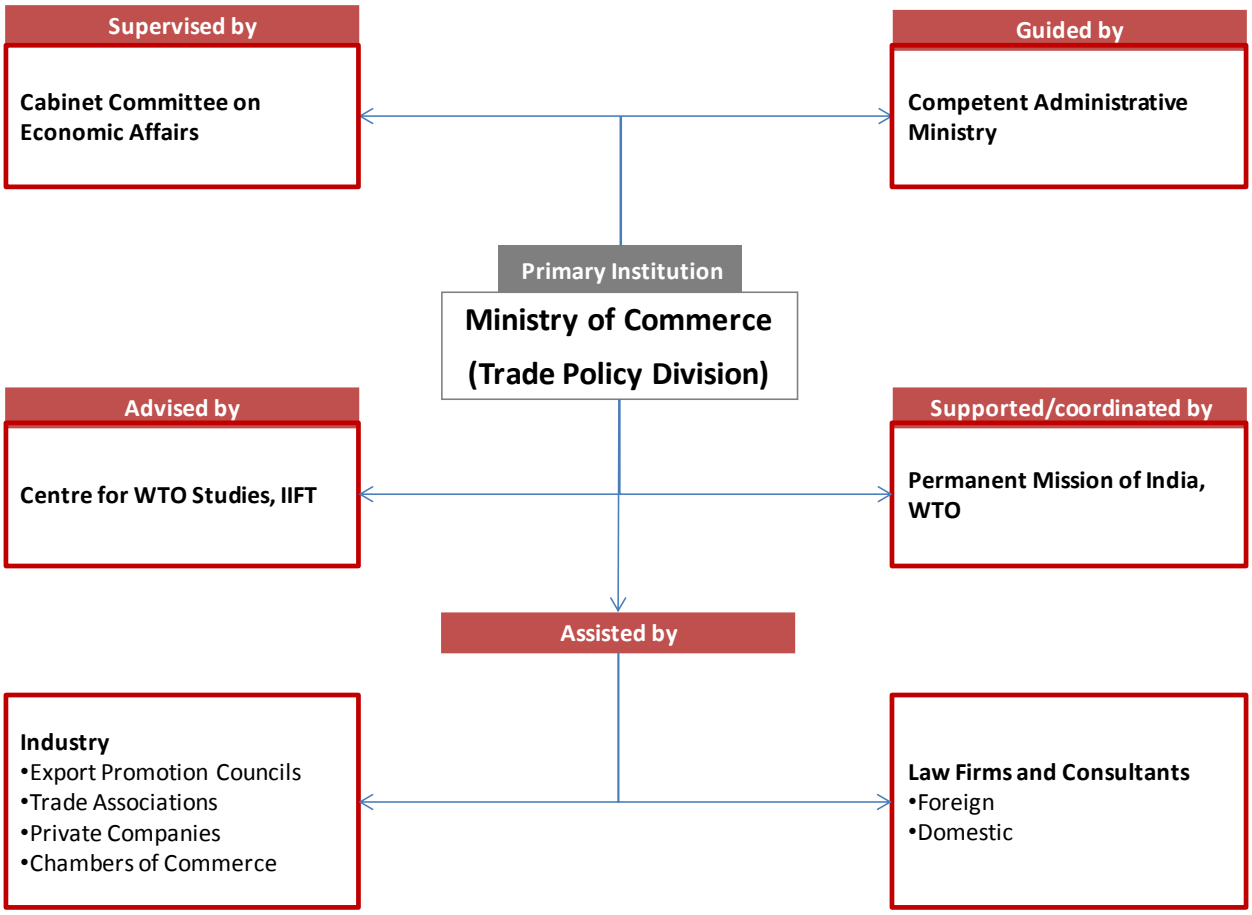


Figure 6: Institutional Framework in India

Given that international trade and commerce is the prerogative of the central government under the Constitution of India, the Ministry of Commerce is made chiefly responsible for handling international trade issues, including the settlement of foreign trade disputes and disagreements. More precisely, TPD is made responsible for the settlement of foreign trade disputes. It is responsible for coordinating with the private sector, identifying and investigating disputes and litigating them at the WTO.[33] It is the Commerce Secretary or the Commerce Minister (in cases of high importance) who is authorised to make determinations on appropriate action. While

[33] Written response to the RTI Application (n 7).

exercising their decision-making powers, they are mainly guided by the recommendations made by TPD, and these recommendations are mostly based on the inputs and analysis provided by the concerned private sector, PMI, concerned government department and the Centre for WTO Studies.[34]

Other Ministries which deal with the subject-matter of the case at hand also play an important role. They are officially known as the 'Competent Administrative Ministry'.[35] The officials at the TPD are expected to perform their tasks in coordination with the Competent Administrative Ministries, and these Ministries are expected to provide expert assistance to the TPD during investigation of barriers and preparation of cases.[36] Their role becomes vital especially in cases of a technical nature such as those dealing with sanitary and phytosanitary measures.[37] Officers from these Ministries are invited to join national delegation teams during consultation meetings and Panel proceedings.

In order to further expand its expertise in trade law and policy-making, the Ministry of Commerce has established the Centre for WTO Studies, Indian Institute of Foreign Trade (IIFT). It works as a think tank for the Ministry of Commerce. It gathers information and evidence, organises outreach programmes and consultative meetings with the private sector, monitors foreign practices and analyses the legality and scope of trade disputes.[38] It assists TPD officials

[34] Details provided in the interview with Rajan Sudesh Ratna, Ministry of Commerce, Government of India (3 May 2013). The trade and commerce with foreign countries come under the Union List given in Part XI of the Constitution of India. It is the Central Government which is authorised to deal with the items under the Union List.
[35] Interview with Rajan Sudesh Ratna, Ministry of Commerce, Government of India (3 May 2013).
[36] Ibid.
[37] Interview with Moushami Joshi, Luthra and Luthra (Delhi, India, 21 June 2013).
[38] Details of the outreach and training programmes provided by the Centre can be accessed at Centre for WTO Studies: Indian Institute of Foreign Trade <http://wtocentre.iift.ac.in/ORP6.asp> and <http://wtocentre.iift.ac.in/SHC.asp> accessed 19 September 2013.

in developing cases by marshalling the required evidence and arguments.[39] The Centre often works in close coordination with law professionals and expert consultants hired by the government or the private sector, depending upon the nature and requirements of each case.

The Centre for WTO Studies has established its regional divisions in different states of India. Nodal officers are appointed as the head of each regional division, and these divisions are officially known as 'focal points' and 'nodal agencies'. They are mainly responsible for coordinating with the private sector operating in their regional jurisdictions.[40] In order to discharge their functions effectively, nodal officers working in these divisions receive regular training in international trade and its legal aspects at the Centre for WTO Studies, New Delhi.[41] These nodal agencies are expected to serve as a link between the private sector and advisers at the Centre for WTO Studies.

The Permanent Mission of India (PMI) to the WTO also plays an active role in the management of foreign trade disputes as it provides the government with the information on WTO rules, especially with respect to substantial, procedural and other administrative requirements. The legal secretaries at the PMI work closely with the TPD officials during the preparation and litigation of the WTO cases. The PMI serves as a focal point of contact between its government and the government of other Member States involved in the matter.[42]

[39] For more details, see Centre for WTO Studies: Indian Institute of Foreign Trade <http://wtocentre.iift.ac.in/> accessed 9 September 2013.
[40] A list of Nodal Agencies and Focal Points can be accessed at Centre for WTO Studies, Indian Institute of Foreign Trade: Nodal Agencies and Focal Points <http://wtocentre.iift.ac.in/outreach.asp> accessed 17 September 2013.
[41] Interview with an official representative, Centre for WTO Studies, Indian Institute of Foreign Trade (IIFT), New Delhi (Delhi, India, 5 June 2013) [Name withheld].
[42] For more details, see Permanent Mission of India to the WTO, Geneva <http://pmi.iisindia.net/> accessed 9 September 2013. Their functions have been confirmed in the interview with Anant Swarup, Permanent Mission of India to the WTO (Geneva, Switzerland, 12 April 2012).

Export Promotion Councils (EPCs) also play an important role in the settlement of disputes as they are expected to serve as an interface between the concerned private entities and the governmental units. They are established and sponsored by the Government of India, and they finance their activities through membership subscription fees, governmental aid and other payments received from industry members. Amidst increasing privatisation of industries in India, EPCs are made responsible to present the government's viewpoints and decisions to the private sector on one hand, and on the other, they serve to integrate the interests of the private sector and represent them to the government on a sectoral basis.[43]

Industries in India are also represented by various other private sector representatives, such as trade associations, trade cooperatives, trade unions and chambers of commerce.[44] However, all economic sectors in India are not well-represented, as trade associations are not sufficiently resourceful and well-connected in many sectors of Indian economy. Industries with large exporting entities having significant trading stakes enjoy strong representation, as they arguably have the capacity to form resourceful trade associations. But the micro, small and medium enterprises (MSMEs) in India, which account for almost forty percent of overall exports from India, remain insufficiently organised and represented.[45]

Small scale industries play a very important role in Indian economy, and they have grown rapidly during the past few years. Due to the remnants of its pre-1990s socialist framework, and to promote decentralised economic development in various states of India, the state governments

[43] A list of all export promotion councils in India is available at Ministry of Commerce, Government of India <http://commerce.nic.in/aboutus/aboutus_epc.asp> accessed 9 September 2013.
[44] Interview with an official, Ministry of Law & Justice, Government of India (Delhi, India, 3 June 2013) [Name withheld].
[45] For details on MSMEs in India, see Sultan Singh Jaswal, 'Problems and Prospects of Micro, Small and Medium Enterprises (MSMEs) in India' (2014) 3(5) Innovative Research and Studies 1. For discussion on the problems of MSMEs, see R Narayan, 'Tackling problems of delayed payments in MSME sector' *The Economic Times* (New Delhi, 6 July 2015) <http://articles.economictimes.indiatimes.com/2015-07-06/news/64142856_1_msme-sector-msmes-kalraj-mishra-indian-micro> accessed 13 July 2015.

have encouraged the formation and growth of small businesses. They have also encouraged these businesses to participate in foreign trade activities.

The government's past practices of engaging the industries (including MSMEs) in the handling of foreign trade disputes has given rise to a set of ad-hoc and informal procedures. A description of these procedures is provided in the following section.

6.3 Existing Procedural Framework: Management of Foreign Trade Disputes in India

6.3.1 As a Complainant

As a common practice, the individual exporters or their representatives (like trade associations, chambers of commerce and export promotion councils) approach the Ministry of Commerce and/or their subject-specific ministry when they face a foreign measure infringing their trade interests.[46] Once private concerns reach the government, or if the government identifies a barrier on its own or with the assistance of a different agent, the Ministry of Commerce usually follows a set of procedures which can broadly be categorised under the following eight stages of dispute settlement.[47]

[46] Interview with an official representative, Ministry of Law & Justice (n 44); The findings gathered from this interview are confirmed in the interview with an official representative, Ministry of Commerce, Government of India (Delhi, India, 12 June 2013) [Name withheld]. They are further confirmed by a private sector representative in the interview with an official representative, TEXPROCIL (Mumbai, India, 27 June 2013) [Name withheld].

[47] The prevailing set of procedures has been outlined and described by various officials working with the Trade Policy Division, Ministry of Commerce, Ministry of Law & Justice, PMI to WTO, Centre for WTO Studies, IIFT, and private sector organisations (i.e., from TEXPROCIL, MPEDA and SEAI). Interviews with these official representatives from the public and private sector were conducted on different dates and through different modes by the researcher. Their details, along with the interview summaries, are on file with the author.

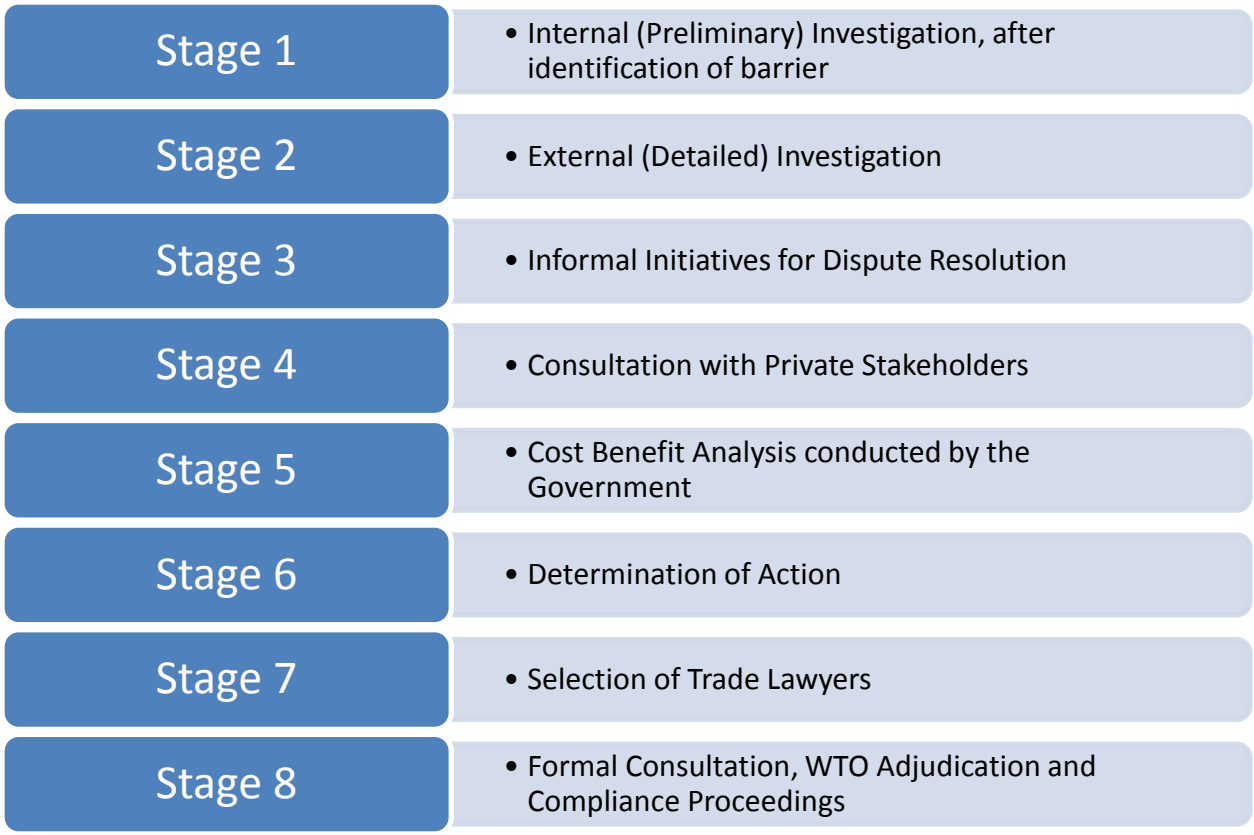


Figure 7: Potential Procedural Stages for Dispute Settlement (as complainant)

Figure 7 shows that a trade dispute in India can go through *eight* potential procedural stages, wherein one stage will lead to another. The given procedural stages resemble the dispute settlement model illustrated in chapter two.[48] These stages may not occur in the order shown above. It may happen that the stage of cost-benefit analysis coincides with the stage of private sector consultations, or vice versa. It may also happen that an issue is promptly resolved by the governments before entering into the stage of external investigation. Hence, each trade barrier identified by the government or the private sector will not go through all these stages. Barriers identified initially and investigated at the preliminary stages will reduce in number as they reach the stages of decision-making and consultations. This is because some barriers may simply be

[48] See chapter two (pages 73-86).

removed, or an understanding may be formed between the complaining and the responding governments during the course of informal consultations or during WTO Committee meetings. Moreover, several disputes may die or fade out due to other economic, diplomatic or political reasons. Therefore, depending upon the nature and requirements of each case, the stages illustrated in the figure may arrive in a different order, or may overlap each other in a few instances, or may not even occur in the lifecycle of a dispute at all as disputes can be settled, dissolved or phased out before that.

The stages and the procedures employed at each stage are described below:

1. Internal (preliminary) investigation: When a complaint is received from the private sector, or when a barrier is identified by the Ministry of Commerce or by a different department, the TPD initiates the process by examining the prima facie legitimacy of the barrier, its consistency with the WTO laws and its impact on the affected industry. This is mainly done on the basis of information provided by the industry. Based on their judgement following a preliminary examination, the TPD officials decide whether further investigations should be launched in a matter or not.[49] Three key officials are normally involved during preliminary examination: first, the officer who is handling that subject-specific WTO Agreement at TPD; second, the officer who is handling the foreign trade disputes and broader rules of WTO at the TPD; and third, the officers at the Centre for WTO Studies at IIFT who evaluate the WTO-consistency of the measure. These three constituents preliminarily investigate a barrier and prepare a brief report on the legal viability of a dispute.[50]

[49] Interview with Rajan Sudesh Ratna (n 35).
[50] Ibid.

2. External (detailed) investigation: If the Ministry of Commerce decides to launch a detailed investigation into the matter, it may seek further informational and evidentiary inputs from the concerned private stakeholders. Moreover, the TPD officials at this stage can seek assistance from the Centre for WTO Studies to examine the viability of initiating a trade dispute.[51] The PMI also remains in constant contact with TPD officials, and they advise them on the administrative procedures and the overall viability of launching a dispute at the WTO. The PMI officials research the WTO jurisprudence, and they apprise their government officials about the possibility of winning a case in the light of WTO precedents and ongoing disputes. The TPD is also obliged to refer the case file to the Competent Administrative Ministry for its opinion and inputs. When required, TPD has also sought assistance from law firms (including ACWL) and economic consultants at this stage for intensive analysis and investigation of the barrier.[52]

   The depth and scope of the investigation carried out at this stage is comprehensive, as the matter is analysed from several different perspectives.[53] The investigation mainly seeks answers to the following key questions:

   a. Is the barrier legally inconsistent with WTO law?

[51] Interview with an official representative, Centre for WTO Studies (n 41); Confirmed in interview with an official representative, Ministry of Commerce, Government of India (Delhi, India, 12 June 2013) [Name withheld].

[52] For example, the Ministry of Commerce approached an India based law firm, Luthra and Luthra, to seek its legal opinion during investigations in the matter of *India - Certain Measures Relating to Solar Cells and Solar Modules*, WT/DS456, in consultations on 6 February 2013 [Panel Composed]. [Interview with Moushami Joshi (n 37)]. Similar advice during investigation was sought from ACWL in the *EC – Tariff Preferences*. [Panel Report, *European Communities – Conditions for the Granting of Tariff Preferences to Developing Countries*, WT/DS246/R, adopted 20 April 2004, as modified by Appellate Body Report WT/DS246/AB/R, DSR 2004:III, 1009]. This information is gathered during interview with an official representative, TEXPROCIL (n 46).

[53] These concerns were expressed during interviews with two officials from the Ministry of Commerce, an official from Ministry of Law & Justice and an official from the Centre for WTO Studies, IIFT. These issues are also suggested in Marie Wilke, 'Practical Considerations in Managing Trade Disputes' (December 2012) ICTSD Information Note 11 <http://ictsd.org/downloads/2013/02/practical-considerations-in-managing-trade-disputes.pdf> accessed 27 September 2013.

b. What impact is the barrier having on the economic interests of the industry, and to what extent?

c. What are the prospects of winning the case at the WTO?

d. What are the costs involved in litigating the dispute, and whether sufficient resources for the same are available?

e. Is the affected private sector willing and motivated to assist the government in bringing a challenge against the offending Member State?

f. Is it diplomatically and politically viable to launch the dispute? What might be the systemic implications of launching the dispute?

g. What are the chances of compliance in this case, and would it be viable to pursue the case up to the stage of retaliation in case of non-compliance?

Once these issues are addressed, TPD prepares a report to recommend the further course of action. Depending upon the TPD's recommendation, the Ministry of Commerce can either discontinue the pursuance of the matter at this stage or can initiate informal bilateral consultations with the offending Member States.[54]

3. Informal initiatives for settlement of dispute: The government will usually prefer to exhaust all informal means of dispute resolution before launching a formal complaint at WTO.[55] Hence, the Ministry of Commerce, in consultation with the PMI, may initiate informal consultations with an offending Member State. It may also, in close

[54] Interview with an official representative, Ministry of Commerce (n 51); Confirmed in an interview with an official representative, Centre for WTO Studies (n 41).
[55] Interview with Anant Swarup, Permanent Mission of India, WTO (Geneva, Switzerland, 12 April 2012).

coordination with the PMI, raise the issue at the concerned WTO Committee.[56] Once Ministry of Commerce has exhausted the informal ways of conflict resolution, and if a settlement has not been reached, the dispute will enter its next phase where internal discussions on the systemic viability of launching a formal dispute will be conducted.[57] A dispute may also be discontinued or be kept in abeyance at this stage if the offending Member State has withdrawn the measure, or has given an assurance of withdrawing the same within a mutually agreeable time frame.[58] In most cases, the government officials would prefer to gradually scale up the dispute to the formal stages of settlement if their informal initiatives have failed to deliver the desired negotiated results.

4. Consultation with private stakeholders: If the government has failed to reach a settlement through informal initiatives, it would normally initiate consultations with the affected private stakeholders to discuss and apprise them of the situation, its possible impact and the potential tasks required for its settlement.[59] The government can also discuss the possibility of seeking assistance from the private sector, if required, for conducting consultations and possible litigation.[60] The government can also seek private sector inputs to calculate the anticipated levels of benefit to the affected industry from the removal of the barrier in question.[61] A TPD official makes the following observation:

> The model of PPP is inherent in almost every dispute we litigate. The government will finally consult the industry before making a

[56] Ibid.
[57] Interview with Rajan Sudesh Ratna (n 35).
[58] Ibid.
[59] Details on recent consultations can be accessed at Centre for WTO Studies: Indian Institute of Foreign Trade <http://wtocentre.iift.ac.in/SHC.asp> accessed 18 September 2013.
[60] Interview with an official representative, TEXPROCIL (n 46).
[61] Interview with an official representative, Centre for WTO Studies (n 41); Written response to RTI Application (n 7).

> determination on the initiation of a dispute. There will rarely be a case where the government will proceed to the formal stages of settlement without engaging with the private sector.[62]

The consultation meetings with the private sector are mostly organised before a decision on the initiation of a formal dispute is made. But the private sector can also be consulted during or before informal initiatives for dispute resolution are undertaken. A dialogue with private sector representatives can be established at any stage of dispute settlement, and nowadays, it is usually established with the help of the Centre for WTO Studies.[63] Based on the feedback and additional resources received from the private sector, the TPD conducts the cost-benefit analysis of launching a formal complaint at the WTO.

The lead coordinator during the consultative meetings with the private sector is one of the leading chambers of commerce or federation of industries in India, i.e., Federation of Indian Chambers of Commerce and Industry (FICCI)[64], Confederation of Indian Industry (CII)[65], the Associated Chambers of Commerce and Industry of India (ASSOCHAM)[66], Federation of Indian Export Organisations (FIEO)[67] or Federation of Indian Micro and Small & Medium Enterprises (FISME)[68].[69] The lead coordinator, in consultation with the TPD, decides the date and place of the meeting, and is responsible for making other

[62] Interview with an official representative, Ministry of Commerce (n 4); Confirmed in RTI application response (n 7).
[63] Ibid.
[64] For details, see FICCI: About FICCI <http://www.ficci.com/about-ficci.asp> accessed 20 September 2013.
[65] For details, see CII: About Us <http://www.cii.in/About_Us> accessed 20 September 2013.
[66] For details, see ASSOCHAM India: About Us <http://www.assocham.org/about/aboutus.php> accessed 21 September 2013.
[67] For details, see FIEO <http://www.assocham.org/about/aboutus.php> accessed 21 September 2013.
[68] For details, see FISME: About Us <http://www.fisme.org.in/aboutus.php> accessed 21 September 2013.
[69] See Centre for WTO Studies: Indian Institute of Foreign Trade <http://wtocentre.iift.ac.in/SHC.asp> accessed 18 September 2013.

administrative and organisational arrangements.[70] Other participating private sector representatives can be other chambers of commerce, export promotion councils, trade associations, affected private companies, NGOs and consumer organisations.[71]

5. Cost-benefit analysis: The final task before launching a formal challenge is usually the 'cost-benefit analysis' conducted by the government. With the feedback received from the private sector, and the investigation report prepared with the assistance of lawyers, the Centre for WTO Studies and the PMI, the Ministry of Commerce calculates and compares the expected cost of litigation with the expected benefits from the removal of the questioned measure.[72] If the expected benefits from its removal are higher than the anticipated cost of dispute settlement process, the case would normally progress from the cost-benefit analysis stage to the stage of final decision-making.[73] This analysis is not conducted entirely on the basis of quantifying the benefits *versus* the costs, but it is largely based on the 'systemic evaluation' of these anticipated factors, along with other factors considered during the investigation stage.[74]

   The cost-benefit analysis is carried out by a team comprising three main constituents: the officer handling that subject-specific WTO Agreement under TPD; the officer handling

[70] Interview with Rajan Sudesh Ratna (n 35).
[71] An example of a private stakeholder's consultation is the 'Consultation with the Indian Industry on EU Reach Regulation by Centre for WTO Studies'. [Details can be accessed at Centre for WTO Studies: Indian Institute of Foreign Trade <http://wtocentre.iift.ac.in/SHC.asp> accessed 18 September 2013]. The meetings for this consultation were held in Mumbai, Kolkata and Ahmadabad. These venues were chosen on a sector-wise basis as these cities have the largest concentration of concerned businesses, SMEs and affected manufacturers. The export promotion councils were instrumental in bringing in the key exporters for discussions. Officials from TPD and the Department of Pharmaceuticals, Drugs and Petrochemicals, advisers from the Centre for WTO Studies, and the officials from the concerned export promotion council were leading these consultative meetings. Further details on recent consultations held with private stakeholders, lead coordinators, venues and dates for the consultative meetings held in recent years and those planned for the future, can be accessed at Centre for WTO Studies: Indian Institute of Foreign Trade <http://wtocentre.iift.ac.in/SHC.asp> accessed 18 September 2013.
[72] Ibid.
[73] For a discussion on 'cost-benefit' analysis, see chapter two (page 76).
[74] Interview with Rajan Sudesh Ratna (n 35).

the foreign trade disputes and broader rules of WTO at TPD; and the export promotion council(s). Other participants could be the officials from various concerned ministries, advisers from the Centre for WTO Studies and representatives from private companies, trade associations and chambers of commerce.[75] Following this analysis and the private sector consultations, the team submits its report suggesting the appropriate course of action to the Ministry of Commerce.[76]

6. Decision-making: The internal, external and consultative reports are synthesised by TPD, and a recommendation is prepared to make a decision on whether to initiate a formal case at WTO.[77] If TPD recommends that the government should launch a formal challenge against a foreign measure, the Union Minister of Commerce would normally approve such recommendation. The usual practice dictates that such files are normally signed by the Commerce Secretary, but in cases of high importance, the Commerce Secretary refers the case file to the Minister of Commerce for final approval.[78] In cases with substantial strategic implications or in cases that are sensitive in nature, the file may further be referred to the Cabinet Committee on Economic Affairs or the full Cabinet for final approval.[79] Hence, there could be multiple decision-makers for such actions in India. Once the file has been signed by the Commerce Secretary or the Commerce Minister, it is sent to the PMI, Geneva for further coordination of tasks.[80] In addition, a request is also

[75] Ibid.
[76] Ibid. Confirmed in Interview with Rajan Sudesh Ratna (n 35).
[77] Confirmed in various interviews with the TPD officials, Ministry of Commerce dated 12 June 2013, 15 June 2013 and 15 August 2013. [Names withheld].
[78] Confirmed in three interviews with the officials from the Ministry of Commerce, Government of India, dated 12 June 2013 and 15 August 2013. [Names withheld].
[79] WTO case files have only been referred twice or thrice to the Cabinet Committee. Hence, it is not a practice, but more of an exception. [Interview with an official representative, Ministry of Law & Justice (n 4)].
[80] Interview with Anant Swarup (n 261).

sent to the Ministry of External Affairs for requesting the launch of formal consultations with the offending Member State(s).

7. Selection of Trade Lawyers: The selection of lawyers for the preparation and litigation of disputes is not entirely based on a fixed, prescribed procedure. It is rather a mixed, flexible and need-based procedure. The appointment of lawyers depends on several factors, including the nature of a case, availability of relevant in-house expertise and capacity, availability of resources with the government, and past experiences of dealing with the available legal experts.[81] An official states that 'in some cases, we may bank upon the expertise of new trade lawyers, and in other cases, we may prefer lawyers with whom we have had some previous experience'.[82] The decision to engage a lawyer in a matter is taken by the Ministry of Commerce. In cases where an industry is participating actively, the decision will be made after consulting the participating industrial representatives.[83]

   Over the past decade, the procedure for the selection of trade lawyers has become somewhat 'systemic' in nature.[84] The Ministry of Commerce issues a call of interest to the Government of India empanelled law firms that have expertise in the relevant subject. The law firms which respond to the call are asked to analyse a given trade matter and submit their legal opinion on the same. They are simultaneously asked to provide information about their team of trade lawyers and their relevant experience in the subject-matter. The TPD examines their credentials and the extensiveness of their legal analytical

[81] Interview with an official representative, Ministry of Commerce, Government of India (Delhi, India, 12 June 2013) [Name withheld].
[82] Ibid.
[83] Ibid.
[84] Ibid.

work reflected in their written opinion.[85] Based on this examination and other specified factors, the decision to engage an appropriate law firm is made by the officials at TPD.[86]

At times, the empanelled law firms are also hired on a rotational basis. 'As a practice, the Panel stage work generally is allocated to the same lawyer who assisted the government at the time of the consultation. The same sequence of action is envisaged at the Appellate stage as well, if any.'[87] However, there have clearly been cases in India where a different set of lawyers was hired for different stages of dispute settlement. For example, in *EU-Seizure of Generic Drugs in Transit*[88], Luthra & Luthra provided the initial opinion relating to the legal viability of launching the dispute but Mr. Venugopal, Mr. Abbot and Mr. Tiwari were subsequently hired for the formal consultative meetings.[89]

The selection process employed by the government is described by an India based trade lawyer as a 'learn to swim or sink' strategy.[90] The lawyer states that the government has, in the past, hired law firms based in India with no previous WTO experience, and has asked them to prepare and present a case at the WTO Panel on their own. The system

[85] Written response to RTI Application (n 7).
[86] Ibid.
[87] Written response to RTI Application (n 7).
[88] *European Union and a Member State – Seizure of Generic Drugs in Transit*, WT/DS408, in consultations on 11 May 2010.
[89] In this case, '[Department of Commerce] consulted the Permanent Mission of India (PMI), Geneva in selecting the foreign expert based on the recognized expertise in the IPR matters. From amongst the Indian law firms/advocates the [Department] considered their expertise in handling the WTO disputes and trade law matters. After short-listing the legal experts the [Department] took the approval of the [Department] of Legal Affairs for their engagement and payment terms.' This is an extract taken from the response given by Ministry of Commerce, Government of India, to the RTI application filed by Prashant Reddy T. (Advocate) vide document F.No.1/13/2012-TPD, Government of India, Ministry of Commerce & Industry (New Delhi, 6 March 2012). <https://docs.google.com/file/d/0Bxi2TzVXul5ZRTF3N3pQb05RMWktbXFRbUFoMTR3QQ/edit> accessed 17 September 2013.
[90] Interview with Moushami Joshi (n 37).

seems to work as it is believed that the strategy 'enhances the potential and brings out the best in domestic law firms'.[91]

8. Preparing for formal consultation, litigation and compliance proceedings: The main constituents responsible for preparing consultation requests and legal briefs for the WTO adjudicatory hearings are: the officials from the TPD, the officials from the Department of Regional and Multilateral Trade Relations, law officers from the PMI, advisers from the Centre for WTO Studies, the lawyers and consultants engaged for the dispute, and representatives from the private sector.[92] The national delegation at the consultation meetings, Panel and Appellate Body hearings, and compliance proceedings is composed of these public and private sector officials, but it can vary as per the requirements of each case.[93] The roles of these public and private representatives are not clearly defined or demarcated during these stages. They are expected to work together and in close coordination with each other. However, TPD continues to be the lead coordinator and it is responsible for coordinating tasks among these officials.[94]

The government employs a slightly different approach when it acts as a respondent or when it participates as a third party during the settlement of WTO disputes.

6.3.2 As a Respondent

On receiving a formal consultation request from a WTO Member State, the Ministry of Commerce refers the matter to its TPD for detailed investigation. While acting as a respondent in a WTO case, the key governmental participants involved in preparing the defence are largely the

[91] Ibid.
[92] Interview with Rajan Sudesh Ratna (n 35). Also confirmed in two interviews with officials from the Ministry of Commerce, Government of India, dated 12 June 2013 and 15 August 2013. [Names withheld].
[93] Ibid.
[94] Confirmed in two interviews with officials from the Ministry of Commerce (n 92).

same, but the scope of their role changes. The TPD, PMI and Competent Ministry are together responsible for preparing a defence.[95] They decide the course of action, the appropriate response to the challenge, the lawyers to be engaged and the channels for gathering information and evidence.[96] While defending a case, or participating in consultations as a respondent, the national delegation would normally comprise the first legal secretary from the PMI, the Ambassador of the PMI, the director level officials from the TPD, officials from Competent Ministries and the lawyers.[97]

Each participating constituent has a more defined role while the country is acting as a respondent. The TPD, with the assistance of lawyers, is responsible for investigating the legality of a challenge and the WTO-consistency of a measure that is challenged. It is also responsible for preparing the defence briefs, determining the legal positions of the country at different stages of a dispute, and determining the legal procedures to be followed.[98] The Centre for WTO Studies investigates and analyses the scope of a dispute, including the implications of the continuance or discontinuance of a challenged measure(s).[99] On being approached by the government or otherwise, the export promotion councils, trade associations, chambers of commerce and relevant government departments usually provide information, evidence and commercial arguments to help the government prepare a sound defence.[100] They provide practical insights to the government relating to the commercial situation of a measure and its implications for the affected industry.[101] The Ministry of Commerce, after consulting the Competent Ministry and relevant stakeholders, determines whether to withdraw the challenged policy and resolve the

[95] Ibid.
[96] Ibid.
[97] Interview with an official representative, Centre for WTO Studies (n 41).
[98] Confirmed in two interviews with TPD officials, Ministry of Commerce (n 92).
[99] Interview with an official representative, Centre for WTO Studies (n 41).
[100] Written response to RTI Application (n 7).
[101] Interview with an official representative, TEXPROCIL (n 46).

matter with the complainants during the consultation stage, or to allow the matter to proceed to the stage of Panel proceedings.[102] The PMI guides TPD while preparing the timelines for policy removal, deciding the dates for filing responses and other procedural issues which have to be determined in conformity with the WTO rules.[103]

At the same time, it has been observed that the government has often reached out to the industry when they have required informational and evidential support to prepare a defence.[104] Quite often, the purpose of the government in holding private consultations has not only been to gather information, but has also been to prepare an industry by informing them about the withdrawal of a policy and its potential implications.[105]

The procedures employed for the selection of lawyers here is also different from the cases where India acts as a complainant. In 2010, the Department of Commerce, together in consultation with the Department of Legal Affairs, enlisted 17 law firms onto its panel for defending India's interest in future WTO disputes.[106] 'The work related to these disputes is allocated to these law firms on a rotation basis subject to their expertise in the relevant field'.[107] As a matter of practice, the same law firm is hired for initial investigations, consultation meetings, subsequent litigation and compliance proceedings.

[102] Confirmed in various interviews with officials from the Ministry of Commerce and the Ministry of Law & Justice [Names Withheld]. Also confirmed in the written reply to the RTI Application (n 7).
[103] Interview with an official representative, Centre for WTO Studies (n 41).
[104] For instance, in the case of *India – Wines and Spirits*, the government was reaching out to the Spirits industry while it was preparing its defence case. [*India – Measures Affecting the Importation of Sale of Wines and Spirits from the European Communities*, WT/DS352, in consultations on 20 November 2006]. Interview with Marie Wilke, International Centre for Trade and Sustainable Development (Geneva, Switzerland, 8 March 2013).
[105] Interview with an official representative, Centre for WTO Studies (n 41).
[106] Ministry of Commerce written reply to RTI Application (n 7).
[107] Ibid.

6.3.3 As a Third Party

The procedure for filing a third party request is simple. If the Ministry of Commerce, in consultation with the Competent Ministry, decides to join a specific WTO case as a third party, the Ministry of Commerce will send the request to the PMI. The PMI files the formal application with the consulting Members and the DSB requesting to join a dispute as a third party.[108]

Together, these procedures are employed, somewhat on an ad-hoc and informal basis, by the government and private sector during the handling of trade disputes. However, these procedures remain in the confidential files of the government, and hence, the public and private sectors in India do not have a legislation or a rule book (as in the case of China) which they can refer to while they are jointly conducting dispute settlement procedures. Some of these procedures have been employed during the conduct of selected WTO disputes.

6.4 Public Private Coordination: Analysis of Selected Trade Disputes

This section introduces and analyses certain trade disputes which have been conducted through varied forms of coordination between the government and private stakeholders in India. The following examples of WTO disputes outline a different form of partnership, i.e., an informal 'pattern of coordination' which has emerged between the public and private sector entities during the conduct of WTO disputes in India.

[108] Interview with an official representative, Centre for WTO Studies (n 41).

6.4.1 EC-Tariff Preferences

In the case of *EC-Tariff Preferences*[109], India challenged the tariff concessions granted by the European Communities (EC) to twelve developing countries [110] under the 'Drug Arrangements'[111] (one of the five preferential tariff 'arrangements'[112]).[113] India alleged that the EC's tariff system was violating the provisions of Most Favoured Nation (MFN) and the Enabling Clause.[114] The Panel and the Appellate Body upheld the challenge as they found that the tariff preferences were inconsistent with GATT 1994, and the measures were not justified under the Enabling Clause.[115]

This case is a significant example of coordination formed between the government and the affected export promotion council, the Cotton Textiles Export Promotion Council of India (TEXPROCIL)[116]. The existing literature claims that the case was principally initiated by the Ministry of Textiles and the Ministry of Commerce, and that the private stakeholders were largely absent during most of the consultation and initial investigation phase of the dispute.[117] It

[109] Panel Report, *European Communities – Conditions for the Granting of Tariff Preferences to Developing Countries*, WT/DS246/R, adopted 20 April 2004, as modified by Appellate Body Report WT/DS246/AB/R, DSR 2004:III, 1009.
[110] The preferred countries were: Bolivia, Colombia, Costa Rica, Ecuador, El Salvador, Guatemala, Honduras, Nicaragua, Pakistan, Panama, Peru and Venezuela.
[111] It is known as the 'Special arrangements to combat drug production and trafficking'. Council Regulation (EC) No 2501/2001 of 10 December 2011 applying a scheme of generalised tariff preferences for the period from 1 January 2002 to 31 December 2004 [2001] OJ L346/8, art 1.2.
[112] Council Regulation No 2501/2011 of 10 December 2001, art 1.2.
[113] It was pursuant to Council Regulation No. 2501/2001 of 10 December 2001 under its Generalised System of Preferences Scheme.
[114] The 'Enabling Clause' is officially known as the 'Differential and more favourable treatment reciprocity and fuller participation of developing countries'. It permits developed countries to make preferential arrangements with developing countries in goods trade. The Enabling Clause is the WTO legal basis for the Generalised System of Preferences. [Decision of 28 November 1979 (L/4903) para 2].
[115] For more details, see WTO - Dispute Settlement: Dispute DS246 <http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds246_e.htm> accessed 9 September 2013.
[116] For details, see TEXPROCIL <www.texprocil.org> accessed 8 October 2012.
[117] Biswajit Dhar and Abhik Majumdar, 'Learning from the India-EC GSP dispute: the issues and the process' in Gregory C Shaffer and Ricardo Melendez-Ortiz (eds), *Dispute Settlement at the WTO: The Developing Countries Experience* (Cambridge University Press 2010) 182-185; Biswajit Dhar and Abhik Majumdar, 'The India-EC GSP Dispute: The Issues and the Process' (ICTSD Asia Dialogue on WTO Dispute Settlement and Sustainable

further observes that TEXPROCIL filed a report (requesting the government to protect its trade interests) with the Ministry of Commerce only *after* the government had invoked WTO DSU provisions in the matter.[118] In contrast, the private sector (in the empirical investigation) claims that the measure was identified by TEXPROCIL and a representative from TEXPROCIL was part of the national delegation during all stages of dispute settlement, including the stage of formal consultation and Panel proceedings.[119] It can therefore be seen that the findings from the literature and empirical research contradict each other and are difficult to reconcile.[120] This research attempts to verify these conflicting claims.

The literature and empirical findings confirm that TEXPROCIL provided the government with the required information relating to India's performance before and after the EC's implementation of Drug Arrangements. It supplied data on the declining exports of Indian textiles and cotton to the EC, and other related information required at the litigation stage.[121] As per the claims made by a TEXPROCIL representative, 'TEXPROCIL provided data on the lost market access, the impact it is having on textile exporters and industry, what kind of amount we are losing, and what we could have gained in the absence of the preferential regime. The entire datasheet was provided by us, along with the commercial arguments.'[122] A TPD official confirms

Development, Jakarta, 25 January 2006) <http://www.ictsd.org/downloads/2008/06/dhar.pdf> accessed 21 September 2014.

[118] Ibid.

[119] Interview with an official representative, TEXPROCIL (n 46).

[120] Information is based on discussions with a representative from TEXPROCIL who participated throughout the process and was leading the partnership on behalf of the textiles industry {Interview with an official representative, TEXPROCIL (n 46)}. On the other hand, it is claimed in Dhar and Majumdar that '[i]n the absence of industry participation, the consultations in respect of the dispute remained confined to the Ministry of Textiles and the Ministry of Commerce' [Dhar and Majumdar, 'Learning from the India-EC GSP dispute' (n 117) 183].

[121] Dhar and Majumdar, 'Learning from the India-EC GSP dispute' (n 117) 183; Interview with an official representative, TEXPROCIL (n 46).

[122] Interview with an official representative, TEXPROCIL (n 46).

this claim as he states that 'TEXPROCIL had very close association with the government and it provided all the required evidence and information during the dispute.'[123]

The government in this case relied heavily on the subsidised legal services provided by ACWL. The representatives from TEXPROCIL assisted the ACWL lawyers with required commercial evidence and information. The Government of India states, in an explicit manner, that all WTO disputes are financed entirely by the Government, and that 'no financial assistance is taken from the industry'.[124] However, a private sector representative claims that a part of the ACWL's legal fees in this case was paid by TEXPROCIL.[125] The claim is confirmed by a government's trade adviser in the following statement: 'Because TEXPROCIL had its commercial interest in the dispute, and was backed by the concerned exporters, it also incurred some of the legal costs for hiring lawyers to prepare and litigate this case at the WTO'.[126] The ACWL's legal team was further assisted by a trade lawyer based in India, Mr. Krishnan Venugopal.[127] His participation was limited in the case as ACWL was the main legal service provider. But one of the purposes of appending an in-house lawyer to the ACWL lawyers can possibly be seen as the government's initiative to build and enhance domestic legal expertise in WTO laws. This capacity-building strategy appears to be similar to the "lawyer-pairing" approach employed by the Chinese and the Brazilian government.

It may be recalled that an official from TEXPROCIL was part of the national delegation during consultation and Panel meetings. Direct participation of a private sector representative at the official meetings was a unique feature of the partnership as the government has usually preferred

[123] Interview with an official representative, Ministry of Commerce (n 81).
[124] Response to RTI Application (n 7).
[125] Interview with an official representative, TEXPROCIL (n 46).
[126] Interview with an official representative, Centre for WTO Studies (n 41).
[127] Ibid.

to keep private sector representatives out of the official meeting rooms. A private sector representative further explains this aspect of PPP in the following statement:

> …This is how we felt like a part of the system and the feeling motivated us to invest our resources and time in the process. I was an equal participant and a partner with the government in the process throughout. When you are kept outside the room, you become an indirect contributor. But when you participate directly to this extent, the problems and the issues can be raised in consultation with the private sector and be answered there and then, and the momentum of the proceedings is therefore not lost.[128]

In other words, it is suggested that the momentum of the arguments during consultation and official proceedings can be maintained with the help of regular and close cooperation between industry and the government, more so through direct participation of industrial representatives during the proceedings in Geneva. A private sector representative claims that this approach has its merits, as it enables an industry to fully contribute to the settlement of a dispute, and it allows the government to gain full confidence and support from an industry. But there could be possible drawbacks to the approach as it might enable an industry to dominate the inter-governmental process at the WTO. It might also provide an industry with an opportunity to protect its own special economic interests at the cost of wider national interests.[129] But that risk could be counterbalanced to some extent, especially in the present case, as the industry representative (TEXPROCIL) was a body established and sponsored by the government. Therefore, it is natural to assume that the government could have, if required, influenced the council to some extent.

[128] Interview with an official representative, TEXPROCIL (n 46).
[129] Such problems can arise from regulatory threats arising from corruption, rent seeking and lobbying. These problems and their possible impact on the management of disputes are discussed in chapter two (page 86).

The informal yet significant coordination between the government and the industry representative during the conduct of this case outlines certain interesting features of an informally formed partnership. It is interesting to note that TEXPROCIL approached the Ministry of Commerce without any regulation, law or established procedure in place. But TEXPROCIL is a government established export promotion council and could therefore arguably have an easier access to the government (as compared to private companies, trade associations and other industry representatives). It reached out to the concerned ministries and advocated the significance of litigating the measure through 'casual telephonic calls, emails and unscheduled meetings'[130]. Hence, informal procedures of coordination in this case gave rise to the formation of a PPP arrangement which was not very different to the nature of institutionally prescribed partnerships in Brazil or the formal partnership arrangements formed in China or the US as a written complaint was filed by TEXPROCIL and the resources were exchanged throughout the proceedings.

In conclusion, TEXPROCIL supplied vital resources to the government and their lawyers with the aim of gaining the lost market access in the EU. At the same time, the government had to ensure that the interests of the textiles industry were not injured at the cost of beneficial treatment extended by the EU to India's immediate neighbouring competitors (including Pakistan). It can therefore be argued that both the sectors had overlapping interests in exchanging their resources and litigating the case together. In other words, the resources were exchanged between them on the basis of mutual benefit and reciprocity. The exchange was *effective* because it enhanced the dispute settlement capacity of the government by providing it with a wider access to information, evidence, commercial analysis and finances provided by the industry.

[130] Ibid.

6.4.2 EC-Bed Linen

In the case of *EC-Bed Linen*[131], India requested consultations with the EC in respect of anti-dumping proceedings initiated by the EC against the imports of cotton-type bed-linen products from India. India alleged that the anti-dumping duties imposed by the EC violate the provisions of the Anti-Dumping Agreement and the GATT 1994. It contended that the EC had not taken into account the developing country status of India, and had erred in making determinations, establishing the facts and evaluating them. The Panel and the Appellate Body partially upheld the claims made by India and recommended that the EC should bring its measures in confirmation with its obligations under the Anti-Dumping Agreement.[132]

This case is an instance where an export promotion council coordinated with the government from the initial stage of identification to the final stages of implementation. A private sector representative claims that the barrier was identified by TEXPROCIL which subsequently approached the Ministry of Textiles and the Ministry of Commerce with the representation that the duties imposed by the EC were infringing the interests of the textile industry.[133] The Ministry of Commerce, in coordination with the Textiles Ministry and the PMI, preliminarily examined the matter and decided to investigate the matter further. Subsequently, the government was convinced that the duties were inconsistent with the WTO rules and that the duties were causing a significant loss of market to its textile exporters.[134]

[131] Panel Report, *European Communities – Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India*, WT/DS141/R, adopted 12 March 2001, as modified by Appellate Body Report WT/DS141/AB/R, DSR 2001:VI, 2077.
[132] For more details, see WTO, Dispute Settlement: Dispute DS 141 <http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds141_e.htm> accessed 10 September 2013.
[133] Interview with an official representative, TEXPROCIL (n 46). This was confirmed in the interview with Anant Swarup (n 55).
[134] Ibid.

A trade policy adviser to the Ministry of Commerce confirms that 'TEXPROCIL was actively involved at each stage of the dispute in the *EC-Bed Linen* case'.[135] 'TEXPROCIL participated in the investigations, consultations, in meetings with the Panel, and in preparation of the legal documents for the litigation. It provided all the required information'.[136] It also played a proactive role at the enforcement stage of the dispute. After receiving a favourable ruling from the Panel and the Appellate Body, TEXPROCIL continued to monitor the EC's progress in implementing the award. On finding that the award was not being implemented, TEXPROCIL again approached the Ministry of Commerce with the evidence of non-implementation and convinced the Government to initiate compliance proceedings against the EC. Subsequently, the government requested the launch of compliance proceedings on the basis of facts provided by TEXPROCIL.[137] It can therefore be inferred that an industry can play an instrumental role, not only in the investigation, preparation and litigation of the case, but also during the implementation and compliance stages.

TEXPROCIL hired the Brussels based Vermulst Verhaeghe & Graafsma law firm for preparing and presenting the case at WTO, and paid a substantial amount of their legal fees. A part of that expenditure was later reimbursed to TEXPROCIL by the government, and the other part of the expenditure was met by TEXPROCIL through industry contributions.[138] The council was in close contact with the lawyers, and it regularly updated them with relevant commercial information for the development of the case. Interestingly, the commercial arguments which were marshalled by TEXPROCIL were promptly submitted by the government and accepted by

[135] Interview with an official representative, Centre for WTO Studies (n 41).
[136] Ibid.
[137] Ibid.
[138] The law firm is now known as VVGB law firm. The lawyers engaged in the matter were Edwin Vermulst and Folkert Graafsma. The claims were made by an official representative from TEXPROCIL {Interview with an official representative, TEXPROCIL (n 46)}.

the Panel. For example, the argument of 'zeroing' was suggested by an official working at TEXPROCIL.[139]

One of the most effective features of this partnership arrangement was the openness in the channels of communication between the government and the industry. A TEXPROCIL's representative confirms the importance of 'open channels of communication' in the following statement:

> The EC-Bed Linen is a classic case of PPP in India as the lines of communication between the Government and TEXPROCIL were very open. The entire set of information was disseminated and discussed in an open manner between the two. We never got the feeling that we were outsiders. We were very much part of the proceedings and were updated on a regular basis by the Government.[140]

The government was alert throughout the proceedings, and it reacted promptly to the updates provided and requests raised by the industry. A representative from TEXPROCIL was given a forum to express opinions and respond to commercial enquiries raised during official consultations. TEXPROCIL's representative was seen as a commercial expert in the matter, and the inputs provided from TEXPROCIL were seriously considered during the internal and official meetings and discussions.[141] The open dissemination of information and resource exchange could therefore be made possible with the assistance of this export promotion council.

[139] The representative states that '[t]he argument of zeroing was marshalled by us and legally developed by our lawyers. Every argument we gave was taken on board by the government and was accepted by the Panel. We were fortunate enough to raise the right notes during the litigation.' [Interview with an official representative, TEXPROCIL (n 46)].
[140] Ibid.
[141] The claims have been made by the council's representative in the interview conducted by the author on 27 June 2013. The interview summary is on file with the author. The claims have been confirmed by the representatives of

The findings indicate that the industry and the government in this case cooperated 'like never before'[142]. The private sector in the case was actively participating until the measure was withdrawn by the offending Member State. One of the key reasons behind the formation of this distinct PPP arrangement could be that the government, by this stage, had confided in TEXPROCIL. At the same time, TEXPROCIL as a repeat player had established relevant contacts in the Ministry. A TEXPROCIL's representative states that 'we both had confidence in each other, and we trusted each other'.[143] Hence, government-industry coordination throughout the pre-litigation, litigation and post-litigation phases of dispute settlement is the most distinct feature of this partnership. It is a landmark case which reaffirms that partnership arrangements can enable developing countries to gain the expertise and resources required for litigating the WTO rights even against the powerful developed countries.

6.4.3 Turkey – Safeguard Measure on Imports of Cotton Yarn Other Than Sewing Thread

In the case of *Turkey – Safeguard Measure on Imports of Cotton Yarn Other Than Sewing Thread*[144], India challenged Turkey's safeguard measures on imports of cotton yarn from all origins. India alleged that the measures violated the provisions of the Agreement on Safeguards and the GATT 1994. After formal consultations with India, Turkey withdrew these measures and the dispute therefore phased out at the consultation stage.

The private sector identified that the measures imposed by Turkey were impeding its trade interests and were inconsistent with WTO laws. TEXPROCIL preliminarily investigated the

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Ministry of Commerce and a trade policy advisor to the Ministry of Commerce in interviews conducted by the author on 12 June 2013 and 5 June 2013 respectively.

[142] Interview with an official representative, TEXPROCIL (n 46).

[143] Ibid.

[144] *Turkey – Safeguard Measure on Imports of Cotton Yarn Other Than Sewing Thread*, WT/DS428, in consultations on 13 February 2012.

matter and filed an application with the Ministry of Commerce to request the government to investigate the measure.[145] TEXPROCIL once again played an instrumental role as it represented the industry's interests to the government and convinced the government to launch formal consultations. It utilised its established contacts with the officials at the Ministry of Commerce while it was convincing the government to look into the matter. It also held several internal consultations with the government officials during the gap year in which the dispute was not initiated.[146]

The government initially attempted to raise the issue at the WTO Committee on Safeguards, but there was no response from Turkey, and the matter could not therefore be resolved at the Committee level. Following that, the measure was investigated by TPD. It was found that the manner in which the duties were being extended by Turkey was detrimental to the economic interests of the Indian textiles industry and was not consistent with the WTO rules.[147] The matter was investigated with the help of the commercial inputs provided by the private sector and their lawyers. A TPD official also confirms that the investigation was conducted in close coordination with the private sector. The official further affirms that the request for consultation was prepared with the assistance of TEXPROCIL's hired lawyers and the commercial facts provided by the industry.[148]

The national delegation during formal consultations at Ankara comprised the officials from the Ministry of Commerce, the PMI to WTO, the Ministry of Textiles, a representative from TEXPROCIL and lawyers from Lakshmikumaran & Sridharan attorneys.[149] Interestingly, a

[145] Interview with an official representative, TEXPROCIL (n 46); Interview with Swarup (n 55).
[146] Interview with an official representative, TEXPROCIL (n 46).
[147] Interview with an official representative, Ministry of Commerce (n 81).
[148] Ibid.
[149] Interview with an official representative, Ministry of Commerce (n 81).

representative from TEXPROCIL participated directly in the official consultations with Turkey and was allowed to make interventions during the discussions.[150] The direct engagement of the private sector representative was acknowledged positively by the business community. The participating representative confirms the same: 'I was very much part of the government's team during the consultations at Ankara. We were allowed to speak, and we were very much a part of the entire process.'[151] This direct engagement shows that the private sector in India has realised the merits of coordinating with the government for the protection of its trade interests. The engagement also shows that the government has possibly realised that the participation of private sector is vital for the effective enforcement of WTO rights.

The capacity building potential of a PPP arrangement can clearly be inferred from the present instance. The complete information and commercial analysis was provided by TEXPROCIL to the government, which the government utilised in investigating the measure and preparing the request for consultation.[152] The lawyers in the matter were hired and initially paid for by TEXPROCIL.[153] The hired law firm (Lakshmikumaran & Sridharan attorneys) were at that time the legal retainers for TEXPROCIL. This to some extent strengthens the private sector's claim that the lawyers were hired by the private sector after consulting the government. The fact that the lawyers were hired by the private sector does not mean that their entire legal fee was also paid by that sector. Although the law firm was hired by TEXPROCIL, the legal expenses initially incurred by TEXPROCIL were reimbursed by the government when the invoice for the

[150] Interview with Swarup (n 55); Interview with an official representative, Ministry of Commerce (n 81).
[151] Interview with an official representative, TEXPROCIL (n 46).
[152] Interview with an official representative, TEXPROCIL (n 46). It was further verified in the interview with an official representative, Ministry of Commerce (n 81).
[153] Interview with an official representative, TEXPROCIL (n 46).

same was raised on the government.[154] The finding indicates that this payment arrangement between the government and TEXPROCIL worked well for both entities. The government approved the budget, TEXPROCIL initially incurred the expenditure from the funds gathered through industrial contributions, and the expenses were later reimbursed by the government. This convenient payment arrangement between the government and TEXPROCIL was instrumental in building confidence and trust in their relationship.[155]

Similar financial understandings can potentially help the resource-constrained developing country governments to self-enforce their WTO rights as and when they are violated without having to wait for the required financial arrangements. Niall Meagher cites an instance where a developing country government had to wait for six months for the allocation of funds in the new financial year before initiating a winning case at the WTO.[156] Such delays can cause serious damage to the financial interests of the private sector and can discourage it from approaching the government for restoring its lost market access. Such problems can potentially be minimised with the help of practical payment arrangements agreed between the private and the public sector. The export promotion councils can evidentially play a vital role in arriving at such financial arrangements because they can potentially be the most trustworthy intermediaries between the government and industry.

It is also worth noting that the export promotion council played an instrumental role in convincing the government to launch formal consultations despite the fact that the government was initially unwilling to launch a challenge against Turkey. Because the council had considerable experience of coordinating with the government and had partnered the government

[154] The representative confirms that almost 60-70% of the legal fee was reimbursed by the government once the bill was raised.
[155] Interview with an official representative, TEXPROCIL (n 46).
[156] Interview with Niall Meagher, ACWL (Geneva, Switzerland, 11 April 2013).

several times in the previous WTO instances, the council had established informal contacts with the officials at the relevant departments of the government. The council had also formed a favourable reputation in the eyes of the government due to its past performance and extensive support extended to the government on previous occasions. It therefore used its informally constructed networks with the government officials to convince the 'higher officials' to challenge the measures imposed by Turkey.

It can therefore be observed that TEXPROCIL, in multiple WTO cases, has been instrumental in assisting the government in many ways: it has supplied required information, evidence and documentation to the government during different stages of disputes; it has also hired lawyers to prepare the request for consultations, to investigate the measures, and to prepare and litigate cases at WTO; its officials have participated in formal and informal consultations with the government officials of India and other Member States; and it has identified barriers and conducted investigations into the commercial viability and importance of their removal. TEXPROCIL has also demonstrated the potential role that can be played by export promotion councils and other industry representatives during the post-litigation stages of compliance and implementation.[157]

TEXPROCIL has established itself as a *repeat player* by partnering the government during multiple dispute settlement proceedings. The recurring partnerships in these cases illustrate the nature of 'pattern of coordination' as a distinct form of partnership arrangement, as initially presumed in chapter two.[158] Finally, the WTO instances discussed above have made out a strong case for the argument that the confidence between an industry and the government can gradually,

[157] See, for instance, *EC-Bed Linen* case (text to n 137).
[158] See chapter two (page 66).

but effectively, be established with the help of export promotion councils which can serve as a reliable and a trustworthy interface between the two.

6.4.4 US-Carbon Steel (India)

In the case of *US-Carbon Steel (India)*[159], India challenged the imposition of countervailing duties by the United States on imports of certain hot rolled carbon steel flat products from India. India alleged that the duties violate the provisions of the GATT 1994 and the SCM Agreement. With regard to the claims that were within the scope of the DSU proceedings, the Panel concluded that the US had acted in contravention of the SCM Agreement. Hence, one of the main allegations raised by India was upheld by the Panel. However, the Panel rejected numerous claims made by India against the US trade remedy laws and determinations made by the US Department of Commerce with regards to the imports of certain steel products from India. The Appellate Body reversed the Panel's recommendations with respect to the US Department of Commerce (USDOC) findings that were inconsistent with Article 1, 14, 12 and 15 of the SCM Agreement and Article 11 of the DSU. The AB ruling was a favourable decision for India as it ruled that the countervailing duties imposed by the US on steel imports from India are inconsistent with the SCM Agreement and that the US should bring its measures in confirmation with its WTO obligations.[160]

The government in the present instance was approached directly by the affected companies. It was unlike the previous disputes where companies approached the government departments through trade associations and export promotion councils. Essar Steel, along with Tata Steel and

[159] Panel Report, *United States – Countervailing Measures on Certain Hot-Rolled Carbon Steel Flat Products from India*, WT/DS436/R and Add.1, adopted 19 December 2014, as modified by Appellate Body Report, WT/DS436/AB/R.

[160] For more details, see WTO, Dispute Settlement: Dispute DS436 <http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds436_e.htm> accessed 11 September 2013.

Jindal Steel, filed an application with the Ministry of Commerce. In their application, they alleged that the countervailing duties imposed by the US on the imports of certain hot rolled carbon steel flat products were detrimental to their exporting interests, and were inconsistent with the WTO provisions. The application was a bulky file with an intensive collection of informational facts, evidential data and commercial arguments.[161] The matter was subsequently investigated by TPD. Following that, the file was referred to the PMI for further investigation and preparation of a request for consultation.[162]

Essar Steel was the chief private sector participant as it was the most affected company as compared to the other two companies. Most of the information was therefore provided by Essar Steel to the government.[163] The government held consultations with all three affected companies. The national delegation during formal consultation and Panel proceedings comprised lawyers (Lakshmikumaran & Sridharan Attorneys), the officials from the Ministry of Commerce, officials from PMI to WTO, and the advisers from the Centre for WTO Studies.[164] The private sector in this case was not directly involved in the formal proceedings held at Geneva. But the physical absence of the private entities during consultation or Panel meetings should not suggest that they were not an essential and active part of the process. 'They were indeed extensively consulted while making preparations for the consultation meetings and while preparing the consultative briefs. Their physical presence in the meeting was just not required in this case.'[165]

[161] The author gained access to the application which was filed by Essar Steel. It was addressed to the Ministry of Commerce, Government of India [Details confidential].
[162] Interview with Swarup (n 261).
[163] Ibid.
[164] Interview with an official representative, Ministry of Commerce (n 81).
[165] 'Having an industrial representative in the national delegation during consultation meetings is need based.' [Interview with an official representative, Ministry of Commerce (n 81)].

The case outlines several PPP strategies that can be considered by other developing countries which are seeking to strengthen their WTO DSU participation.

First, the case confirms that a private sector (which in this case comprised the giant steel companies in India) would be more forthcoming and active in assisting the government during the settlement of disputes if it has high stakes in the matter and is anticipating substantial gain from the removal of a trade barrier. Therefore, as initially discussed in chapter two, one of the vital stages of the dispute settlement process is the stage where the private sector examines the benefits from the removal of barrier as against its expected cost of removal. The industries' decision to approach and assist the government largely depends upon the cost-benefit analysis conducted at this stage.[166]

Second, the case adds a new perspective to the way in which the Government of India has coordinated with industries in the past. The government in this case accepted and acknowledged an application filed by a private company and proceeded to the stage of investigation, consultation and litigation on the basis of the evidence provided by the private companies. There is no noticeable mention of any trade association, trade union, export promotion council or a chamber of commerce assisting the government and the private companies to coordinate and exchange resources in the case. The finding provides a testimony to the fact that resourceful and influential companies like Essar Steel can directly (and with comparative ease) approach their governments if they have a trade matter to be resolved. They may not require the intervention of an industrial representative as they often themselves possess the capacity to supply required resources to the government. On the other hand, the previous cases and the case studies of China and Brazil have established the significance of institutionalising and strengthening the private

[166] Ibid. For discussion on cost-benefit analysis, see chapter two (page 76).

sector representative organisations as it may not be possible for the smaller and less resourceful companies individually to access and partner their governments for the settlement of disputes.[167]

Third, the case suggests that the physical presence of an industry representative during formal dispute settlement proceedings is not an essential feature or a prerequisite of an effective PPP. An industry can assist the government in various other ways as identified in the cases above. The government's decision to invite an industrial representative for formal consultation and litigation meetings largely depends upon the nature and requirements of the issue, and the adequacy of arguments and evidence available to the government.

6.5 Challenges and Strategies: Emerging from India's Domestic Context

This section brings out and discusses the problems that dispute settlement partnerships in India have been facing and the challenges that such partnerships may face in the future.

One of the biggest constraints that India may face in effectively utilising PPP approach can be attributed to its largely 'unorganised' private sector.[168] The economic sector in India is heavily fragmented, with multinational businesses leading a handful of economic sectors including steel, automobile and information technology, and a large portion of economic sectors run by MSMEs on the other hand. Together, the MSMEs contribute significantly in foreign trade, but their individual volumes of exports and profit margins may constrain their capacity to form and finance representative organisations, gather information and approach the government with a

[167] For a discussion on significance of organised private sector, see chapter two (page 90).

[168] An unorganised sector in India is defined as a sector which consists 'of all unincorporated private enterprises owned by individuals or households engaged in the sale or production of goods and services operated on a proprietary or partnership basis and with less than ten total workers.' Over ninety percent of country's working population is employed by the unorganised economic sector. [National Commission for Enterprises in the Unorganised Sector, Government of India, *Report on Conditions of Work and Promotion of Livelihoods in the Unorganised Sector* (Academic Foundation 2008) 1774] For definition of organised private sector in the context of this study, see chapter two (page 90).

well-researched trade issue. Hence, the partnership strategies employed by Brazil may not work effectively in India as the structure of economic sectors in India is predominantly different from that in Brazil. Moreover, the formal strategies employed by China may also be unsuitable for India as the structure and composition of economic sectors, along with the political context within which the economic sectors operate, are significantly different in the two countries.

An interviewee provides an example to illustrate the problem of insufficiently organised private sector in India. The fisheries industry in India comprises micro and small producers and exporters. They are partially represented by trade associations (such as SEAI) and an export promotion council (MPEDA), but the main problem lies in the fact that the industry is not 'sufficiently institutionalised' as trade associations, councils, exporters and producers have failed to coordinate and represent the interests of unorganised and unaware exporters and producers of the sea food - the fishermen in India.[169]

Matthew suggests that investment should be made in developing the institutional capacity of the private sector by creating interconnected trade cooperatives, associations and export promotion councils. These cooperatives can provide training in relation to international trade regulations, trade avenues, strategies, and national foreign trade policies. The trade unions and cooperatives can jointly coordinate with the government departments and can make attempts to strike bargains for beneficial domestic and international conditions in the interest of producers and exporters. They can assist producers to produce and market goods to their optimum capacity by imparting

[169] The problem is further illustrated in the words of an official from fishing industrial community: 'By and large, there is poor awareness among the fishermen about the exports market, efficient and environment friendly ways of fishing, the technological developments for minimising wastage, and the opportunities offered to them by the increasingly liberalising world trade. Some of the WTO agreements actually protect the interest of the poor fishermen who are the actual producers, but the fishermen think that the international agreements and rules are not for them but are only intended to serve the interests of the exporters.' {Interview with an official representative, Fisheries & Fishing Communities in India (Mumbai, India, 17 June 2013) [Name Withheld]}.

the right training in production and marketing techniques. They can also assist exporters to find the right markets for their products and to divert their exports to new markets in case of trade disagreements and barriers arising in the former.

The export promotion councils and trade associations are a product of the 1950s when India practised the policy of "export promotion import substitution". So they date back to a pre-liberalisation period when the markets were closed and protected, and hence they continue to employ an 'inward-looking' approach. Whereas today, since the markets have become global, businesses are expected to identify their markets across national borders, and are also expected to negotiate their interests nationally and internationally. Hence, in the wake of different trade rules and international trade conditions, an institutional reform of representative organisations is a much needed step for building an integrated private sector and for establishing effective coordination between the public and private sector in India.[170]

Another obstacle that needs to be overcome in India is the problem of coordination between various divisions of the government and between government and economic sectors.[171] The problem is illustrated with the help of an example. In the case of *China-Electronic Payment Services*[172], China's practices relating to their electronic payment system were challenged by the US. An official from China's Permanent Mission to the WTO approached his counterpart at the PMI to WTO to apprise him of the matter which, according to Chinese officials, also affected the financial interests of India. On being informed of the matter, the Mission officials made relevant enquiries with the Reserve Bank of India. The Mission officials subsequently investigated the facts and discovered that India might also be affected by the outcome of the matter due to its

[170] Ibid.
[171] Interview with an official, PMI to WTO (13 April 2013) [Name withheld].
[172] Panel Report, *China – Certain Measures Affecting Electronic Payment Services*, WT/DS413/R and Add.1, adopted 31 August 2012, DSR 2012:X, 5305.

national electronic payment system. But at the very last stage, India could only manage to join the case as a third party. Hence, the lack of communication and coordination between the private financial sector and the government, and between the Ministry of Finance and the Ministry of Commerce in India becomes evident here.

In addition, other problems which India has faced in utilising the WTO DSM provisions and the challenges which may in the future obstruct the formation of effective partnership arrangements could be enumerated in the following points:

1. *Wealth inequality* among different industries in India, for instance, between the agriculture and steel industries, has resulted in an unevenly represented private sector, and this domestic condition has further caused 'discriminatory protection' of special economic interests by the government.[173] This can be evidenced in the cases discussed above, as they reflect that the wealthy industries in India have the potential to approach the concerned government officials, with or without the assistance of their industry representatives.[174] On the other hand, the poor industries in India have found it difficult to organise their resources for representing their trade interests to the government.[175] The problem is described by a TEXPROCIL official:

> It is not easy for other trade associations or export promotion councils to approach the Government when their trade interests are infringed. Our case has been different as we have been repeat players in partnering the Ministry of Commerce in various WTO litigations, and we therefore have

[173] Sam Pizzigati, 'To End Extreme Poverty, End Extreme Wealth' *Inequality.org* (27 January 2013) <http://inequality.org/extreme-poverty-extreme-wealth/> accessed 24 September 2013; Soutik Biswas, 'India's Billionnaires and the Wealth of the Nation' *BBC News: India* (12 October 2012) <http://www.bbc.co.uk/news/world-asia-india-19921501> accessed 24 September 2013.
[174] See, for example, the *US-Carbon Steel* case (text to n 163).
[175] Interview with an official representative, TEXPROCIL (n 46).

> gained the experience and knowledge of the right process of approaching the Ministry and the right people at the Ministry. It may be difficult for other industries to approach the government in a similar way as the government may not be able to trust the fairness and legitimacy of their complaint without a strong representational agency supporting their interests.[176]

Hence, as discussed in chapter two, wealth inequality can create a divide between the 'haves' and 'haves not' industry sectors in India. It is important to note that this particular weakness was also observed in the functioning of the semi-formal PPP arrangements examined in the case study of Brazil. The weakness, to some extent, was also discussed during the examination of the US and EU's handling of trade disputes and their formalised PPP systems.

2. *The cost of employing trade lawyers* on a permanent basis may be greater than its utility as India is only involved in a handful of litigations every few years and the affected private stakeholders may not engage in all WTO disputes.[177] It is mainly for this reason that trade lawyers are not hired by the governments or industrial entities on a permanent basis. WTO-trained lawyers may also find very limited professional avenues at corporate law firms and export companies in India for a similar reason.[178]

Additionally, the WTO-related modules are not a popular option among students in India. The lack of professional, training and internship opportunities available to Indian students in this area can be seen as the main reason for this unpopularity. In addition, trade law

[176] Ibid.
[177] Identified in interview with Swarup (n 55). For details on private sector involvement in WTO disputes litigated and defended by India, lawyers engaged and the frequency of WTO disputes from the year 1995 to 2013, see Table 2 and Table 3.
[178] Interview with Moushami Joshi (n 37).

modules taught in the National Law Schools and Universities in India are predominantly doctrinal and lack practical aspects of study. For example, the WTO-related courses often comprise the study of WTO Agreements and Panel reports, but they rarely include practical training on legal research, writing and practice. The fact that most of the trade lawyers practising WTO law in India have obtained their legal specializations from the US or UK based universities evidences this problem.[179] These factors consequentially lead to low levels of WTO-related expertise in the country.[180]

The option of engaging foreign lawyers for WTO disputes, when the expertise is not available in the country, is cost-demanding and can conveniently be avoided by expanding domestic expertise in international trade law. The government has realised this and steps are being taken to build domestic legal capacity. 'Over these years, the government has increasingly been hiring India based lawyers for conducting trade disputes.'[181] An India based trade lawyer also confirms the observation as she states that 'the government is encouraging the domestic law firms to gain WTO legal expertise by engaging us in WTO matters and issuing calls for our legal opinions on various international trade issues'[182].

3. As discussed in chapter two, the element of *confidentiality* is an essential requirement for an effective PPP mechanism.[183] An industry must therefore be assured by the government that its business information will not be disclosed and that strict confidentiality will be

[179] Gregory C Shaffer, James Nedumpara**,** Aseema Sinha and Amrita Bahri, 'Indian Trade Lawyers and the Building of State Trade-Related Legal Capacity' in David Wilkins, Vikramaditya Khanna, and David Trubek (eds), *The Indian Legal Profession in the Age of Globalization* [Cambridge University Press, Forthcoming 2015].
[180] Ibid.
[181] Interview with Swarup (n 55).
[182] Interview with Moushami Joshi (n 37).
[183] European Commission DG-Trade, 'Final Report: Interim Evaluation of the European Union's Trade Barrier Regulation (TBR)' (June 2005) 18 <http://trade.ec.europa.eu/doclib/docs/2005/october/tradoc_125451.pdf> accessed 25 September 2014. Also see chapter two (page 108).

observed in dealing with their requests and information.[184] It is also important that the government should assure the industry that anonymity on request can also be granted so that industries do not face the fear of trade retaliation from their trading partners abroad whom they are challenging.[185] In the EU, companies are discouraged from filing TBR petitions as the TBR provisions do not grant the right to the complainants to remain anonymous. [186] Similarly, in the absence of any established procedures granting confidentiality and anonymity in India, industries might be discouraged from accessing the government, sharing business information and litigating matters with them.

4. *Lack of confidence* between the government and industry is another reason that can impede the formation of effective networks between the two.[187] The problem is described by a SEAI official:

> We have at times faced scepticism from the government when we approached them for certain trade concerns our exporters had. We were asked to establish that the affected exporters had not done anything wrong, and that the financial loss they were facing was due to a foreign measure and not due to other internal reasons. The burden of proof was entirely on us to prove the legitimacy of our complaint……The industry, which was asked to supply detailed evidence, felt that the government is trying to discourage them from raising their complaints. This and similar other experiences have caused a major trust deficit between us.[188]

[184] This has been confirmed in interview with an official representative, SEAI (9 September 2013) [Name withheld].
[185] Interview with an official representative, TEXPROCIL (n 46).
[186] See chapter three (text to n 213 and 217).
[187] Bohanes and Garza (n 73) 80. For discussion on this challenge, see chapter two (pages 108-109).
[188] Interview with an official representative, SEAI (9 September 2013) [Name withheld].

It is contended that the 'first battle' for the private sector to overcome foreign trade barriers is 'internal', i.e., 'the battle of convincing our government' to investigate the problem and to launch an action at WTO. This signifies 'distrust' between the government officials and private sector entities as 'they both believe that they have different interests and their interests cannot coincide'.[189]

It is therefore important that the mindset of the government and business entities should change. The government should view industry interests through a legal and economic spectrum, and should believe that the protection of legitimate trade interests would foster international trade and economic growth in India. At the same time, industries should also trust that the government will strive for the protection of their legitimate business interests.

5. *The coordination problem* between various departments of the government and between the government and industry has already been discussed above. One underlying reason for this problem is that the inter-ministerial coordination in India is weak. The instance of *China-Electronic Payment Services* has already illustrated the problem. A trade lawyer based in India further observes that the lawyers hired for WTO disputes are not only expected to coordinate with the Ministry of Commerce, but also with other concerned Ministries, depending upon the subject-matter of a dispute.[190] This can be problematic. For example, in one of the WTO cases which an India based law firm was preparing, assistance from a different Ministry was required. The lawyers posed questions to various involved Ministries, but their reaction time was 'delayed' and 'very slow'. The technical

[189] Interview with an official representative, TEXPROCIL (n 46).
[190] Interview with an India based trade lawyer (Delhi, India, 27 August 2013) [Name withheld].

nature of the case required intensive scientific and technical analysis which should have been carried out by the subject-specific Ministry, but the lawyers themselves carried out the technical analysis as they could not secure adequate assistance from the concerned government departments.[191]

These instances therefore reflect that coordination between the government departments should be strengthened by devising affordable focal points and practical procedures of inter-ministerial coordination.[192] In addition, the coordination between the government and industry should also be improved by devising effective and open channels of communication between the two.[193]

6. *Corruption, rent seeking, bribery and lobbying leading to corporate regulatory capture*: Participation of the private sector in the intergovernmental procedure of managing trade disputes may also give rise to certain regulatory concerns.[194] As discussed in chapter two, the regulatory problems can specially emerge in countries (such as India) which have high levels of corruption and poor observance of 'rule of law'.[195] Widespread corruption, lack of transparency in the operation of the government, and opaqueness in the financial management of political parties and electoral campaigns in India can lead to the

[191] A trade lawyer observes the following: 'The scientists at the Ministry should have dealt with [the] scientific issues. They should have provided an expert input, but this did not happen.' {Interview with an India based trade lawyer (Delhi, India, 27 August 2013) [Name withheld]}.
[192] Practical procedures for managing internal coordination between the government departments are suggested in Marie Wilke, 'Practical Considerations in Managing Trade Disputes' (December 2012) ICTSD Information Note 11 <http://ictsd.org/downloads/2013/02/practical-considerations-in-managing-trade-disputes.pdf> accessed 27 September 2013.
[193] Periodical meetings between the private and the public sector for open communication is suggested in Bohanes and Garza (n 73) 81; Practical ways of managing external coordination with private sector entities and foreign bodies is suggested in Wilke 'Practical Considerations in Managing Trade Disputes' (n 192).
[194] See chapter two (page 86).
[195] Kounteya Sinha, 'Corruption rate in India is double of global average' *The Times of India* (London, 9 July 2013) <http://articles.timesofindia.indiatimes.com/2013-07-09/india/40468760_1_global-corruption-transparency-international-huguette-labelle> accessed 24 September 2013; 'India's corruption scandals' *BBC News: South Asia* (18 April 2012) <http://www.bbc.co.uk/news/world-south-asia-12769214> accessed 24 September 2013.

formation of opaque alliances between the capitalist sector and political leaders. This can vitiate the process of government's decision-making in many respects.[196] In this manner, as initially discussed in chapter two, threat of corporate regulatory capture can act as a key weakness of PPP approach in countries with such domestic characteristics. This limitation could possibly be one of the fear factors which can discourage the Indian Government from establishing close partnerships with industry for dispute settlement purposes.

These are some of the domestic factors which may impede the formation of effective PPP arrangements in India.

6.6 Additional Comments & Concluding Remarks

Irrespective of the above-mentioned impediments, the public and private sector entities in India have demonstrated an emerging 'pattern of coordination' through a series of disputes discussed above. The government and private sector representatives in India have coordinated in various ways without the existence of a formal law or regulation or a dedicated mechanism facilitating the same. However, it may be recalled that only a few industries have partnered the government, with the leading repeat participant being the textiles industry. The partnership between the government and TEXPROCIL should be seen as more of an 'exception' than a 'rule' in India, as it may not be possible for other industries to approach the government in similar ways.[197] Similar levels of private participation have not been found in cases affecting the interests of other

[196] India has been hit by several corruption scams in the last decade. These scams were a result of corrupt government practices, acts of bribery and political lobbying between business entities and politicians in India. For a list and overview of major corruption scams which have recently taken place in India, see 'India's Corruption Scandals' *BBC News* (South Asia, 18 April 2012) <http://www.bbc.co.uk/news/world-south-asia-12769214> accessed 15 July 2015.
[197] Ibid.

producing and manufacturing industries, such as pottery[198], sea food[199], and agriculture[200]. Economies of scale and substantial stakes involved may be argued as the main reasons for the active participation of the textiles and steel industries in India.[201] On the other hand, the lack of established procedures facilitating the interaction between the two sectors, weak representation, the prospective nature of WTO remedies, low trading stakes and poor economies of scale, besides other discussed impediments, may be argued as the main reasons for the non-participation of other industry sectors.[202]

It is therefore essential that better defined procedures of dispute management and partnership should be established by the government. These procedures should be able to guide and facilitate the private and the public sectors to approach each other and exchange resources for cost-effective conduct of trade disputes. At the same time, such procedures should remain flexible in nature. The need for having flexible and simple procedures in developing countries has been suggested by various public and private sector officials working in India and Brazil.[203] The requirement for flexible procedures does not suggest that the government and the industry should have flexibility in selecting their obligations and rights. Rather, the notion of flexibility suggests that the ways in which the set obligations and rights can be performed should not be rigid, as they should be able to take into account the needs and conditions of the participating partners.

[198] Panel Report, *India – Measures Concerning the Importation of Certain Agricultural Products from the United States*, WT/DS430/R, circulated to WTO Members 14 October 2014 [Panel Report Circulated].
[199] Panel Report, *United States – Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58/R and Corr.1, adopted 6 November 1998, as modified by Appellate Body Report, WT/DS58/AB/R, DSR 1998: VII, 2821.
[200] Panel Report, *India – Measures Concerning the Importation of Certain Agricultural Products from the United States*, WT/DS430/R, circulated to WTO Members 14 October 2014 [Panel Report Circulated].
[201] For details, see chapter two (page 104).
[202] These factors and their interrelationship is explained in chapter two. See, for example, chapter two (page 104).
[203] Interview with Toufiq Ali, Chief Executive at Bangladesh International Arbitration Centre, Former Ambassador to Permanent Mission of the People's Republic of Bangladesh to the WTO, Geneva (21 August 2013); Interview with an official, Permanent Mission of Brazil to WTO (16 September 2013); Interview with an official representative, Centre for WTO Studies (n 41); Email from Ujal Singh Bhatia (n 3).

Finally, it is interesting to note that different features of informal PPPs have emerged from this case study, and some of these features have drawn similarities between the PPP arrangements in India and Brazil. For example, CGC in Brazil and TPD in India have played a similar role in the management of trade disputes. Moreover, as in the case of Brazil, the dispute settlement approach in India remains 'top-down' as the government plays a dominant role in the management of disputes. This draws a contrast between India's management of disputes and that of the US which predominantly employs a 'bottom-up' approach.

The case study reaffirms that PPP arrangements are based on certain common elements, including the exchange of resources, reciprocity and resource interdependency. It also outlines other features which may also be vital for an effective partnership system. These features include: presence of an organised private sector, openness in the channels of communication between the government and industry, their close interaction during all stages of dispute settlement, suitable financial arrangements for financing the dispute settlement process, and the building of confidence and trust in their relationships. With the help of these features, a PPP mechanism can achieve its objective, i.e., it can enhance the dispute settlement capacity of developing countries by enabling them to mobilise resources at pre-litigation, litigation and post-litigation stages of WTO dispute settlement.

Table 1 and 2 outline the current status, affected industries, lawyers and if applicable, the participating private stakeholders for each dispute that India has litigated or defended at the WTO DSU. The information provided in these tables is entirely gathered by means of interviews and other empirical methods.

Table 2: WTO Dispute Settlement Participation of India as Complainant

Title	Agreement	Year	No.	Status	Affected Industries	Representing Lawyer/ Law Firm	Participating Private Stakeholders
Poland - Import Regime for Automobiles	GATT 1994	1995	DS19	Withdrawn, mutually agreed solution	Automobile Industry	**	**
United States - Measures Affecting Imports of Women's and Girl's Wool Coats	Textiles and Clothing	1996	DS32	Withdrawn, mutually agreed solution	Textile Industry	Dr Frieder Roessler	TEXPROCIL
United States - Measures Affecting Imports of Woven Wool Shirts and Blouses from India	Textiles and Clothing	1996	DS33	US withdrew measures after the DSB and AB report	Textile Industry	Dr Frieder Roessler	TEXPROCIL
Turkey - Restrictions on Imports of Textiles and Clothing Products	Textiles and Clothing, GATT 1994	1996	DS34	Turkey withdrew measures after the DSB and AB report	Textile Industry	Dr Frieder Roessler	TEXPROCIL
United States - Import Prohibition of Certain Shrimp and Shrimp Products	GATT 1994	1996	DS58	Compliance proceedings completed without finding of non-compliance	Seafood Industry	Arthur Appleton	SEAI
European Communities - Restriction on Certain Import Duties on Rice	Agriculture, GATT1994, Import Licensing, SPS, TBT, Customs Valuation	1998	DS134	Settled during consultations	Agriculture Industry	**	**
European Communities - Anti-Dumping Investigations Regarding Unbleached Cotton Fabrics from India	Anti-Dumping	1998	DS140	Settled during consultations	Textile Industry	Vermulst Waer & Verhaeghe (VWV)	**
European Communities - Anti-Dumping Duties on Imports of Cotton-type Bed Linen from India	Anti-Dumping	1998	DS141	Compliance proceedings completed with finding of non-compliance	Textile Industry	Edwin Vermulst , Folkert Graafsma - Vermulst Verhaeghe & Graafsma law firm	TEXPROCIL
South Africa - Anti Dumping Duties on Certain Pharmaceutical Products from India	Anti-Dumping	1999	DS168	Settled during consultations	Pharmaceutical Industry	**	**
United States - Anti Dumping and Countervailing	Anti-Dumping, GATT 1994,	2000	DS206	Implementation notified by respondent	Steel Industry	Folkert Graafsma	SAIL

Title	Agreement	Year	No.	Status	Affected Industries	Representing Lawyer/ Law Firm	Participating Private Stakeholders
Measures on Steel Plate from India	SCM, WTO Agreement						
United States - Continued Dumping and Subsidy Offset Act of 2000	Anti-Dumping, GATT 1994, SCM, WTO Agreement	2000	DS217	Authorization to retaliate granted		Wilkie Farr & Gallagher (advised MPEDA/SEAI)	MPEDA/SEAI
Brazil - Anti Dumping Duties on Jute Bags from India	Anti-Dumping, GATT 1994, WTO Agreement	2001	DS229	Settled during consultations	Textile Industry	**	JMDC
Argentina - Measures Affecting the Import of Pharmaceutical Products	GATT 1994, TBT, WTO Agreement	2001	DS233	Settled during consultations	Pharmaceutical Industry	**	**
United States - Rules of origin for Textiles and Apparel Products	Rules of Origin	2002	DS243	Report Adopted, no further action required	Textile Industry	ACWL	TEXPROCIL
European Communities - Conditions for the Granting of Tariff Preferences to Developing Countries	GATT 1994	2002	DS246	Implementation notified by respondent	Textile Industry	ACWL (Dr Frieder Roessler) and Krishnan Venugopal	TEXPROCIL
European Communities - Anti Dumping Duties on Certain Flat Rolled Iron or Non Alloy Steel Products from India	Anti-Dumping	2004	DS313	Withdrawn, mutually agreed solution	Steel Industry	Squire Sanders	**
United States - Customs Bond Directive for Merchandise Subject to Anti - Dumping/Countervailing Duties	Anti-Dumping, GATT 1994, SCM, WTO Agreement	2006	DS345	Implementation notified by respondent	Seafood Industry	Lakshmi Kumaran & Sridharan, Krishnan Venugopal/ Wilkie Farr and Gallagher	MPEDA/SEAI
European Communities - Expiry Reviews of Anti-Dumping and Countervailing Duties Imposed on Imports of PET from India	Anti-Dumping, GATT 1994, SCM, WTO Agreement	2008	DS385	Settled during consultations	Chemicals and Plastic Industry	Krishnan Venugopal/ ACWL/ Steptoe & Johnson	Chemplast
European Union and a Member State - Seizure of Generic Drugs in Transit	GATT 1994, TRIPS	2010	DS409	Settled during consultations	Pharmaceutical Industry	Mr Krishnan Venugopal, Mr Uday Nath Tiwari, Professor Frederick M. Abbot (Luthra and Luthra	**

Title	Agreement	Year	No.	Status	Affected Industries	Representing Lawyer/ Law Firm	Participating Private Stakeholders
						provided the initial opinion)	
Turkey - Safeguard Measures on Imports of Cotton Yarn (Other than Sewing Thread)	GATT 1994, Safeguards	2012	DS428	Settled during consultations	Textile Industry	Lakshmi Kumaran & Sridharan, Krishnan Venugopal	TEXPROCIL
United States - Countervailing Measures on Certain Hot-Rolled Carbon Steel Flat Products from India	GATT 1994, SCM, WTO Agreement	2012	DS436	Report(s) adopted, with recommendation to bring measures into conformity	Steel Industry	Lakshmi Kumaran & Sridharan, Krishnan Venugopal	Essar, Tata, Jindal Steel

*** Information not available.*

**** 'Year' of the dispute is the year in which the request for consultations was filed.*

Source: Interviews, Right to Information application responses, WTO website

Table 3: WTO Dispute Settlement Participation of India as Respondent

Title	Agreement	Year	No.	Status	Affected Industries	Representing Lawyer/Law Firm
India - Patent Protection for Pharmaceutical and Agricultural Chemical Products	TRIPS	1996	DS50	Implementation notified by respondent	Pharmaceutical and Agro-Chemical Industry	Krishnan Venugopal and Dr Frieder Roessler
India - Patent Protection for Pharmaceutical and Agricultural Chemical Products	TRIPS	1997	DS79	Implementation notified by respondent	Pharmaceutical and Agro-Chemical Industry	Krishnan Venugopal and Dr Frieder Roessler
India - Quantitative Restrictions on Imports of Agricultural, Textile and Industrial Products	Agriculture, GATT 1994, Import Licensing	1997	DS90	Implementation notified by respondent	Agricultural, Textile and Industrial Products	Krishnan Venugopal
India - Quantitative Restrictions on Imports of Agricultural, Textile and Industrial Products	Agriculture, GATT 1994, Import Licensing	1997	DS91	Withdrawn, mutually agreed solution	Agricultural, Textile and Industrial Products	Krishnan Venugopal
India - Quantitative Restrictions on Imports of Agricultural, Textile and Industrial Products	Agriculture, GATT 1994, Import Licensing	1997	DS92	Withdrawn, mutually agreed solution	Agricultural, Textile and Industrial Products	Krishnan Venugopal

Title	Agreement	Year	No.	Status	Affected Industries	Representing Lawyer/Law Firm
India - Quantitative Restrictions on Imports of Agricultural, Textile and Industrial Products	Agriculture, GATT 1994, Import Licensing	1997	DS93	Withdrawn, mutually agreed solution	Agricultural, Textile and Industrial Products	Krishnan Venugopal
India - Quantitative Restrictions on Imports of Agricultural, Textile and Industrial Products	GATT 1994, Import Licensing	1997	DS94	Withdrawn, mutually agreed solution	Agricultural, Textile and Industrial Products	Krishnan Venugopal
India - Quantitative Restrictions on Imports of Agricultural, Textile and Industrial Products	Agriculture, GATT 1994, Import Licensing, SPS	1997	DS96	Withdrawn, mutually agreed solution	Agricultural, Textile and Industrial Products	Krishnan Venugopal
India - Measures Affecting Export of Certain Commodities	GATT 1994	1998	DS120	Settled during consultations	Agriculture, leather	**
India - Measures Affecting the Automotive Sector	GATT 1994, TRIMS	1998	DS146	Implementation notified by respondent	Automotive Industry	ACWL/Venugopal
India - Import Restrictions	Agriculture, GATT 1994, Import Licensing	1998	DS149	Settled during consultations	**	**
India - Measures Affecting Customs Duties	GATT 1994	1998	DS150	Settled during consultations	**	**
India - Measures Affecting Trade and Investment in the Motor Vehicle Sector	GATT 1994, TRIMS	1999	DS175	Implementation notified by respondent	Motor Vehicle Industry	ACWL/Venugopal
India - Import Restrictions Maintained Under the Export and Import Policy 2002-2007	Agriculture, GATT 1994, Import Licensing, SPS, TBT	2002	DS279	Settled during consultations	**	**
India - Anti Dumping Measures on Imports of Certain Products from the European Communities	Anti-Dumping, GATT 1994	2003	DS304	Settled during consultations	**	**
India - Anti Dumping Measure on Batteries from Bangladesh	Anti-Dumping, GATT 1994	2004	DS306	Settled during consultations	Battery Manufacturers	**

Title	Agreement	Year	No.	Status	Affected Industries	Representing Lawyer/Law Firm
India - Anti Dumping Measures on Certain Products from the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu	Anti-Dumping, GATT 1994	2004	DS318	Settled during consultations	**	**
India - Measures Affecting the Importation and Sale of Wines and Spirits from the European Communities	GATT 1994	2006	DS352	Authority for Panel Lapsed	Wine and Spirits Industry	Edwin Vermulst (vvgb law firm)
India - Additional and Extra Additional Duties on Imports from the United States	GATT 1994	2007	DS360	Report adopted, no further action required	Wine and Spirits Industry	Economic Law Practices (Sameer Gandhi/Suhail Nathani)
India - Certain Taxes and Other Measures on Imported Wines and Spirits	GATT 1994, SCM	2008	DS380	Settled during consultations	Wine and Spirits Industry	Economic Law Practices (Sameer Gandhi/Suhail Nathani)
India - Measures Concerning the Importation of Certain Agricultural Products from the United States (Avian Influenza)	SPS, GATT 1994	2012	DS430	Panel Report Circulated	Agricultural Industry	Luthra and Luthra
India - Certain Measures Relating to Solar Cells and Solar Modules	GATT 1994, TRIMS, SCM	2013	DS456	Panel Composed	Renewable Energy Industry	Cloras Law Firm (Anuradha)

*** Information not available.*

**** 'Year' of the dispute is the year in which the request for consultations was filed.*

Sources: Interviews, Right to Information application responses, WTO website

7. CASE STUDIES' ANALYSIS: "LESSONS LEARNT"

The case studies have underlined a number of PPP strategies. Some of them have proved advantageous in creating a more enabling dispute settlement environment, whilst others have remained largely ineffective. However, as initially argued in chapter two, and subsequently confirmed in chapter three, four, five and six, it is not possible to generalise the effectiveness (or ineffectiveness) of these strategies as they may not produce similar results in all developing countries, especially because of the different economic and political conditions of all WTO Member States.[1] Hence, in place of arguing in favour of a standard PPP mechanism, the chapter outlines and considers the nature of selected PPP strategies that are principally based on the findings distilled from the previous chapters. These strategies are discussed under the following categories:

1. Individual's Right to File Petition
2. Confidential of Information
3. Dedicated and Inter-Ministerial Institutions
4. Creation of Multidisciplinary Dispute Management Team
5. Provisions Enhancing Transparency and Regulation
6. Creation of 'Strong' Industry Representatives
7. Domestic Trade Law Expertise
8. In-house Ambulance Chasing by Law Firms
9. Creation and Engagement of Specialised Think Tanks
10. Small Claims Provisions for Non-Litigable Matters

[1] See, for example, chapter two (page 97).

Developing Member States that are upper middle and lower middle income countries (MICs) with levels of development, dependency on foreign trade and political economies similar to Brazil, India and China (BIC) can particularly benefit from the experiences of BIC. Moreover, advanced MICs with considerable DSU experience (such as Mexico and Thailand) and the desire of achieving a more enabling dispute settlement environment can consider the strategies proposed in this chapter. However, it is important to note that the proposed strategies are limited in their application as they may not be suitable for developing Member States that are classified under the World Bank's list of "low income countries" and "heavily indebted poor countries", along with the ones listed as "least developed countries" by UN. As discussed earlier in chapter two, these countries do not fit within the parameters of the research objectives due to their almost non-existent DSU participation experience, poor institutional capacity, small market size, low aggregate trading stakes and other domestic conditions that may impede them from participating at WTO DSU.[2] However, findings distilled from the case studies in this chapter can certainly apprise them of the challenges, benefits and prerequisites for engaging the affected private sector should they seek to invoke the provisions of WTO DSU in the future.

As observed in the previous chapters, China, Brazil and India have different domestic circumstances.[3] Multiple domestic conditions prevailing in these countries, including the nature of governance, structure of economy, political circumstances, policies and social values, and bureaucratic frameworks have shaped and influenced the PPP approach employed by these countries.[4] Accordingly, each country considering these options should attempt to assess the suitability of the individual strategies in light of their particular domestic circumstances. During

[2] For a discussion on the exclusion of these countries from the intended research implications and outcome, see chapter two (section 2.2).
[3] For details, see chapter two (pages 97-110); chapter four (pages 169-181); chapter five (pages 206-219); chapter six (pages 247-252).
[4] These factors are discussed in chapter two (sections 2.6 and 2.7).

this assessment, the countries may be guided by, but should not limit to, the examination of multiple domestic factors and potential challenges to PPP approach discussed in chapter two.[5] With this understanding, the chapter draws for consideration some of the "lessons learnt" from the dispute settlement and partnership experiences investigated under this thesis.

7.1 Individual's Right to File Petition

Section 301 mechanism in the US, the TBR mechanism in the EU, and the Rules on the Investigation of Foreign Trade Barriers in China are legal gateways that are established to facilitate PPP during the settlement of foreign trade disputes.[6] Most importantly, they provide the individuals with a right to file a petition at the concerned governmental unit if and when their trade interests are infringed by foreign measures.[7] Empirical findings suggest that the right provides the individuals with the confidence that their legitimate trade interests will be protected by the government and that they will have the right to access their government if and when their trade interests need protection.[8] The right can also assist small and medium level enterprises and their representative organisations which may not otherwise be financially or politically

[5] The factors that can influence the formation and functioning of PPP systems are examined in chapter two (section 2.7). The challenges which partnerships may face in developing countries are also provided in chapter two (section 2.6).

[6] US Trade Act 1974, s 301-310 [Hereinafter, the Act will be referred to as "Trade Act 1974"]; Council Regulation (EC) No 3286/94 of 22 December 1994, art 1 – 14 [Hereinafter, the Regulation will be referred to as "Council Regulation"]; Investigation Rules of Foreign Trade Barrier (2005), art 1 – 37 [Hereinafter, the Rules will be referred to as the "TBI Rules"]. For details on these provisions, see their respective case studies.

[7] See, for example, Council Regulation, art 3 which gives a right to a natural or legal person, an association, enterprise or industry to file a written complaint when it considers that it has 'suffered injury as a result of obstacles to trade that have an effect on the market of the community'. Chinese TBI Rules, art 5 states that 'Domestic enterprises and industries or natural persons, legal persons on behalf of domestic enterprises and industries or other organisations (hereinafter referred to as "the applicants") may make an application for trade barrier investigation to the Ministry of Commerce'. The US Trade Act 1974, s 302 (a) (1) states that 'Any interested person may file a petition with the Trade Representative requesting that action be taken under section 301 and setting forth the allegations in support of the request.' 'Interested person' under the Act refers to, but is not limited to, 'domestic firms and workers, representatives of consumer interests, United States product exporters, and any industrial user of any goods or services that may be affected by actions taken under s 301 (a) or (b)'.

[8] See chapter three (pages 133, 133, 161, 161).

influential to approach and influence the government.[9] Hence, as mentioned initially in chapter two and explained subsequently in chapter three and four, a similar legal provision can "empower" industries.

At the same time, it is possible to argue that granting the right to petition may not be an effective way to encourage PPP as similar rights in the US, the EU and China have not been utilised frequently by the industries and the governments.[10] The EU's TBR evaluation report concludes that the formal TBR mechanism imposes a high burden of evidential requirement on the petitioner, which is one of the key reasons that have dissuaded the private sector from filing TBR petitions.[11] This disadvantage may become an even more serious hurdle in developing countries where the private sector may not be very well-organised and is often resource-constrained.

Many industries in developing countries, for example the infant private industries in China and MSMEs in India, may not have the capacity to provide supporting evidentiary inputs which the governments may require them to file with a formal petition. Hence, the provision may not grant an *effective* right to petition to those business entities which cannot afford to satisfy the resource obligation that comes with the petitioning right. It therefore becomes important that the right to petition is accompanied by the right to seek exemption from evidential requirements.[12] A similar accompanying right will better enable the resource-constrained industries to approach the government with their trade concerns. The exemption applications should contain the petitioner's precise reasons and constraints for seeking an exemption. The exemptions may be granted by the

[9] The argument is based on the findings laid down in chapter three (pages 133, 133, 161).
[10] See chapter three (text to n 192 - 196); chapter three (text to n 93 - 94); the case study of China (text to n 98).
[11] Council Regulation, arts 3(2) and 4(2) r/w art 10 imposes evidentiary requirements on petitioners. The Regulation also states that a petition can be rejected if these evidential requirements are not met by the petitioners.
[12] TBI rules, art 8 contain details about the evidence required with a petition. But at the same time, it relaxes this requirement with a qualification: 'Any applicant who could not submit above materials should explain the reason by writing'.

concerned government department after preliminary inspection of the petition and exemption application. Introducing such cost-reducing provisions based on a petitioner's legitimate request can potentially enhance the utilisation of the "right to petition".

7.2 Confidentiality of Information

The individuals, the representatives of industry or interested person(s) who provide information should have the right to request non-disclosure of documents, evidence and information provided by them in the interest of their business.[13] In the absence of such a right, the private sector may be hesitant to extend any informational assistance to the government.[14] The concerned government department should therefore be obliged to consider the request for confidentiality made by parties supplying the information and documents. The request may be accepted if the government deems it appropriate and in the legitimate commercial interests of the requesting party.[15] Once confidentiality is granted, the confidential documents shall not be used for any other purpose except for their legitimate use in investigation, consultation and litigation of the trade concern. Also, they should not be used for any other purpose or a different trade enquiry, unless a specific permission has been obtained from the providers of the information.

Similarly, the provision should include the right to seek identification confidentiality or anonymity. Companies may be discouraged from approaching the government or providing

[13] See, for example, TBI Rules, art 23 granting individuals with the right to request confidentiality of documents which they have provided to the unit. Trade Act 1974, s 308 (c) (1) (A) provides that USTR shall not disclose any information received for the purpose of investigation to any person if the person providing the information certifies that the information is business confidential, not generally available or the 'disclosure of such information would endanger trade secrets or profitability'. USTR holds the right to determine whether such certification is well founded [s 308 (c) (1) (C)].

[14] Interview with Moushami Joshi, Luthra and Luthra (Delhi, India, 21 June 2013); Jan Bohanes and Fernanda Garza, 'Going Beyond Stereotypes: Participation of Developing Countries in WTO Dispute Settlement' (2012) 4(1) Trade Law & Development 45, 82.

[15] See, for example, TBI Rules, art 24 which obliges MOFCOM to 'treat the materials provided by the interested parties as classified' if it thinks that the request for confidentiality is proper. Council Regulation, art 9 also deals with confidentiality obligation imposed on the European Commission.

business information if the provisions do not grant a right to complainants to remain anonymous. It may be recalled that the European Commission's TBR provision is not utilised frequently by the EU enterprises because the 'TBR complaint procedure does not contain provisions to protect the identity and confidentiality of the complainant'[16]. The absence of such provisions generates a 'very real fear of some kind of retaliation at a later stage by the country maintaining the trade barrier'.[17] Hence, to enable industries overcome such fears, a country's dispute settlement framework should contain a provision that could make the domestic handling of disputes and procedures of coordination completely anonymous.

7.3 Dedicated and Inter-Ministerial Institutions

Brazil has taken significant steps towards institutionalizing the conduct of WTO litigation and, as a result, it has emerged as a leader of developing country members with regard to the WTO dispute settlement mechanism.[18] It can be recalled that Brazil has established CGC, which is the dedicated authority responsible for coordinating with the private sector and preparing and presenting a case at WTO.[19] China and the EU have also employed a dedicated approach of handling disputes with the establishment of Trade Barrier Investigation Mechanism Unit in China and the Market Access Unit and Trade Barrier Regulation Committee in the EU.[20]

[16] European Commission DG-Trade, 'Final Report: Interim Evaluation of the European Union's Trade Barrier Regulation (TBR)' (June 2005) 46, 47 <http://trade.ec.europa.eu/doclib/docs/2005/october/tradoc_125451.pdf> accessed 25 September 2014. ['Article 8 (1) of the TBR Regulation does not mandate the identification of a complainant in the Notice of Initiation published in the EU's Official Journal, although this has invariably occurred in the past'.]
[17] Ibid.
[18] Confirmed in the interview with an official from Brazilian Ministry of Foreign Affairs (Brasilia, 19 April 2004) [Presently derived from Chad P Bown and Bernard M Hoekman, 'WTO Dispute Settlement and the Missing Developing Country Case: Engaging the Private Sector' (2005) 8(4) Journal of International Economic Law 861].
[19] For details, see the case study of Brazil (page 206).
[20] For details, see the case study of China (pages 169 and 174) and chapter three (page 135).

Another special feature of the Brazilian dispute settlement mechanism is the introduction of the Inter-Ministerial Foreign Trade Chamber, also known as CAMEX.[21] With the establishment of CAMEX, Brazil has devised an inter-ministerial approach for managing foreign trade disputes.[22] The approach ensures that different point of views and information are taken into consideration before a decision is taken on the matters of dispute settlement.

In line with these establishments, it is proposed that a dedicated dispute settlement unit (established within the designated ministry) should be made responsible for the overall conduct of WTO disputes and for achieving coordination with the private sector throughout the conduct of foreign trade disputes.[23] It is essential that the officers recruited in this unit have basic training and experience of WTO dispute settlement, alternative methods of dispute resolution and the foreign trade policies. They should remain updated on recent WTO disputes, negotiations, market access concerns and international trade law developments.[24]

As observed in the previous chapters, a dedicated focal point between government and industries can create and foster a relationship of trust and confidence between them, as its mere presence can encourage private sector representatives and individual companies to approach the government with specific trade concerns. Moreover, the unit should have an inter-ministerial component to ensure that it works in close coordination with other departments of the

[21] Also see PDM Veiga, 'Trade policy-making in Brazil: Changing patterns in State-civil society relationship' in Mark Halle and Robert Wolfe (ed), *Process Matters: Sustainable Development and Domestic Trade Transparency* (Geneva, IISD 2007) 143, 178.

[22] A detailed analysis of the Brazilian inter-ministerial process, the composition and functions of CAMEX and the role of other ministries is provided in Veiga (n 21) 178.

[23] Proposed in Gregory C Shaffer and Ricardo Melendez-Ortiz (eds), *Dispute Settlement at the WTO: The Developing Countries Experience* (Cambridge University Press 2010) 345.

[24] Proposed in Robert Echandi, 'How to Successfully Manage Conflicts and Prevent Dispute Adjudication in International Trade' (2013) ICTSD Issue Paper No 11, 29 <http://www.ictsd.org/downloads/2013/04/how-to-successfully-manage-conflicts-and-prevent-dispute-adjudication-in-international-trade.pdf> accessed 22 September 2014.

government for optimum utilisation of the government's knowledge, connections and expertise.[25] The participation of the concerned government departments is vital for the settlement of trade disputes in a cost-effective and timely manner.[26] Moreover, other institutions, such as NGOs, think tanks, law firms, trade association, confederations and chambers of commerce can further complement and assist the proposed unit in performing its functions effectively.

7.4 Creation of Multidisciplinary Dispute Management Team

The case studies demonstrate that multiple public and private sector entities have been engaged in the handling of WTO disputes. Their extent of participation has been different from case-to-case, but the composition of different dispute management teams reflects a common pattern. It may be recalled that the key participants involved at the domestic level in *Japan-Laver* from China were: the concerned officials from Ministry of Commerce, subject-specific experts from the Bureau of Fisheries of the Ministry of Agriculture, economic consultants from the China Chamber of Commerce of Import and Export of Foodstuffs, privately hired trade lawyers, Jiangsu Laver Association and laver exporters from China.[27] Those in the *EC-Sugar* from Brazil were: officials from the Ministry of Foreign Affairs and other concerned government departments, a team of lawyers from Sidley Austin, Datagro's team of economic consultants, NGO officials from Oxfam and Netherlands Economic Institute, sugar cane association officials and sugar exporters from Brazil.[28] Those in the *EC-Bed Linen* from India were: officials from the

[25] Proposed in Shaffer and Melendez-Ortiz (eds), *Dispute Settlement at the WTO* (n 23) 345; Bohanes and Garza (n 14) 82; Virachai Plasai, 'Coordinating Trade Litigation' (April 2013) ICTSD Issue Paper No 14, 4 <http://www.ictsd.org/sites/default/files/research/2013/04/coordinating-trade-litigation1.pdf> accessed 24 September 2014.

[26] Shaffer notes that 'Brazil has instituted an inter-ministerial process for trade matters to facilitate a more coherent, coordinated approach for trade policy and trade dispute settlement which has helped deepen trade-related expertise in multiple ministries'. [Gregory C Shaffer, Michelle Raton Sanchez Badin and Barbara Rosenberg, 'The Trials of Winning at the WTO: What Lies Behind Brazil's Success' (2008) 41(2) Cornell International Law Journal 383, 426].

[27] See the case study of China (section 4.2.1).

[28] See the case study of Brazil (section 5.2.2).

Ministry of Commerce and the Ministry of Textiles, trade advisers from the Centre for WTO Studies, officials from an export promotion council and a team of lawyers from a Brussels-based law firm.[29] These, along with other disputes, point towards the multidisciplinary composition of their dispute management teams.

The case studies, with the help of WTO cases, also illustrate the role that each participating entity from different teams can play in the settlement of trade disputes. They demonstrate that a trade concern identified by an exporter will go unaddressed without the engagement of government officials. Government officials may find it difficult to investigate a barrier or litigate it at WTO without resource inputs from the affected industry. An exporter may not be able to approach or even convince a government for looking into a matter without seeking support from its trade association or chambers of commerce. Trade lawyers may not be able to interpret economic formulas or evidential data without assistance from economists, data analysts and subject-specific experts. Trade lawyers are needed to assess the WTO-compatibility of a trade measure, and if needed, to prepare and present a case at WTO. Trade policy experts and diplomats are required to assess the economic, social and diplomatic ramifications of adjudicating a measure.

In light of these observations, it is suggested that each dispute should be handled by a multidisciplinary team which may comprise government officials, trade policy advisors, diplomats, industry representatives, private companies, civil society organisations, trade lawyers, economic consultants, data analysts, subject-specific experts and academics. However, as argued earlier in chapter two, government should remain the most dominant participant of the team. Niall Meagher argues that 'it should always be the government that must retain the authority of

[29] See the case study of India (section 6.4.2).

final decision-making'.[30] Another international economic law scholar observes that 'the hands of the government should not be tied while deciding such matters so that the social welfare interests of the nation are not overridden by special private interests'.[31] Accordingly, the present research argues that the government should have complete discretion for making *informed* determinations on handling foreign trade disputes and deciding on an appropriate course of action.

7.5 Provisions Enhancing Transparency and Regulation

The research findings have prepared a case for devising effective regulatory procedures in order to 'manage and monitor the PPPs'.[32] As initially discussed in chapter two, and subsequently confirmed in the case study of Brazil, an *effective* regulation is a vital prerequisite for a balanced exchange of resources, and it should aim to ensure that a partnership arrangement is regulated in such a way that the interests of a nation and a private sector are properly balanced with each other, and that the protection of latter does not lead to the infringement of former.[33]

The starting point of devising regulatory provisions should be the study and examination of existing regulatory practices which certain Member States have followed. For example, the US, the EU and Brazil have introduced certain initiatives to regulate their dispute settlement and partnership operations. These Member States have undertaken to supervise the functioning of partnership arrangements with the help of establishing committee systems comprising civil society representatives, holding public meetings to discuss trade policies, publishing briefs online and calling for public opinion.[34] USTR pursues the practice of "calling for comments" and holding "public hearings" with the stakeholders, interested persons and the public at large with

[30] Interview with Niall Meagher, ACWL (Geneva, Switzerland, 11 April 2013).
[31] Interview with an international trade law scholar (10 June 2013) [Name withheld].
[32] Ibid.
[33] For discussion on the significance of regulatory provisions, and for the meaning of effective regulation, see chapter two (section 2.6.1). Also see the case study of Brazil (section 5.2.4).
[34] Email from Professor Gregory C Shaffer to author (23 November 2011).

respect to foreign trade issues and dispute settlement.[35] As part of its transparency commitments, USTR also publishes its determinations concerning petitions filed by the private sector, along with the 'description of facts on which such determination is based'.[36]

Brazil has also recognised the need to make such partnership arrangements transparent and their functioning well supervised. It has employed the practice of seeking public opinion on proposed policies, bilateral negotiations, disputes and resolutions.[37] Besides that, MOFCOM publishes its resolutions, regulations, negotiation outcomes and trade proposals online, making them widely available to the people at large. Brazil has also introduced a procedure through which CAMEX appoints representatives from civil societies and social service agencies to its various governmental committees including the Management Executive Committee (GECEX).[38]

The European Commission has also introduced a similar practice of public solicitation with respect to foreign policy making processes. The European Commission consults private entities, civil society organisations and the public at large with respect to foreign trade policies and initiatives on a regular basis.[39] The Commission also regularly publishes its determinations, statement of reasons, dispute settlement updates, status and progress reports and briefs filed at

[35] One such example is USTR press release: 'USTR Calls for Comments on Intellectual Property Protection and Enforcement' (*USTR*, January 2012) <http://www.ustr.gov/about-us/press-office/press-releases/2010/january/ustr-calls-comments-intellectual-property-protecti> accessed 29 October 2012. The US also seeks public opinion on their proposed regulations and related documents via a web portal regulations.gov <www.regulations.gov> accessed 29 October 2012. The provisions for public hearing for the presentation of views upon request are provided in Trade Act 1974, ss 305 (b) (1) (A), 302 (a) (4), 306 (c) (2).

[36] Trade Act 1974, s 301 (d) (3) (c) (iii).

[37] A recent example is the call for public comments 'Secex opens public consultation on negotiating agreements with the EU and Canada' (*CAMEX*, 26 September 2012) <http://www.camex.gov.br/noticias/ler/item/218> accessed 29 October 2012.

[38] For the composition of GECEX, see CAMEX, GECEX <http://www.camex.gov.br/conteudo/exibe/area/1/menu/4/Comit%C3%AA%20Executivo%20de%20Gest%C3%A3o%20-%20GECEX> accessed 29 October 2012.

[39] European Commission: Trade, Public Consultation <http://trade.ec.europa.eu/consultations/> accessed 29 October 2012. Council Regulation, art 8(1) (a) obliges the Commission to announce the initiation of an examination procedure in response to a petition within a fixed time 'within which the interested parties may apply to be heard orally by the Commission'.

WTO.[40] The Commission's transparency commitment is further reflected in the right it has conferred on private individuals to inspect the documents available with the Commission (barring certain exceptions).[41] Chinese MOFCOM has closely followed the pursuit as it has employed similar transparency procedures under the TBI Rules.[42]

Robert Wolfe observes that a regulation is *effective* only when the 'regulatees' (i) 'know the existing rules', (ii) 'have the ability to shape new rules' through 'effective consultation' procedures with the government, (iii) and 'have the confidence that the rules will be implemented fairly'.[43] An effective regulatory framework in developing countries can be established on the basis of these transparency and accountability enhancing principles. Moreover, the 'regulatory provisions' can be known as 'best practices' or 'good practices' so that their enforcement does not convey a negative connotation to the regulated subjects.[44] The government and the individuals should not be given the feeling that they are being regulated as that might hamper the process of effective exchange of resources between the two.

7.6 Creation of 'Strong' Industry Representatives

As initially discussed in chapter two, and subsequently confirmed in chapter three, four, five and six, one of the key elements for effective government-industry exchange is the presence of an 'organised' private sector that is represented by 'strong' trade associations, confederations,

[40] See Council Regulation, arts 8(1) (a) and 12.
[41] See Council Regulation, art 8(4) (a). Its transparency commitment is further evident in the Commission Communication which proposes to make the process of handling trade barriers more transparent and inclusive of the interests of SMEs. The communication specifically addresses the need to include SMEs in the process of handling foreign trade barriers and development of Market Access Strategy [Commission (EC) 'Implementing the Community Lisbon Programme – Modern SME Policy for Growth and Employment' (Communication) COM (2005) 551 final].
[42] See TBI Rules, arts 13 and 14.
[43] Robert Wolfe, 'How Transparency Brings Standards to Life' (Standard-Settling in International Trade, Academy of Global Governance Executive Training Seminar Series, European Research Institute, Florence, 18-20 February 2013).
[44] Interview with a former Deputy Director General of the WTO (Geneva, Switzerland, 11 April 2013) [Name Withheld].

chambers of commerce or export promotion councils.[45] The examples of TEXPROCIL, Jiangsu Laver Association, Brazilian Soluble Coffee Industry Association and Global Sugar Alliance in the case studies reiterate that dispute settlement partnerships can work smoothly if the private sector is sufficiently organised.

The need for an organised private sector is also explicitly acknowledged in the terminologies used in various national legal texts. For example, the EU Council Regulations address private sector petitioners and participants as 'community industry' and 'community enterprises'.[46] In China's TBI Rules, the petitioners and participants are referred to as applicants who can be legal or natural persons, domestic enterprises, domestic industries and organisations.[47] The findings also indicate that industry representatives play a vital role in the domestic handling of trade disputes. More particularly, the case studies note that representatives have a more important role to play in representing industries that are resource-constrained, small and non-influential.[48] Underlining the role that trade confederations and associations can play, a representative from the Indian fisheries industry observes the following:

> The trade cooperatives and associations in India should take up social and economic issues together and help to protect the interests of an industry which is poor, illiterate and disorganised. For example, they can educate the poor fishermen in India who are almost illiterate and fully unaware of international trade agreements, market access opportunities and efficient ways of fishing and transporting.[49]

[45] The meaning of 'organised' private sector is provided in chapter two (section 2.6.2).
[46] See chapter three (n 141).
[47] See the case study of China (n 17).
[48] See the case study of India (text to n 167).
[49] Interview with an official, Fisheries & Fishing Communities in India (India, 17 June 2013) [Name withheld].

Confederations and associations can convince the government on various trade issues and developments that may be needed to uplift the foreign trade benefits for their industry. These organisations can coordinate with the producers of goods and services, the national and international markets, exporters, and the government in order to strike the best bargains for the business entities. For example, the cooperatives in Europe have in the past bargained successfully for subsidised fuel for consumption by fishing vessels in the country. This has decreased the costs of operation and increased the profit margins of the fisheries industry.

These associations can also identify the right markets for the producers and exporters and can assist them in exporting their produce to foreign markets in a cost-effective manner. If, for example, the demand for prawns in the market of country A diminishes or disappears, the confederations of fisheries industries can identify an alternative market in country B where this perishable produce can be exported at maximum advantage and with minimum wastage. These organisations can be sector-specific or region-specific or both.

Chambers of commerce can also play an instrumental role in the management of disputes. They can represent a wide range of business interests, irrespective of their size, nature and sector. The chambers can encourage the sharing of opportunities, knowledge and expertise among various industries in the nation. They can provide 'companies with practical support, useful connections and valuable access to new ideas and innovations'[50].

Export promotion councils can also act as a focal point between the exporters and the concerned government departments. They can either be established by the central government, or state governments on regional basis, or by the government and industry on a joint basis. The key aim

[50] British Chambers established in UK <http://www.britishchambers.org.uk/> accessed 21 July 2013.

of these councils should be the promotion of exports in their respective jurisdictional regions and economic sectors. The councils potentially can bridge the intra and inter industry gap as they can provide a common forum where exporters can interact and coordinate. They can also facilitate the formation of trade associations within their respective economic sectors and prompt individual entities to join these representative associations. Workshops and symposia can be organised by the councils (i) to explain the benefits and incentives of organisation, and (ii) to provide a common forum of interaction between the individuals, industries and representatives. Additionally, it would be important to devise ways for keeping the councils active and incentivised so that they perform their functions effectively through regular consultative meetings, training programmes and awareness workshops.[51]

Governments can play an important role in the creation of an aware and organised business community. They can organise joint business symposia to educate business communities about the benefits of WTO laws, recent developments in international trade and legal order, and the procedures for approaching the government and communicating information on trade infringements.[52] Such outreach activities can provide a forum where businesses can initiate dialogues concerning the prospective formation and development of trade associations and confederations. For example, the Brazilian Government has, from time to time, conducted FTAA meetings for business forums, and that has helped trigger the formation of trade associations and an 'encompassing Brazilian Business Coalition (CEB)'.[53] In addition, Brazil's legislative provision of compulsory taxation levied on the business entities has also arguably supported the

[51] Similar examples can be observed at Centre for WTO Affairs, IIFT <http://wtocentre.iift.ac.in/SHC.asp> accessed 21 July 2013.
[52] Echandi (n 24) 30.
[53] Shaffer, Badin and Rosenberg (n 26) 446.

functioning of business organisations in Brazil.[54] With the help of this legislation, the government has collected taxes from domestic businesses and distributed the revenue among trade associations. Similar provisions can be devised by other developing country governments for enhancing the financial capacity of trade associations.

7.7 Domestic Trade Law Expertise

The creation of in-house trade law expertise can reduce the cost of dispute settlement procedure for both public and private sector entities and further spur the formation of public private networks. It could be done by creating a standing legal team (trained in WTO laws) within the government departments, confederations or industry associations. However, this would make no financial sense for those developing countries which have a low WTO caseload as they would experience poor economies of scale from maintaining a standing legal force. One alternative approach could be to make use of the subsidised ACWL's legal services. Another way forward for developing countries could be to encourage private domestic law firms to develop expertise and experience in WTO laws.[55] Many developing countries have evidentially followed one or more of these routes.

India and China are important examples of developing countries that have recently increased their international trade law expertise at the domestic level. An India based trade lawyer observes the following:

> India has started to build its domestic legal capacity by following a unique approach. The government has hired various local law firms which had some trade law expertise and it has thrown them into a deep end, as if the

[54] See the case study of Brazil (page 214).
[55] Michael Ewing-Chow, 'Are Asian WTO Members Using the WTO DSU 'Effectively'?' (2013) 16(3) Journal of International Economic Law 669, 679.

> government was telling them to 'learn to swim or sink'. We were, and we are being encouraged by the government to gain knowledge and expertise over international trade laws.[56]

Until the year 2000, India mainly hired Geneva or Brussels based lawyers for litigating WTO cases.[57] In addition, a single Indian lawyer was repeatedly hired for preparing defences until the year 2000.[58] However, the government (especially from 2006 onwards) has started engaging a significantly higher number of domestic trade lawyers for matters relating to WTO dispute settlement.[59]

China has also significantly expanded its domestic legal capacity during the last decade. The MOFCOM in China has consistently required international law firms to work with their domestic law firms while preparing and presenting WTO cases. With this approach, they have gradually trained their domestic lawyers to handle future WTO cases. Moreover, China has further enhanced its legal expertise and experience through third party participation. The approach has enabled these countries to 'learn from other participants and obtain a better understanding of the functioning, reasoning and views of Panels and the Appellate Body'.[60] The strategy has provided

[56] Interview with Moushami Joshi (n 14). [Interviewee further observes the following: 'With more number of cases being litigated by and against India mainly from the year 2001, the government decided to expand its legal expertise. It was not feasible anymore to hire expensive Geneva based lawyers, especially in the cases where India was challenged. It was also not wise to exclusively rely on a sole trade lawyer in India [Mr Krishnan Venugopal]. The government therefore started to hire other Indian lawyers from different law firms based in India.']

[57] The foreign lawyers hired by India in the years before 2000 were: Dr Frieder Roessler, Edwin Vermulst and Folkert Graafsma. [See Table 2 and Table 3 in the case study of India]

[58] Krishnan Venugopal was the sole lawyer hired by the Government of India for disputes challenging Indian trade measures from the year 1996 to 2000. [See Table 2 and Table 3 in the case study of India]

[59] The new generation of trade lawyers hired by the government after 2005-2006 were: ACWL lawyers, Krishnan Venugopal, Lakshmi Kumaran and Sridharan, Economic Law Practices, Luthra and Luthra and Cloras Law Firm. [See Table 2 and Table 3 in the case study of India]

[60] Han Liyu and Henry Gao, 'China's experience in utilizing the WTO Dispute Settlement Mechanism' in Shaffer and Melendez-Ortiz (eds), *Dispute Settlement at the WTO* (n 23) 137, 160. Also see Henrick Horn, Louise Johanneson and Petros C Mavroidis, 'The WTO Dispute Settlement System 1995-2010: Some Descriptive Statistics' (2011) 45(6) Journal of World Trade 1107, 1117; Francis Snyder, 'We Need a Global Food Safety

its law firms and government officials with an opportunity to 'observe, practise and learn' the litigation techniques required for WTO DSM.[61]

These two approaches (lawyer-pairing and third party participation) are cost-effective strategies that can help developing country governments '...face lower start-up costs for subsequent participation'.[62] High 'start-up costs' can initially make WTO DSM an unaffordable option for most developing countries, but more DSU-related experience gained through third party participation and lawyer-pairing approach can substantially decrease this cost.[63] With these approaches, the creation and expansion of domestic legal expertise in a country can enable the affected industries and governments to cost-effectively hire legal experts and thereby reduce the overall cost of dispute settlement.

7.8 In–house Ambulance Chasing by Law Firms

The international law firms, on their own initiative, have started the practice of monitoring foreign policies and their implications on market access. Without receiving an instruction from a corporate client or a government, these international law firms identify and examine potential barriers, gather information and approach the affected business and governmental entities with their findings and analysis. The firms carry out this exercise with the hope that they will be able to generate new clients. In this arrangement, they normally propose to share the information concerning market access and violations in exchange for an agreement with the receiving client

Agency: Reflections on the Hidden Jurisprudence of the WTO' (2013) 1(2) Peking University School of Transnational Law 162, 207.

[61] Ibid, 148.

[62] Christina L Davis and Sarah Blodgett Bermeo, 'Who Files? Developing Country Participation in GATT/WTO Adjudication' (2009) 71(3) The Journal of Politics 1033, 1034.

[63] Ibid, 1047.

that the supplying law firm will be hired for further monitoring, investigation or litigation of the potential dispute.[64]

This practice could be a useful tool for developing countries which cannot afford to have their own specialised monitoring institutions. Private law firms can have the expertise and capacity to monitor foreign practices and analyse their legitimacy in the light of legal texts. At present, the law firms which usually engage in 'ambulance chasing' are mostly Geneva, Brussels or Washington based international law firms, and hiring their services in exchange for their ambulance chasing practices could be an unaffordable option for many developing countries.[65] Hence, it is proposed that 'ambulance chasing' practices can be carried out by domestic law firms in developing countries. The practice can be referred to as 'in-house ambulance chasing'. The practice would have multiple benefits, i.e., it could enhance domestic legal expertise, provide additional monitoring services and reduce the overall cost of dispute settlement.

The proposed 'in-house ambulance chasing' strategy can potentially enable the governments and the affected business entities to gain information on WTO violations as this may be required to investigate the WTO-incompatibility of a measure. The services provided by domestic law firms would potentially be more affordable, as compared to the legal service fee often charged by internationally based law firms. An India based trade lawyer acknowledges the importance of the in-house ambulance chasing approach as she states that 'the lawyers in India should be more

[64] Chad P Bown, *Self-Enforcing Trade: Developing Countries and WTO Dispute Settlement* (Brookings Institution Press 2009) 124.
[65] The practice of 'ambulance chasing' is mostly offered by firms based in Geneva or Brussels. [As observed in Bown, *Self-Enforcing Trade* (n 64) 124].

proactive, and should reach out to the industry and the government with their identification and analysis'.[66]

A similar practice has recently shown an emerging trend in India.[67] Luthra & Luthra, an Indian law firm, was hired by the Government of India in the *India –Agricultural Products*[68] case after the law firm had provided the initial information and legal analysis concerning the measure to the Ministry of Commerce.[69] A trade advisor to the Ministry of Commerce confirms that Luthra & Luthra provided the Ministry with initial analysis and informational support and that its initial assistance was the main reason for its engagement in this case.[70]

Deriving support from these experiences and arguments, it is possible to envisage that the proposed 'in-house ambulance chasing' strategy can benefit developing countries by enhancing their dispute settlement capacity. To encourage the law firms in this direction, the concerned ministries can introduce a secondment training programme in Geneva for trade law professionals working at domestic law firms. The secondments can take place at the country's Permanent Mission at Geneva[71] or at ACWL[72]. A secondment program can help boost trade law expertise

[66] Interview with Moushami Joshi (n 14).
[67] Ibid. [The interviewee observes the following: 'We are doing a study for the Ministry of Commerce on agricultural subsidies to analyse and determine a WTO claim on subsidies. Our work on agricultural subsidies could possibly lead somewhere on an international scale. In addition, we have advised the Ministry on issues concerning national renewable and solar policy, which has now become a WTO issue.']
[68] Panel Report, *India – Measures Concerning the Importation of Certain Agricultural Products from the United States*, WT/DS430/R, circulated to WTO Members 14 October 2014 [Panel Report Circulated].
[69] Interview with Moushami Joshi (n 14).
[70] Interview with an official representative, Ministry of Commerce, Government of India (Delhi, India, 12 June 2013) [Name Withheld].
[71] Brazil offers such secondment and internship programs at its Permanent Mission at WTO to its young law professionals on an annual basis.
[72] The information on secondments offered at ACWL can be found at ACWL: Training <http://www.acwl.ch/e/training/secondment.html> accessed 2 July 2013.

and experience within domestic law firms. Additionally, the approach would help the government to create a bigger presence at WTO through its expanded Geneva Mission.[73]

With such practices in place, the private sector and the governments will have enhanced access to monitoring services and legally marshalled information and evidence at a comparatively affordable rate. On the other hand, the domestic law firms in developing countries with small trade law expertise (mainly due to shortage of business and/or lack of professional or internship opportunities) will be able to generate more business and expand their expertise and experience. This trend can also increase demand for courses in international economic law at universities, leading to an overall enhanced trade law expertise and awareness in the country.

7.9 Creation and Engagement of Specialised Think Tanks

Think tanks can assist the governments and industries in multiple ways. Think tanks can provide legal and economic analysis of trade matters to the government and industries. They can also assist the government with the collection of information in the absence of a participating private sector.[74] They can provide support to the government to evaluate the genuineness of claims made by an industry and calculate the impact of a trade barrier(s).[75] In addition, think tanks can assist the governments in conducting the cost-benefit analysis of litigating a measure at WTO DSU. As the case studies have affirmed, think tanks have performed these functions, and in this manner,

[73] The proposal was supported by an official representative from Ministry of Commerce, Government of India and a trade lawyer at Luthra & Luthra. {Interview with an official representative, Ministry of Commerce (n 70); Interview with Moushami Joshi (n 14)}. A problem with the proposal as pointed out by a legal advisor at the Permanent Mission of India at WTO was the lack of funds available with the Government to finance such secondment and training programmes. {Interview with an official, Permanent Mission of India to WTO (Geneva, Switzerland, 12 April 2013). [Name Withheld]}. However, it may be noted that the secondment programs at ACWL are paid-secondments. It is available to Government lawyers only. Additionally, the internships and secondments proposed at the Mission can partly be funded by the law firm and partly by the government.

[74] See, for example, the case study of China (text to n 51).

[75] See, for example, the case study of India (pages 254-255).

they have actively assisted the governments and industries with the financing of disputes in various national jurisdictions.

The developing countries can cost-effectively create think tanks and research centres with the help of industry officials, academics, trade and policy experts, retired foreign trade officers and national bureaucrats. These institutions can be funded partly by the government and partly by the chambers of commerce or trade associations, or industry-oriented think tanks can be financed and run by a specific industry.[76] One such example is discussed in the Brazilian case study. The several think tanks in Brazil are created by entrepreneurs to advise, inform and assist the government and industry on various trade issues. Some of them are profit-based, and others are non-profit based institutions. Several think tanks in Brazil are also associated with and run by universities.[77]

Alternatively, these institutions can also self-finance their operation through the provision of courses and training programmes concerning international trade law to students, lawyers, industry officials and policy experts. The emergence of specialised think tanks will reduce the expenses required to be spent by the government and industries on hiring policy experts and consultants for the analysis and evaluation of trade measures. It may also reduce the expenses that the governments and industries may need to incur on hiring agencies to gather information and documents. Finally, these institutions may bridge the gap between industry, academia and government through organising outreach programmes such as workshops, joint meetings and

[76] The proposal is based on the functioning and nature of think tanks in Brazil. See the case study of Brazil (text to n 53-56).

[77] For example, the Brazilian Center of International Relations is a non-profit based centre which is linked to a university, and it was founded by a 'group of intellectuals, businessmen, government authorities, and academics'. It is fully sponsored by exporting companies, foundations and law firms in Brazil. For details, see Shaffer, Badin and Rosenberg, 'The Trials of Winning at the WTO' (n 26) 449.

field trips.[78] In this manner, think tanks specialised in different disciplines of international trade and dispute settlement can play an integral role in reducing the cost of dispute settlement proceedings.

7.10 Small Claims Procedures for Non-Litigable Matters

Not all trade concerns identified by an industry or a government will be pursued. There are issues that can arise, but an industry might not pursue them for several reasons. An industry may fear retaliation by an offending trade partner, or it may think that the stakes involved are smaller than the resources required for investigating the measure and pursuing it further. A government might also have several reasons for not pursuing a trade concern through WTO DSU provisions. It may fear political and trade retaliation, especially when the alleged measure is maintained by an important trade partner or a powerful developed country. A conflict may affect sensitive areas relating to public policy, health, social or moral considerations, environmental protection and domestic expectations. Alternatively, a conflict may pertain to the exportation or importation of a perishable item and hence it may not be litigable at all. How should an industry approach its government if a non-litigable trade concern is jeopardizing its exports or imports? What procedure should an industry follow if it wants the government to promptly raise an issue at the TBT or SPS committee? How should an industry and a government coordinate when trade issues are to be resolved more informally, through negotiations or ADR procedures?

It is proposed that there should be a simpler and expeditious procedure for the private stakeholders to approach the government if and when such trade concerns arise.[79] A 'small

[78] See the case study of Brazil (text to n 53 - 56); the case study of India (text to n 40 - 41).
[79] The proposal was discussed during the interview with Niall Meagher, ACWL on 11 April 2013. Prof Gregory C Shaffer has proposed the establishment of 'Small Claims Procedure' at the international level, i.e., at the WTO to deal with certain trade claims with the help of fewer resources and time. [Hakan Nordstrom and Gregory Shaffer,

claims procedure' of coordination should be devised at a domestic level and be treated as a part of the proposed PPP framework. Small claim provisions as an alternative to litigation have worked in many national jurisdictions. For example, the US courts provide small claims proceedings as an alternative to litigation in several claim areas such as minor civil claims, public law claims, and tax claims.[80] England and Wales also have small claims procedures as a cost-effective means of settling claims.[81] The state of California has also established a Small Claims Legal Advisor Program.[82] Another interesting example is the European Small Claims Procedure, which addresses cross-border claims of up to 2,000 Euros except certain categories.[83] These procedures are not related to public private coordination and to disputes concerning international trade, but they nevertheless recognise the importance of small claims procedures at a domestic level as an effective alternative to costly and time-consuming procedures leading to litigation.

Certain features of the proposed 'small claims procedure' are suggested below:

1. A dedicated government's unit should remain the focal point of contact for the private sector in respect of all trade concerns.
2. The private sector should be able to invoke its right to petition the government through a specially devised small claims procedure which should exempt the small claim petitions from regular evidential requirements.

'Access to Justice in the World Trade Organization: The Case for a Small Claims Procedure?' (2008) 7(4) World Trade Review 587].

[80] See William C Whitford, 'The Small-Case Procedure of the United States Tax Court: A Small Claims Court that Works' (1984) 9(4) American Bar Foundation Research Journal 797.

[81] Pablo Cortes, 'Does the Proposed European Procedure Enhance the Resolution of Small Claims?' (2008) 27(1) Civil Justice Quarterly 83.

[82] James C Turner & Joyce A McGee, 'Small Claims Reform: A Means of Expanding Access to the American Civil Justice System' (2000) 5(1) University of the District of Columbia Law Review 177.

[83] Regulation (EC) 861/2007 of the European Parliament and of the Council of 11 July 2007 establishing a European Small Claims Procedure [2007] OJ L199/1.

3. There should be online and offline application forms available with chambers of commerce, regional nodal agencies representing the government, and relevant departments of the government. These forms should be drafted in a simple format, and they should seek relevant information needed to examine the issue and to initiate an informal dialogue with the offending country's government.
4. The requirement to provide accompanying evidential documents and information should be kept to a minimum so that industries are not discouraged from promptly reporting their concerns to the government.
5. The concerned government unit should have the discretion to scrutinize, prioritize and pursue small claim petitions/forms in the best interests of the nation.
6. Once a small claim form is administered, the unit should examine the issue and determine the appropriate measure to deal with it. The unit should have the right to make an initial determination on pursuing the measure through a viable approach which may include negotiations, bilateral consultations, WTO Committee discussions or ADR procedures.
7. The right to seek updates on the progress of the matter, request consultations with the government at any stage, and seek confidentiality and anonymity in the matter should be conferred on the petitioners in the small claims procedure.
8. The unit should have the discretion to define the explanatory provisions. It may require the unit to answer questions such as: what is a small claim? Who should the small claims mechanism be available to? Should it also be available to NGO's and consumer groups? Should appeals or reviews be permitted in this procedure? Other ancillary procedures should also be determined by the unit.

These domestic features are by no means exhaustive. The Members will be required to develop their own specific approach of government-industry coordination for the handling of small claims in an expeditious and economical manner. However, nations can consider these suggestions while they are devising a PPP framework for the management of day-to-day disagreements concerning international trade. Finally, it is important to note that these provisions cannot replace the previously proposed PPP strategies. They are only suggested as an alternative strategy for government-industry coordination during the handling of claims which are small, perishable, non-continuing and therefore, non-litigable.

7.11 Concluding Remarks

The present chapter, along with the three case studies, explores the possibilities of engaging the private sector in the intergovernmental process of dispute management, the elements required for government-industry coordination, the possible methods of coordination, and the reforms that will be required for ensuring the predictability of rules or procedures governing the reciprocal exchange of resources. Following identification and analysis in the case studies, the discussed proposals examine the important issues and elements that should be considered by a country which is aspiring to enhance its dispute settlement capacity through the proposed partnership approach. A dispute settlement partnership may be formed with or without the discussed elements, but the findings suggest that these elements can better enable the formation and functioning of effective partnership arrangements.

Brazil, India and China have provided an indicative roadmap of what is required and what can be done at the domestic level to take advantage of opportunities (created by WTO DSU) at the international level. Other advanced MICs which have also demonstrated considerable interest in participating at WTO DSU, for example Mexico and Thailand, can "learn lessons" from peer

reviewing the case studies and the strategies considered under this chapter. They can learn how their peers have overcome the problems, at least to some extent, which they face today at WTO DSU.

As discussed above, the effectiveness of various dispute management and partnership strategies will depend upon multiple domestic factors, and hence, it is important for future research and scholarship to investigate the suitability of these proposals in light of the economic, political, diplomatic and social circumstances of individual countries. The proposed strategies can be adopted or adapted by individual Member States on a trial basis and their performance can be reviewed after a fixed period of time. Depending upon the individual domestic circumstances of each Member State, these features and strategies can be modified or additional features can be introduced for devising an effective mechanism for dispute management.

8. CONCLUSION

8.1 The Research Objective and Research Approach

The research objective was not to devise or suggest a standard formula for a PPP mechanism. Rather, the aim was to evaluate the dispute settlement and partnership strategies employed so far, and to examine the strategies which can be considered by developing countries. To achieve this aim, the present research has provided a detailed examination of *how* the most active DSU users among developing countries have strengthened their DSU participation. This has been done by provoking reflection on the dispute settlement and partnership experiences of the top three middle income country users of DSU among developing country Members of WTO. With the help of this approach, the present research has attempted to answer the research question: How can a public private partnership arrangement enhance the WTO dispute settlement capacity of developing countries?

In particular, the present research has attempted to answer the research question by establishing the two key arguments that inform and pervade through the entire thesis. *First*, the dispute settlement experiences examined throughout the present thesis reinstate the argument that the participation problems that developing countries face at WTO DSU are embedded in their domestic conditions and, hence, the participation challenges should be addressed at domestic level. In other words, research findings exhibit that effective dispute settlement procedures employed at the domestic level can strengthen the WTO Member States' capacity to file litigations and defend home practices at WTO DSM. *Second*, the research findings have established that the engagement of affected industries during the management of trade disputes is a ‘crucial enabling element’ for the protection and enforcement of WTO rights, and therefore, the

developing country governments should handle WTO disputes in close coordination with the affected industries.

In consonance with the above-mentioned arguments, all chapters in this thesis have furthered the research objective by addressing the three central issues for investigation: *one*, how the governments can manage disputes by engaging the affected private stakeholders; *two*, how the governments can engage the affected private stakeholders for capacity-building; and *three*, how the governments can overcome the impediments they may face during the formation and functioning of dispute settlement partnerships.

8.2 The Research Outcome

The research question is answered with the help of a conceptual framework, theoretical and literature review and three case studies that have consistently established that a PPP mechanism can enhance the dispute settlement capacity of developing countries. The chapters on conceptual analysis, literature review, case studies and proposed strategies have clearly demonstrated the manner in which a dispute settlement partnership can enable governments to identify and investigate barriers, consult and negotiate settlements, and litigate and defend cases at WTO. Besides that, PPP arrangements have enabled individuals and private sector representatives to protect and restore their foreign market access through governmental processes, i.e., the arrangements have provided individuals with an indirect access to international adjudicatory procedures. Therefore, public private partnership strategies have clearly been a winning approach, both for the governments and industries in various developed and developing countries.

As initially discussed in chapter two, and subsequently illustrated in chapter three, four, five and six, the PPP mechanism has a number of benefits. However, it may be difficult for developing countries to design, implement and regulate such dispute settlement partnerships. The private sector in a developing country may not be sufficiently organised or resourceful to form such complex partnerships with the government. Alternatively, the government may not possess the expertise and resources required for the management of disputes through the engagement of the private sector. For example, a government may not have the legal expertise to oversee the work of privately hired lawyers, or it may not have the resources to establish a specialised division for coordinating with the private sector. The interaction and exchange of resources between the public and private sector entities can also give rise to a number of regulatory concerns arising from corruption, bribery, lobbying and rent seeking. A developing country government may not have the capacity to monitor and regulate the functioning of PPPs in order to keep the real threat of corporate regulatory capture at bay. Owing to all these reasons which add to the complexity of this mechanism, it becomes important to derive practical insights from the experiences of developing countries which have engaged the private sector during the identification, investigation, consultation and litigation stages of dispute settlement. This has been done in the chapters on case studies and proposed strategies.

The literature review of the management of WTO disputes in the US and the EU, together with the case study of China, shows that the governments in certain developed and developing countries have devised formal laws and regulations for exchange of resources during the management of trade disputes. For example, the private sectors in the US, the EU and China have the right to petition and request their respective governments to protect or restore their infringed trade interests. The governments, on the other hand, can ask the petitioners to provide

information and commercial evidence which may be required during the investigation of a barrier or consultation or litigation of dispute. However, these formal PPP arrangements, in practice, are frequently accompanied and shadowed by informal procedures. The most preferred and commonly invoked PPP method is not the formal mechanism of Section 301 in the US or the TBR in the EU or the TBIM in China. Mostly, interaction and resource exchange in these countries have taken place by means of informal strategies or through a combination of formal and informal procedures.

A distinct approach to the management of WTO disputes has been observed in the case study of Brazil. Dedicated and specialised institutions in Brazil have facilitated the formation and functioning of PPP arrangements. An organised business community, a specialised group of government professionals and an inter-ministerial management of trade disputes in Brazil have supported the functioning of institutionalised partnerships. The Brazilian PPP has been described as a quasi-formal partnership which has the elements of a formal mechanism (as its institutionally supported PPP resembles the US, the EU and China's PPP in some aspects) and an informal system of coordination (as it operates without a legal framework).

The case study of India has enunciated the nature and features of two forms of partnership systems: a patterned system of coordination and an informal, ad-hoc system of coordination. Having some overlap with the Brazilian institutionalised partnership mechanism, the two coordination mechanisms examined in India's case study introduce a different category of arrangement to those discussed in the chapters before. The case study has also outlined several practical concerns and pre-conditions for the functioning of effective PPP arrangements in developing countries. The case study's originality, its in-depth analysis and its distinct findings have contributed extensively to inform the strategies proposed in the following chapter.

Together, all case studies have confirmed the initial presumptions (laid down in chapter two) relating to the nature of formal, informal and ad-hoc partnerships.[1] Irrespective of whether a government has formed a partnership with the private sector in a formal, semi-formal or informal manner, the end result of the partnership commonly observed in all case studies has been the enhancement of the country's dispute settlement and overall WTO participation capacity. The government, as the lead partner, has received several benefits from the private sector engagement, including better litigation strategies, wider access to information and commercial evidence, enhanced financial capacity, comprehensive legal and commercial analysis, better monitoring and identification of barriers and increased capacity to seek compliance. However, these resources have not come for free. The private sector, in exchange for these resources, has actively sought to protect, restore or enhance its foreign market access and benefits from international trade.

The case studies have also considered a range of obstacles which have weakened the impact of (or have obstructed the formation of) government-industry coordination in various developed and developing countries. An insufficiently organised business community, lack of specialised procedures and institutions, traditional outlook of the government, inadequate domestic expertise, lack of funding procedures, lack of WTO-related awareness among private sector and regulatory concerns are some of the most common limitations and challenges which such partnerships have faced.

In accordance with the characterisation of PPP approach provided in chapter two, the case studies have confirmed that all forms of partnership arrangements are based on three fundamental elements. *First,* the exchange of resources between government and industry is

[1] The initial presumptions were laid down in chapter two (page 63).

based on reciprocity and resource interdependency. *Second*, the key partners in the proposed arrangement are the concerned government authority and affected business entities. *Third*, these participants will most commonly form ad-hoc, domestic and hybrid partnerships. The formal and informal partnership procedures employed by developed and developing countries have been founded on the basis of these common features.

The dispute settlement experiences of the US, the EU and China present several distinguishing features of the partnerships formed and facilitated with the help of formal laws and regulations. These features include: 1. Legal provisions conferring rights and obligations to individuals and governments; 2. Institutional processes for administering, scrutinizing, investigating and litigating legitimate trade concerns; 3. Regulatory provisions for monitoring interactions. These features confirm the presumptions (laid down in chapter two) with respect to the nature and elements of formal processes and the distinction between the informal and formal systems of coordination. However, in practice, their operation draws a thin and a blurring line of distinction between formal and informal procedures of partnership.

The blurring line of distinction between formal and informal partnership systems has become evident in the case studies' analysis as the operational nature of different PPP arrangements has overlapped, and the ways in which different partnership procedures have been conducted have revealed similarities. For instance, the existence of a specialised institution for receiving private sector petitions has demonstrated a similarity between the Brazilian institutionalised PPP and the EU's formal mechanism.[2] The complete financial support, political lobbying and use of informal contacts by the affected business entities to persuade the Government of India to pursue the

[2] The institution established for receiving private sector petitions in Brazil is CGC and in the EU is the Commission's TBR Committee.

matter at WTO in the *EC-Tariff Preferences* case show several commonalities between India's PPP experience and the US's approach.[3] Hence, the typology of 'formal' and 'informal' PPPs is imprecise and cannot be exactly defined. However, it has not been the focus of the present research to distinguish and define such a typology. Rather, the focus has been to illustrate and examine certain dispute settlement strategies which can be considered for devising an *effective* PPP mechanism (not necessarily a formal one) in developing countries. In other words, the existence of a more formal system of coordination will only be relevant in so far as this procedure makes the partnership more *effective* in developing countries. The proposed strategies (in chapter eight) have accordingly focussed on the *practical aspects* of devising an effective partnership mechanism in developing countries.

The case studies have also outlined a number of elements which have been effective and those which have not worked well. The features of PPPs which have not worked well and have introduced complexities and other problems into the handling of disputes are: evidential requirements accompanying an individual's right to petition, increased complexity and procedural burden imposed by formal mechanisms, a government's extensive resource dependence on private sector, and discriminatory protection of interests dictated by wealth and influence. Particular strategies and elements of PPP arrangements which have worked well and have therefore informed the proposed strategies are: transparency provisions, in-house legal expertise and enhanced WTO experience, an organised private sector community, an institutional interface between public and private sectors, open channels of communication and resource exchange, the building of trust and confidence between the partners, inter-ministerial

[3] For details on how *EC-Tariff Preferences* case was handled, see the case study of India (section 6.4.1). Similar informal approach was employed by the US industries in the *EC-Hormones (US)* and *Japan-Film* cases. For details, see chapter three (section 3.1.3).

management of trade disputes, confidentiality and anonymity provisions, the 'bidding' process for the selection of lawyers (leading to the pairing up of foreign and domestic trade lawyers), and practical payment arrangements agreed between private and public sectors.

The research does not suggest that the above-mentioned strategies or a common procedure of interaction can produce similarly positive results in all developing countries. The institutionalised PPP in Brazil may not be as effective in India as it is in Brazil.[4] The formalised procedures of the EU or the US may introduce further resource and procedural complexities if employed as such by India. Therefore, one size cannot fit all in this case, especially because of the heterogeneous nature of developing countries and their varied social, economic and political climate. Hence, the strategies proposed in chapter eight should be examined by Member States in accordance with their individual circumstances.

It is essential for developing countries to devise a clear roadmap of how to engage with dispute settlement system and the affected private stakeholders to enhance their dispute settlement capacity. It is important that they enhance their capacity in order to navigate the complex system of WTO DSU. It is *one* thing to be a part of WTO agreements and know the WTO rules, and the *other* is to know how to use and take advantage of those agreements and rules in practice. The strategies, which have ensued from the dispute settlement experiences of Brazil, India and China, have provided an illustration of how developing countries can utilise WTO DSU by engaging the affected private stakeholders.

[4] The institutionalised PPP process of Brazil may not be as effective in India because there are stark differences in the structural development and composition of various industries in Brazil and India. For details, see the case study of Brazil (section 5.1) and the case study of India (section 6.1).

8.3 Key Challenges and Tasks Ahead

It is outside the scope of this research to provide a complete methodology for implementing the strategies proposed in chapter eight. Nor would it be useful as any standardisation of methodology would defeat the desired flexibility which the countries with very different domestic circumstances may require for adopting or adapting these proposals. Hence, these proposals should be viewed as practical suggestions aimed at the identification, examination and development of certain features which can be considered for establishing the dispute settlement partnership mechanisms. The country-specific implementation plans and their methodologies should, in future, be individually devised by the policy makers, economists and lawyers.

The proposed dispute settlement strategies should not be considered objectively, as their effectiveness will depend upon the requirements, conditions and capacities of the countries considering them. A degree of flexibility should also be maintained throughout the planning and implementation of the suggested reforms because, generally, 'PPPs are inherently flexible and situation-dependent' in nature.[5] Notions of flexibility should also be inherent in the interpretation of the provisions and procedures so that the circumstances and needs of the participating parties are taken into account during the management of trade disputes.

At the same time, it is important that the provisions and procedures devised for the handling of disputes and formation of partnerships are robustly defined to enhance the transparency and predictability of rules. They can be devised either in the form of laws and regulations, or PPP arrangements can be facilitated by an institutional framework devised at the domestic level. The Member States could also manage disputes and engage the private sector without a legal,

[5] Major Christopher E Martin, 'Sovereignty, Meet Globalization: Using Public-Private Partnerships to Promote the Rule of Law in a Complex World' (2009) 202 Military Law Review 91, 140.

regulatory or an institutional framework, as long as the procedures of partnership and dispute management are effectively and clearly defined.

In order to derive optimum advantage from the partnership arrangements, the public and private sector participants should have a clear understanding of the methods and procedures which they can utilise to form and structure their coordination. This can be achieved through organising outreach and joint consultative meetings between the participants. Think tanks can also play an important role, as they can provide training facilities to apprise the government officials and private sector representatives about the available methods of coordination. It is also important to devise effective channels of information-sharing and communication between the partners so that the information concerning the governmental laws, regulations and procedures can reach the private sector and the information on trade barriers and their impact on commercial interests can promptly be communicated to the government. One way of doing this could be to create a web portal which can be accessed and updated by the authorised government and industry representatives. The portal could also have a feature of registering requests and complaints from the individual entities. The government could also provide regular updates and simple guides explaining the available procedures of coordination to the business entities.

One significant challenge of this approach would be to engage the private sector in defence cases at WTO DSU. The case studies have consistently shown that the concerned industries have mostly been willing to participate and invest resources in cases where their government has acted as a complainant. This is why the PPP approach has mainly been examined in the case studies through a spectrum of WTO cases from the complainants' point of view. As seen in the case studies, complaints at WTO are mostly filed after receiving a request from the concerned private sector. In such cases, the affected industry often has the required willingness and stakes to

support the government and bear the cost of litigation. In contrast, industries generally would not engage in cases where an existing trade policy is challenged by a foreign government, unless they have substantial stakes involved in maintaining the challenged home measure.[6] Due to this imbalance, the suggested PPP approach may not be able to directly benefit a defending country at WTO DSU. However, the use of partnership strategies would enhance the overall legal expertise and experience of the government overtime, and that would also gradually have a positive impact on the defence capacity of a developing country government.

Another challenge for this strategy is to engage the poorly organised, small and resource-constrained commercial sectors. With their poor economies of scale, low per capita stakes and insufficient resource clout, they will find it difficult or rather unaffordable to protect their business interests through governmental actions. One way of mitigating this problem could be to devise some waivers to relax the resource burden which a private sector entity would normally be expected to discharge. The proposed regulatory features may further empower and engage these interests. However, it is beyond the scope of this research to suggest strategies for engaging private entities which cannot afford or otherwise discharge the partnership obligations. Nevertheless, the aspect of wider and fuller engagement of private sector is a topical issue which should be explored by future researchers.

In the future, it is also important to devise an adaptability plan for empowering the governments and private sector entities to utilise the proposed provisions of coordination and dispute management. Future research can also explore the potential of coordination and resource

[6] For discussion on why private sector has largely remained absent from participating in defence cases, see chapter two (text to n 169-172). Also see Michael Ewing-Chow, 'Are Asian WTO Members Using the WTO DSU 'Effectively'?' (2013) 16(3) Journal of International Economic Law 669, 680. [The author notes the following: 'Asian developing countries are about 8% more likely to escalate disputes when they are in the capacity of complainants than when they are respondents'.]

exchange between the government and private entities other than businesses, including voluntary organisations, think tanks, research centres, academia, inter-governmental and international organisations. The case studies have briefly discussed how these non-governmental and non-commercial participants have assisted the process of dispute settlement, and thus, the case studies' analysis can offer an initial "food for thought" to the future research exercise.

The concept of PPP can have wider application in the field of international trade law, i.e., beyond the framework of WTO DSM. The strategies of partnership can be employed during the settlement of trade disputes under various bilateral and regional agreements, such as Preferential Trade Agreements (PTA) and Free Trade Agreements (FTA). Moreover, the proposed partnership strategies can also be utilised by the governments to develop the capacity required for implementing the commitments agreed under the WTO Trade Facilitation Agreement (TFA). The facilitation of trade by the simplification of customs rules and reduction in red tape at the borders has a direct bearing on the private sector's trade interests, as this will expand the exporting market for available products and will also reduce the cost and time involved in the movement of goods across borders.[7] Hence, the private sector can work with the customs officials and border authorities in devising effective and fast track procedures for clearance, inspections, compliance, licenses and approvals. The PPP arrangements between the private company officials and government officials can therefore be envisaged in this respect. The broader application of the PPP mechanism and its suitability in the context of this capacity-building aspect offer interesting avenues for future research.

[7] Lewis E Leibowitz, Teresa M Polino and Melanie A Frank, 'WTO Negotiations on Trade Facilitation: Prospects for Cutting Red Tape at the Borders and Opening Doors for Developing Countries' [2007] 1 International Trade Law Review 4, 15.

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Appendices A: List of Interviewees

Interviewees from Public Sector:

1. Official Representatives (two), Ministry of Commerce, Government of India, India
2. Rajan Sudesh Ratna, Ministry of Commerce, Government of India, India
3. Official Representatives (two), Centre for WTO Studies, India
4. Official Representative, Ministry of Law & Justice, Government of India, India
5. Official Representative, Ministry of Commerce, Government of Brazil, Brazil
6. Official Representative, Trade Barrier Division, European Commission, Belgium

Interviewees from Permanent WTO Missions:

1. Ujal Singh Bhatia, Former Ambassador, Permanent Mission of India to WTO, Switzerland
2. Anant Swarup, Permanent Mission of India to WTO, Switzerland
3. Toufiq Ali, Chief Executive at Bangladesh International Arbitration Centre; Former Ambassador to Permanent Mission of Bangladesh to WTO, Switzerland
4. Celso de Tarso Pereira, Permanent Mission of Brazil to WTO, Switzerland
5. Eduardo Chikusa, Permanent Mission of Brazil to WTO, Switzerland
6. Official Representative, Permanent Mission of the People's Republic of China to WTO, Switzerland
7. Legal Officer, Permanent Mission of Thailand to WTO, Switzerland

Interviewees from International and Inter-governmental Organisations:

1. Former Deputy Director General, World Trade Organization, Switzerland
2. Official Representatives (two), World Trade Organization, Switzerland
3. Official Representative, International Centre for Trade and Sustainable Development (ICTSD), Switzerland
4. Marie Wilke, International Centre for Trade and Sustainable Development (ICTSD), Switzerland

Interviewees from Private Sector Organisations:

1. Official Representative, Fisheries & Fishing Communities in India (ICSF), India
2. Official Representative, Textile Industry (TEXPROCIL), India
3. Official Representative, Private Sector Organisation, Brasilia, Brazil
4. Official Representative, Seafood Exporters Association of India (SEAI)

Interviewees from Academic Institutions:

1. International Trade Law Scholar, European University Institute, Italy

2. Professor Henry Gao, Singapore Management University, Singapore
3. International Trade Law Scholar, University of Illinois, United States
4. Professor Huiping Chen, Xiamen Academy of International Economic Laws, China
5. Professor Gregory Shaffer, University of Minnesota Law School, United States
6. International Trade Law Scholar, London School of Economics and Political Science
7. International Trade Law Scholar, University of Delhi, India

Interviewees from Law Firms:

1. Moushami Joshi, Luthra and Luthra law firm, India
2. International Dispute Settlement Lawyer, Fox & Mandal, India
3. Trade Lawyer, VVGB law firm, Belgium
4. Trade Lawyer, White & Case law firm, Switzerland
5. Niall Meagher, Advisory Center on WTO Law (ACWL), Switzerland

**The list is prepared in accordance with the anonymity conditions agreed between the interviewer and the interviewees.*

*** Names and organizational affiliations of interviewees are explicitly provided in the thesis citations only if the interviewee has granted permission for the same.*

****If an interview was conducted face-to-face, its citation has included city and country name where that specific interview took place. For the interviews which were conducted via other modes including voice call, video conferencing and Skype, the citations have not included city and country name.*

****Full details, interview summaries and consent forms are on file with the researcher.*

Appendices B: List of Questions

Individual sets of questions were prepared for each interview. These sets are as follows:

I. Interview with Official Representative, Ministry of Commerce, Government of India, India

1. Does India have any procedure that is commonly employed during the management of foreign trade disputes? For example, how are concerns addressed to the government by industries? What happens then? Who is responsible for registering and investigating the concerns and barriers? Is there a specialised dedicated body for this? What is the process of investigation and decision making? What are the parameters for accepting concerns, investigating them and launching actions at the WTO? Is the procedure written anywhere?
2. What is the process now? Has it changed since 1995?
3. When India acts as the respondent, what is the procedure then?
4. In *EC-GSP* and *US-CBD* cases, what was the extent of private sector engagement? How did they participate? In what ways?
5. Any other dispute where concerned industries have participated? (at monitoring, investigation, preparation, litigation, enforcement stages)
6. Can you think of any significant disputes or instances where this partnership did not work smoothly, or raised regulatory issues, or other concerns in India?

II. Interview with Official Representative, Ministry of Commerce, Government of India, India

1. Do you know which lawyers/law firms represented India in the disputes litigated at the WTO, both as complainants and respondents? Also, were any private stakeholders (exporters or trade associations or export promotion councils or chambers of commerce) involved in the investigation, management, preparation or presentation phases of any of these disputes? (Please refer to the excel sheet with information on these cases attached)
2. Any suggestions for devising a proposed domestic framework for India to interact with the private sector during the management of foreign trade disputes? Any suggested features to regulate the partnership to make sure that the national interests and special private interests are balanced?

III. Interview with Official Representative, Ministry of Law & Justice, Government of India, India

1. Can you think of any significant disputes or instances where the government-industry partnership did not work smoothly, or raised regulatory issues, or other concerns in India?

2. Do you think that the private sector's participation in the handling of WTO disputes has enhanced the domestic capacity of the government, enabling them to participate effectively at the WTO?
3. What procedures are used in India to handle WTO disputes and to engage the industry in the same?
4. Can you cite examples (or share experiences) demonstrating the governmental capacity building as a result of the private sector's participation at each stage mentioned below:
    a. Monitoring foreign trade practices in order to identify barriers or WTO-inconsistent policies
    b. Investigating foreign trade barriers or WTO-inconsistent policies
    c. Preparation and litigation of case at WTO DSM
    d. Post-litigation enforcement measures, such as financial compensation, retaliation and generation of public/political foreign support.

IV. Interview with Official Representative, Centre for WTO Studies, India

1. Des India have any procedure that is commonly employed during the management of foreign trade disputes? For example, how are concerns addressed to the government by the industries? What happens then? Who is responsible for registering and investigating the concerns and barriers? Is there a specialised dedicated body for this? What is the process of investigation and decision making? What are the parameters for accepting concerns, investigating them and launching actions at the WTO? What is the procedure while acting as a defendant or a third party? Is the procedure written anywhere?
2. *EC-GSP* and *US-CBD* cases seen as significant examples of PPP in India - what was the extent of private sectors participation in these cases?
3. Any other dispute where the industry has participated in the process of dispute settlement?
4. Can you think of any significant disputes or instances where this partnership did not work smoothly, or raised any concerns in India?
5. Any suggestions while I am devising a proposed domestic framework for Indian Government to interact with the private sector for the handling of WTO disputes? Any suggested features to regulate the partnership to make sure that the national interests and special private interests are well-balanced?

V. Interview with Official Representative, Trade Barrier Division, European Commission, Belgium

1. Does the private sector participate in the handling of WTO disputes? If so, can you cite few instances of disputes where this participation by the private sector became apparent? What was the extent and nature of participation private sector demonstrated in these disputes?

2. How is the Office of the Trade Directorate General of the EU Commission commonly approached by the private sector, if and when they face a trade barrier? Does it happen through the traditional legal route of Article 207 of the Treaty on the Functioning of the European Union [ex Article 133 of the Treaty Establishing the European Community] or through the Trade Barrier Regulation (TBR), or both?
3. Thomas Jurgensen (at the Global Governance Programme Conference organized by European University Institute) mentioned that the TBR provision has not been frequently used by the industry. He spoke about the following reasons behind the scant use of TBR process: industry exposure, fear of retaliation, high level of information required to launch the trade barrier investigation. What do you think about these reasons? Why is the TBR process not frequently used by the industry? Besides the problems mentioned above, do you think the industry or the Commission faces other problems while using the TBR process?
4. Which provision is preferred over the other, and why? Is the traditional legal route of Article 207 of the Treaty on the Functioning of the European Union used instead?

<u>VI. Interview with Official Representative, Permanent Mission of the People's Republic of China to WTO, Switzerland</u>

1. Please share your observations on the effectiveness of TBIM and the problems leading to its underutilization?
2. Is *Japan Laver* the only example where TBIM was invoked? Was the TBIM invoked in the *US-Renewable Energy* matter?
3. *Japan-Laver*: What was the extent to which the Jiangsu Laver Association was engaged with the MOFCOM? In what ways did it assist MOFCOM? Was the assistance only limited to informational and evidential support?
4. *US – Renewable Energy*: What was the extent to which the industry was engaged with MOFCOM? How did it approach the Government? In what ways did it assist MOFCOM?
5. Any other WTO matters where the PPP was observed, formally or informally?
6. China has expanded its WTO-related legal capacity to a large extent and is seen as a role model for other developing countries in this respect. How has this been achieved?
7. Has the Government started to hire domestic law firms (as opposed to foreign law firms) to conduct WTO cases? If so, could you please mention the name of few law firms (along with the cases they have worked on)?
8. Do you have any suggestions or advice for other developing countries aspiring to develop international trade law expertise, or aspiring to build a similar PPP mechanism?

<u>VII. Interview with Official Representative, Permanent Mission of Brazil to WTO; Interview with Legal Officer, Permanent Mission of Brazil to WTO, Switzerland</u>

1. Does the private sector in Brazil participate in the monitoring, investigation, preparation, litigation and enforcement stages of conducting a trade dispute at the WTO? If so, can

you cite few significant examples of this interaction? What was the extent and nature of participation that the private sector demonstrated in these disputes?

2. *Brazil - Civil Aircraft*: What was the extent to which the industry was engaged with the government in this case? How did the industry approach the Government? In what ways did it assist the government?
3. *EC-Sugar, Coffee case*: What was the extent to which the industry was engaged with the government in this case? How did the industry approach the Government? In what ways did it assist the government?
4. *EC-Brazil Coffee*: Do you have any observations about the way in which the Brazilian coffee industry convinced the government to launch a challenge against the EC? Any thoughts on why the government (in this instance) waived its right to challenge the EC preferential practices which were targeting and impeding the exports of other Brazilian products? Or, any other thoughts on the government-industry interaction which took place during this instance?
5. How is the Brazilian public sector (CGC, or CAMEX, or the Ministry of Foreign Affairs, or the Ministry of Development, Industry and Trade – hereinafter referred to as the "public sector") commonly approached by the private sector? Does it happen through a specific regulation or a legal provision or does it happen informally? If so, which is the most common procedure opted for and why is it preferred over the others?
6. The Brazilian model of PPP is based on institutional procedures. Are these procedures published anywhere?
7. Do you think the Brazilian model of institutionalised PPP is an effective one? If so, why? Can you outline few benefits?
8. Are there any challenges that the PPP model faces while operating at the domestic level?
9. Do you think the Brazilian inter-ministerial PPP model can potentially be adopted by other similarly developed developing countries, such as India? Can you think of any challenges that India might face in adapting this model?

VIII. Interview with Legal Officer, Permanent Mission of Thailand to WTO, Switzerland

1. Does the private sector in Thailand participate in the monitoring, investigation, preparation, litigation and enforcement phases of conducting a trade dispute at WTO? If so, can you cite few examples of cases where they participated? What was the extent and nature of participation private sector demonstrated in these disputes?
2. For the given purpose, how is the public sector commonly approached by the private sector? Does it happen through a specific regulation or a legal provision (like Section 301 of the US Trade Act 1974 or TBR Mechanism in EU)? If so, which one? Or, does it take place through an informal coordination between the government and industry?
3. Can you think of any problems which the Government of Thailand/WTO Mission of Thailand faces during participation at the WTO DSU, or are there any specific challenges

which impede the engagement of concerned industries during dispute settlement procedures?

4. Are there any WTO related internship and training opportunities provided at the Thai WTO Mission and/or at the relevant departments of the government in Thailand? Do you agree that the lack of WTO related internship/training opportunities have resulted in a lower demand for WTO courses and research opportunities at the universities in Thailand?
5. Are there any specialized think tanks or academic centres dedicated to international trade and related legal disciplines based in Thailand? Do they assist the government and the industry in identifying a trade barrier or investigating or litigating it?
6. 'Thai government believes that the WTO matters are purely intergovernmental in nature and should therefore be entirely dealt with and decided by the government.' What are your views about the present relevance and accuracy of this statement?
7. 'Private sector has been allowed to assist the government in certain related tasks (for example in Sugar dispute), but it has so far not been allowed to participate extensively and/or directly for conducting any tasks or making any decisions relating to international trade.' Do you think the statement rightly explains the form of PPP Thailand has experienced until now?
8. 'The business community in Thailand largely remains unaware of the benefits from WTO participation and significance of international trade laws. The prevalent private perspective is that it is the government that should be concerned and be responsible for the handling of WTO related matters.' Do you think the statement is an accurate description of the private sector's views? If yes, is it important to change this perspective and enhance WTO-related awareness among the private sector in Thailand? Do you think that this change can strengthen the public-private coordination during the management of future WTO cases?
9. There is a national legal provision in Thailand that provides that the government should earmark an annual standing budget for the handling of foreign trade disputes. Where can I find more details on the provision? Can you provide me with a citation or source of legislation?

IX. Interview with Chief Executive at Bangladesh International Arbitration Centre; Former Ambassador to Permanent Mission of Bangladesh to WTO, Bangladesh

1. Would it be fair to say that the interaction with the private sector in *India-Battery* case enabled the country to expand its dispute settlement capacity and WTO related expertise?
2. In *India-Battery* dispute, what sort of public private interaction did you observe?
3. There is BTC in Bangladesh that allows private sector to access government in dumping/anti-dumping cases. Any other provisions which allow industries to access government in cases other than dumping issues?

4. What problems do you envisage for similar PPP arrangements in the future management of trade disputes in Bangladesh?

X. Interview with Official Representatives, International Centre for Trade and Sustainable Development (ICTSD), Switzerland

1. Can PPP pose a threat to national interests? Are you aware of any instances where special private interests were protected at the cost of national interests?
2. How do we ensure that the balance between the special interests of the private sector and the national interests of the government is maintained?
3. What kind of features should be introduced in the PPP mechanism for effective regulation? Do you think judicial review at the domestic level could be one of the best practices?
4. Do you think the PPP mechanism can strengthen the dispute settlement capacity of developing countries?

XI. Interview with Trade Lawyer, White & Case, Switzerland

1. How can lawyers play a more proactive role to help developing countries manage WTO disputes?
2. Can you think of any WTO case where public private coordination was clearly visible? In what ways did the industry and the government coordinate?

XII. Interview with Trade Lawyer, Advisory Centre on WTO Law (ACWL), Switzerland

1. What are the main obstacles which developing countries face at the WTO DSM?
2. You referred to a standing budget provision – what do you mean by this? Standing budget with whom? Government or industry? How can this provision work?
3. Have there been instances in the past where the fee of the ACWL lawyers was directly paid by the private sector?
4. Two main constraints of developing countries that you mentioned are: budget unavailability and lack of procedure. Do you think an effective PPP can to some extent address the budgetary and procedural constraints which developing countries are facing at the moment?
5. Is an organised private sector important for PPP? Why?
6. At a conference held at European University Institute, you mentioned that Section 301 process is very much underutilised. Why? Is the informal process preferred over the formal provisions? Why is the formal provision not used by the industry?
7. What lessons can developing countries derive from the weaknesses of Section 301?
8. Do you think US PPP is facing the problem of political lobbying, pressure from Congress and industry?
9. *Brazil coffee* case is an instance of regulatory capture. Any similar disputes where PPP has become a problem for the wider national wellbeing?

10. Can PPP be seen as a mechanism to grant access to justice to its private stakeholders?

XIII. Interview with Trade Lawyer, VVGB law firm, Belgium

1. Does the private sector participate in the handling of trade disputes at the WTO DSU? If so, can you cite few disputes (that the EU was litigating or defending) where the private sector was actively engaged? What was the extent and nature of participation the private sector demonstrated in these disputes?
2. Have you observed any problems (such as lobbying or corruption leading to the domination of special economic interests over the public interests) with these partnerships and private engagements in any WTO instance?
3. You have assisted the US and the EU private companies while filing formal TBR or Section 301 petitions, and you have also assisted the USTR and the European Commission while invoking the WTO DSM with the help of the private sector. Do you have any general comments on PPP arrangements which were formed with the help of these formal provisions? Any specific feature of PPPs or provisions or procedures which helped these partnerships to operate smoothly?
4. How is the Office of the Trade Directorate General of the EU Commission commonly approached by the private sector, if and when it face a trade barrier? Does it happen through the traditional legal route of Article 207 of the Treaty on the Functioning of the European Union [ex Article 133 of the Treaty Establishing the European Community] or through the Trade Barrier Regulation (TBR), or both? Why is the TBR process not frequently used by the industry? Is the traditional legal route of Article 207 of the Treaty on the Functioning of the European Union preferred instead? Why?

XIV. Interview with Trade Lawyer, Luthra and Luthra law firm, India

1. The *Avian Influenza* case DS430:
   a. Who hired Luthra & Luthra? The Ministry of Commerce or the private stakeholders?
   b. Who were the private stakeholders involved in the case, if any?
   c. Did they participate at any stage of preparing the dispute for the WTO DSM, including the stage of consultations? Did they assist the government or the lawyers with information/evidence collection or in any other way at any stage?
2. Has Luthra & Luthra provided legal services to the Govt or to the private sector (exporters, businessmen, industry, trade organizations) concerning any other foreign trade measure or a WTO related issue/dispute?
3. Do you have any observations about the Government's process of selecting a law firm for the WTO matters?
4. China has built its in-house legal capacity by encouraging its domestic law firms to develop and expand. Do you think the Indian Government should also follow that course and engage the domestic law firms in WTO related matters?

5. Have you observed any coordination problems with the government departments? Do you have any suggestions to reform the process in which a trade dispute is managed and litigated in India, or in which the Government coordinates with the legal team or/and private stakeholders?
6. Some overseas law firms have started the practice of 'ambulance chasing'- where they dedicate a team of professionals for monitoring market access and identifying foreign trade barriers for developing countries. On the identification of a barrier, they approach the concerned governments with the information and offer their legal services. Do you think something on these lines can be introduced by the Indian law firms as well (considering poor monitoring capacity in India)? What are your views on 'ambulance chasing'?

XV. Interview with Official Representative, Seafood Exporters Association of India (SEAI); Interview with Official, Fisheries & Fishing Communities in India, India

1. In the case of *United States - Import Prohibition of Certain Shrimp and Shrimp Products*, SEAI closely partnered the Ministry of Commerce in litigating the case at the WTO. Is it possible to elaborate on the precise ways in which SEAI assisted the Ministry in this case?
2. Who were the lawyers in this case? Who hired the lawyers involved in this case? Did SEAI pay the legal bills?
3. What is your experience with the ad-hoc partnerships formed with the Ministry of Commerce during the relevant case? Did you face any coordination and access problems in working with the ministry in this case?
4. How did SEAI approach the Government in this case? Generally, is it convenient for firms and trade associations to access Ministry of Commerce, considering that the other industries in India may not be that well organized?
5. China has provided private individuals with a legal right to file petitions and seek information and updates from the Government, and appeal the decision of the government on investigation outcomes and pursuing trade measures. Do you think a similar legal right should also be conferred to the individuals and trade associations in India? Is it really required?
6. Do you think that the organized resourceful fishery industry in the US as against the resource-constrained fishery industry in India had a bearing on how the Shrimp Turtle case was litigated? Do you think that the resource gap between the two countries (at private and public sectors level) was one of the reasons for the outcome in this case?

XVI. Interview with Official Representative, Textiles Industry (TEXPROCIL), India

1. *EC-Bed* Linen: In this case, TEXPROCIL not only helped the Government in identifying the barrier, investigating it or litigating it, but also went all the way to the enforcement stage and informed the Government about the non-enforcement of the award. It was on

TEXPROCIL's insistence that the Government filed for the compliance panel to be established. Is it possible to elaborate more on the precise ways in which TEXPROCIL assisted the Ministry of Commerce in this case?

2. *EC-GSP* case: Please comment on the ways in which TEXPROCIL collaborated with the government during the litigation of this case.
3. Do you think a PPP mechanism is important for the efficient handling of WTO disputes?
4. *Turkey - Cotton Yarn*: I spoke to some government officials who informed me about your active role in identifying the barrier, assisting the Government officials during investigations, and then, you were a part of consultations in Ankara. What has been your experience with that extent of partnership formed with the Government in this case?
5. *Turkey - Cotton Yarn*: Lakshmi Kumaran law firm is on TEXPROCIL's legal panel, and an official from Trade Policy Division informed me that TEXPROCIL is partially paying the legal expenses of the case. Is that true? Does TEXPROCIL pay the legal bills of this case?
6. Has TEXPROCIL paid legal expenses in any other case?
7. Any other cases where TEXPROCIL coordinated with the government?
8. What is your experience with the ad-hoc partnerships formed with the Government during the relevant cases? Did you face any coordination and access problem?
9. How did you approach the Government in various cases in which you identified the barrier and reported it to the Government? Is it convenient for other firms to access the Ministry of Commerce, considering that the other industries in India may not be that well organized?
10. China has given the industries a legal right to file petitions and seek information and updates from the Government concerning trade disputes. Do you think a similar legal right should also be conferred to the individuals and trade associations in India?
11. Did TEXPROCIL assist the Trade Policy Division in any case where India was on the defending side?

XVII. Interview with International Trade Law Scholar, European University Institute, Italy

1. What is (are) in your view the main factor(s) deterring the effective participation of developing countries at the WTO DSM? Do you think an effective PPP can address this factor to some extent?
2. What kind of features/requirements in your view should be introduced for an effective PPP to achieve better participation of developing countries at the WTO?
3. My research proposes to devise a regulatory governance mechanism for developing countries to ensure that the potential regulatory threats can be kept at bay, especially in developing countries. What features would you suggest for such a regulatory mechanism?
4. Well, the main significance behind the PPP is domestic capacity building, but there is another more academic nuance which I am considering to introduce in the thesis - that PPP can provide private stakeholders with a route to access justice and participate in

WTO adjudication. I would be pleased if you could comment on this particular access to justice perspective.

5. Many countries may simply not have any trade issues to be resolved, and therefore it would be a flawed approach to conclude that because they have not been participating at the DSM, they are at a disadvantage. A better approach to looking at this would be to see if there are potential trade concerns in the developing countries that could be brought and should have been brought at the WTO level, but could not be brought because of capacity constraint, procedural problems, diplomatic reasons, or other factors. If the rate of participation in the Committee Meetings is visibly higher than their activities at the DSM, the inference could be that they have potential trade concerns which they are willing to resolve, but are hesitant to invoke the DSM provisions, owing to their known complexity and cost or other procedural or diplomatic reasons. I am trying to draw a comparison between the levels of TBT and SPS related complaints filed by these developing countries at the WTO DSM vis. a vis. their participation in the TBT and SPS Committee Meetings from 1995 – 2012. Do you think it is a sound approach?
6. Are you aware of any public documents which you think may be of interest/relevance to the present research?

XVIII. Interview with International Trade Law Scholar, University of Illinois, US

1. Does the private sector in the US participate in the monitoring, investigation, preparation, litigation and enforcement phases of conducting a trade dispute at the WTO? If so, can you cite few significant examples of this participation by the private sector? What was the extent and nature of participation the private sector demonstrated in these disputes?
2. Do you have any observations on how the government coordinated with the industry and how much did the industry participate during the cases of *US-Gambling, Shrimp Turtle, EC-Hormones, EC-Bananas, Korea-Alcoholic* or *Kodak-Fuji*? Any observation relating to any of these cases would be very helpful.
3. How is USTR commonly approached by the private sector? Does it happen through Section 301 Mechanism of the Trade Act 1974, or through a different provision, or on an informal basis?
4. Do you think the US model of PPP (Section 301) for the conduct of trade disputes is an effective one? If so, why? Can you outline few benefits?
5. It was observed by Niall Meagher that S 301 provision is not frequently used by the private sector, mainly due to its compulsive/mandatory provision. What are your views on this?
6. Are there any other challenges or problems which the provision is facing or may face, like, the provision of mandatory obligation under S 301, or high burden of proof and evidential requirements expected from the industry petitioning the USTR?

7. Can a similar mechanism (like S 301 Mechanism) enable developing countries to efficiently handle trade disputes in coordination with the industry? What may be the challenges that developing countries might face in adapting this model?

XIX. Interview with International Trade Law Scholar, Singapore Management University, Singapore

1. Please share your observations on the effectiveness of TBIM and the problems leading to its underutilization?
2. Why is *Japan-Laver* the only example where TBIM was invoked? Why has the TBIM not been invoked in any other matter?
3. China has expanded its domestic legal capacity to a large extent and is seen as a role model for other developing countries in this respect. What strategies have been employed for the same?
4. *Japan-Laver* case - what was the extent to which the Jiangsu Laver Association was engaged with MOFCOM? In what ways did it assist MOFCOM?
5. Do you have any suggestions or advice for the other developing countries aspiring to develop international trade law expertise, or aspiring to build a similar PPP mechanism?
6. How is China overcoming the problem of insufficient organisation of the private sector? What steps are being taken in this regard?

XX. Interview with International Trade Law Scholar, Xiamen Academy of International Economic Law, China

1. The Chinese Society of International Economic Law (CSIEL), Xiamen University, has been instrumental in disseminating international trade related legal knowledge and expertise to the practitioners, government officials, private sector entities and students in China. Do you agree?
2. Do you think CSIEL has contributed effectively in terms of building WTO legal capacity of the Government? If yes, how and through what functions? In other words, how is the Chinese Society of International Economic Law assisting the Government of China to participate at the WTO Dispute Settlement Mechanism?
3. Has the Government of China started to hire domestic law firms (as opposed to foreign law firms) to conduct WTO cases? If so, could you please mention the name of a few law firms (preferably along with the cases they have worked on)?
4. Has China faced difficulties in participating at the WTO DSM? Is the non-litigious approach of the government one of the obstacles in participating effectively at the WTO? Any other problems: language? Governments' reluctance to involve private and academic actors in WTO matters? Secrecy? Unorganised private industries?
5. Please share your observations on the effectiveness of Trade Barrier Investigation Mechanism (TBIM) and the problems leading to its underutilization?

6. Is *Japan Laver* the only example where TBIM was invoked? Was the TBIM invoked in the *US-Renewable Energy* matter? Any other WTO matters where private sector was involved, formally or informally?

** The given sets of questions were prepared for each semi-structured interview conducted by the author.*

*** This document does not include questions that were raised during informal or semi-formal discussions with certain participants. This is because some discussions were not conducted on the basis of previously set questions.*

Appendices C: Participant Information Leaflet

Title: Public Private Partnership in WTO Dispute Settlement: Enabling Developing Countries

Name of Researcher: Amrita Bahri

Description: The United States of America, the European Union and Brazil are the most active users of the WTO Dispute Settlement Understanding, and arguably the credit largely goes to their close network with the private sector for fighting trade disputes at the WTO. These countries have undoubtedly realised the need for support from the private sector in order to enforce their trade interests at the WTO dispute settlement.

If these countries rely on the private sector for resources required to conduct WTO litigation, it is natural to assume that this support will be more pivotal for developing countries (often suffering from resource-constraint) to successfully conduct WTO disputes and participate effectively at the WTO. More so, if developing countries such as China and Brazil can formalise and institutionalise the model of Public Private Partnership (PPP) for WTO DSM, it leaves other developing countries, especially those possessing similar levels of growth and development, such as India, with no option but to seriously consider establishing an effective mechanism of dispute settlement PPP. The envisaged advantages of PPP mechanism for developing countries are two-fold:

a. Enhanced and effective participation of developing countries at WTO DSU by domestic capacity building, &
b. Individual's access to justice through inter-governmental procedures.

Introduction & Invitation to Participate: I am a doctoral researcher at the Birmingham Law School, University of Birmingham, United Kingdom. The area of my research deals with the domestically formed public private partnerships (PPPs) and the WTO Dispute Settlement Mechanism. The research aims to investigate the nature and elements of domestic mechanisms, including public private partnership (PPP) procedures, devised for the management of WTO disputes in selected developed and developing countries. With the US, the EU, India, Brazil, China, Thailand and Bangladesh as its case-studies, the research seeks to propose guidelines for legal, institutional and procedural reforms that are required to establish an effective PPP mechanism for handling international trade litigations in developing countries.

Your participation in the research is voluntary and you may withdraw your consent to participate via email before or after the interview, at any time. During the interview, I will prefer to use a digital recorder, if you allow me for the same. Should you not prefer the use of a recorder, I will be making hand notes. Should you require further information about the thesis, research or methodology prior to the interview, I am happy to provide the same. The researcher will maintain full confidentiality and anonymity as per your indicated preference (which is optional).

You can opt to remain anonymous in the thesis, or can choose to be identifiable. An option for the same is given in the consent form.

Purpose of the Interview: The key questions which the research aims to answer are:

1. Can a domestically devised PPP mechanism enhance the WTO dispute settlement capacity of developing countries? If yes, how?
2. How can developing countries devise an effective mechanism of PPP for the efficient handling of foreign trade disputes?

I aim to answer these questions by seeking practical insight from the officials who have been involved in the trade dispute settlement process, nationally and internationally. Findings from the interview will be relied upon while devising a blueprint of laws, institutions, procedures and regulation for the proposed PPP mechanism in order to facilitate the conduct of foreign trade disputes in developing countries.

Confidentiality: The information provided in this interview will be used for the purpose of the present doctoral study only. The interview will remain confidential and will not be distributed, published or be used for any other purpose without seeking permission of the interviewee. The permission for audio recording the interview will be sought at the beginning of the interview, and if granted, a digital recorder will be used to record the conversations. The access to these recordings will only be limited to me and my supervisor, Dr Luca Rubini. Data records or notes will be kept in confidential form (in a password secured personal laptop only accessible by me) and every recordings and notes will be destroyed upon the completion of the study.

Anonymity: Please be assured that your contribution to the present research will remain strictly anonymous, and no attribution will be made to your name anywhere in the thesis or elsewhere, unless indicated otherwise by the interviewee. The anonymity of the organisation will also be strictly maintained, unless indicated otherwise by the interviewee. You will be given the option of anonymity in the consent form, which will be strictly adhered to while incorporating the findings in the thesis.

Withdrawal of Consent: You can withdraw your consent to participate in the research at any time or any stage before, during or after the interview with an email to the researcher.

Appendices D: Consent Form

Title: Public Private Partnership in WTO Dispute Settlement: Enabling Developing Countries

Name of Researcher: Amrita Bahri

Fair Processing Statement

This information is being collected as part of a research project concerned with the Doctoral Research on 'Public Private Partnership in WTO Dispute Settlement: Developing Countries' Perspectives', at Birmingham Law School, University of Birmingham. The information which you supply and that which may be collected as part of the research project will be entered into a filing system and will be processed by the University of Birmingham in accordance with the provisions of the Data Protection Act 1998. No identifiable personal data will be published.

Statements of Understanding

- I confirm that I have read and I understand the participant information leaflet for this study.
- I have had the opportunity to ask questions if necessary and have had these answered satisfactorily.
- I understand that my participation is voluntary and that I am free to withdraw at any time without giving any reason. If I withdraw, my data will be removed from the study and will be destroyed.
- I understand that my personal data will be processed for the purposes detailed above, in accordance with the Data Protection Act 1998.
- DELETE APPROPRIATE: I would like my name and organization affiliation to be anonymous when used in the thesis or anywhere else. YES NO

Based upon the above, I agree to take part in this study.

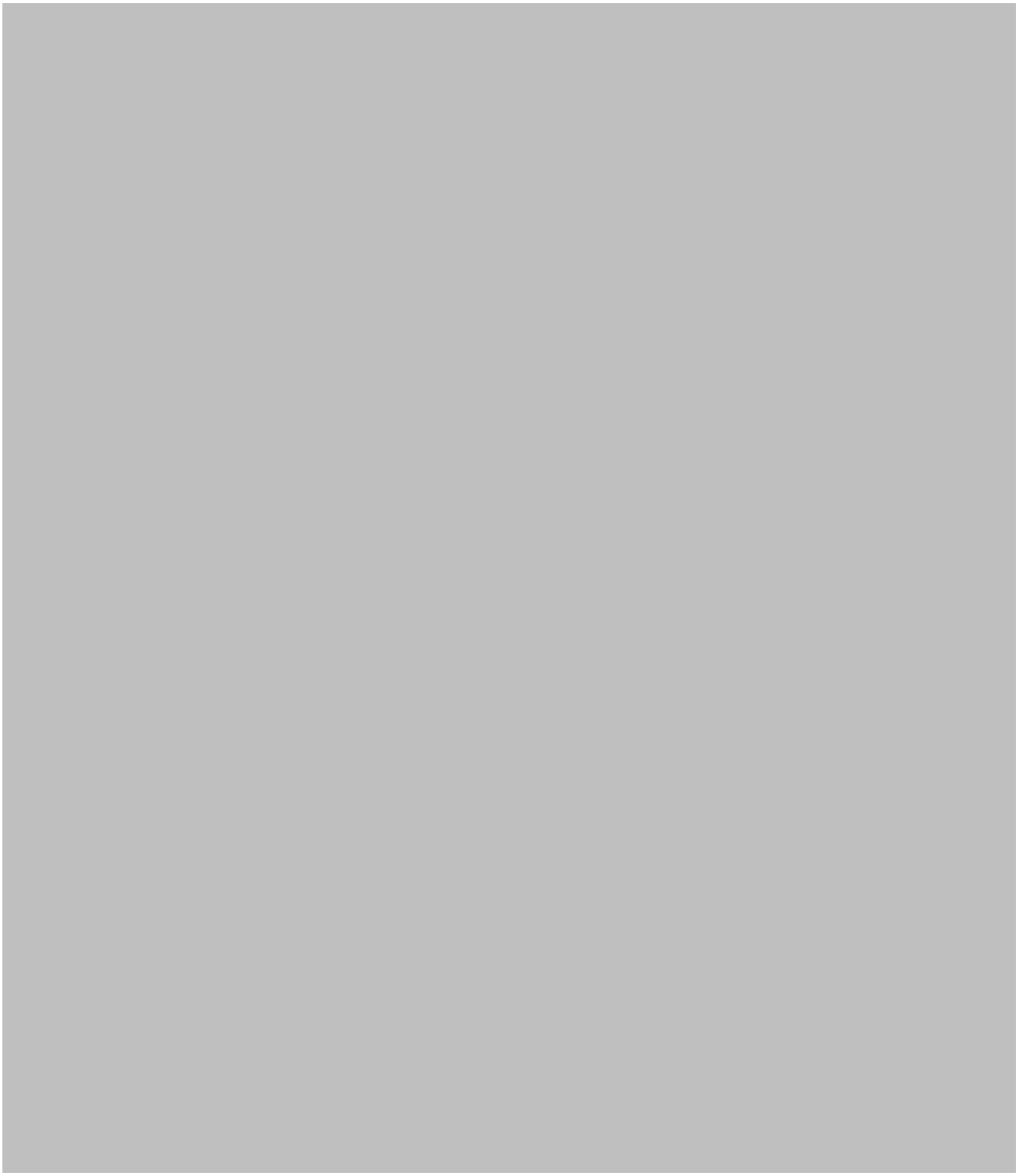
Name, signature and date

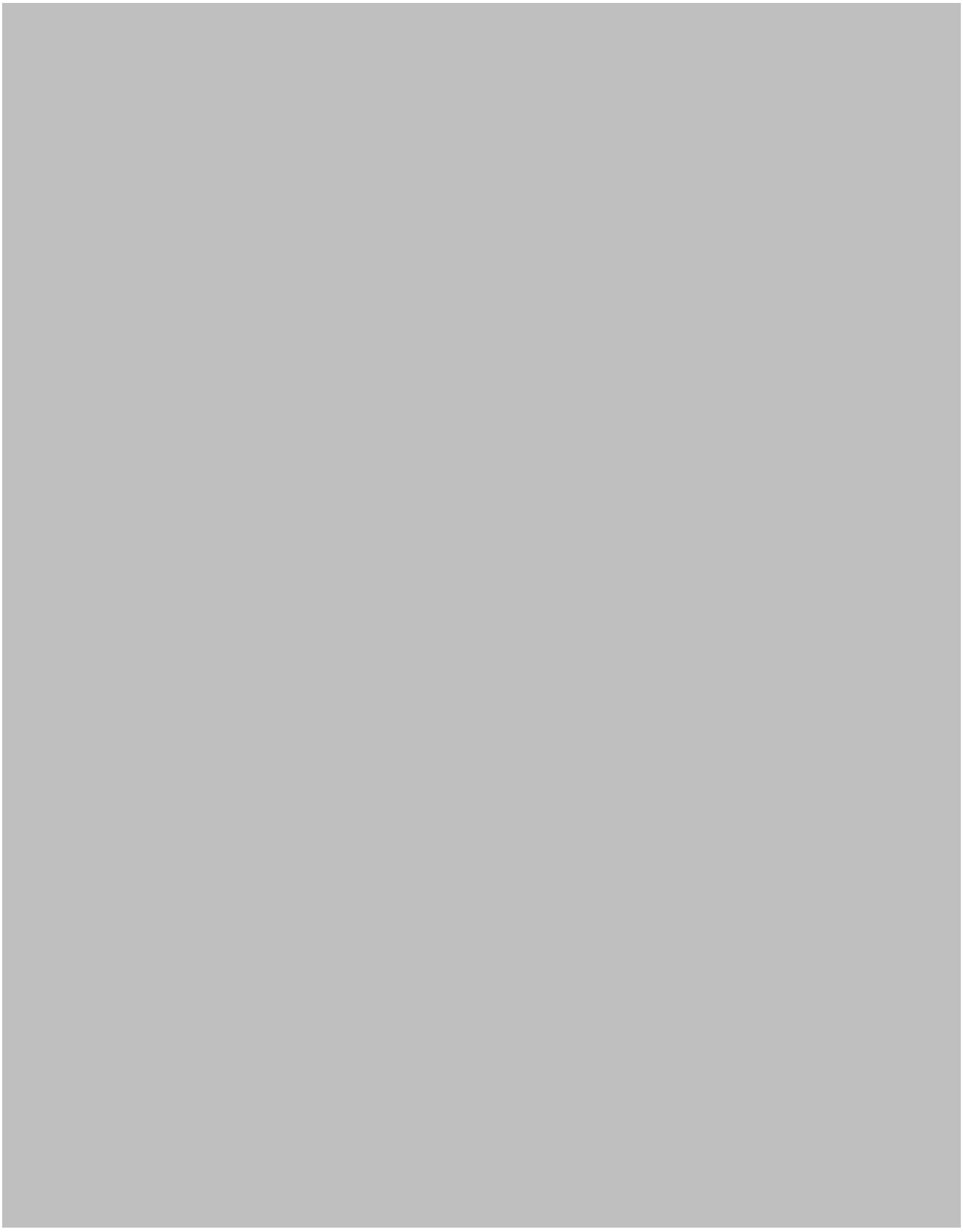
Name of participant…… Date…… Signature……..

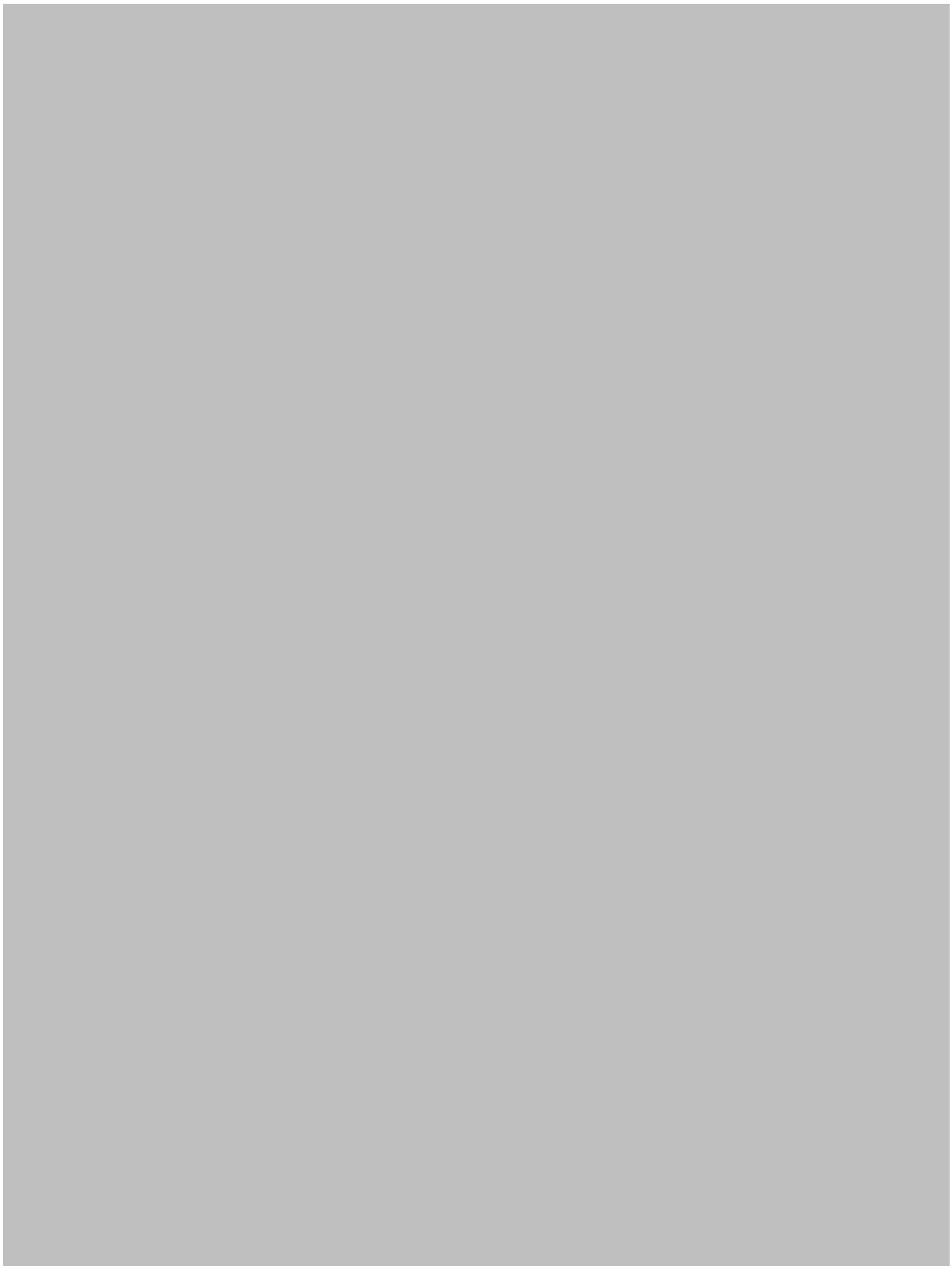
Name of researcher obtaining consent..... Date……. Signature….....

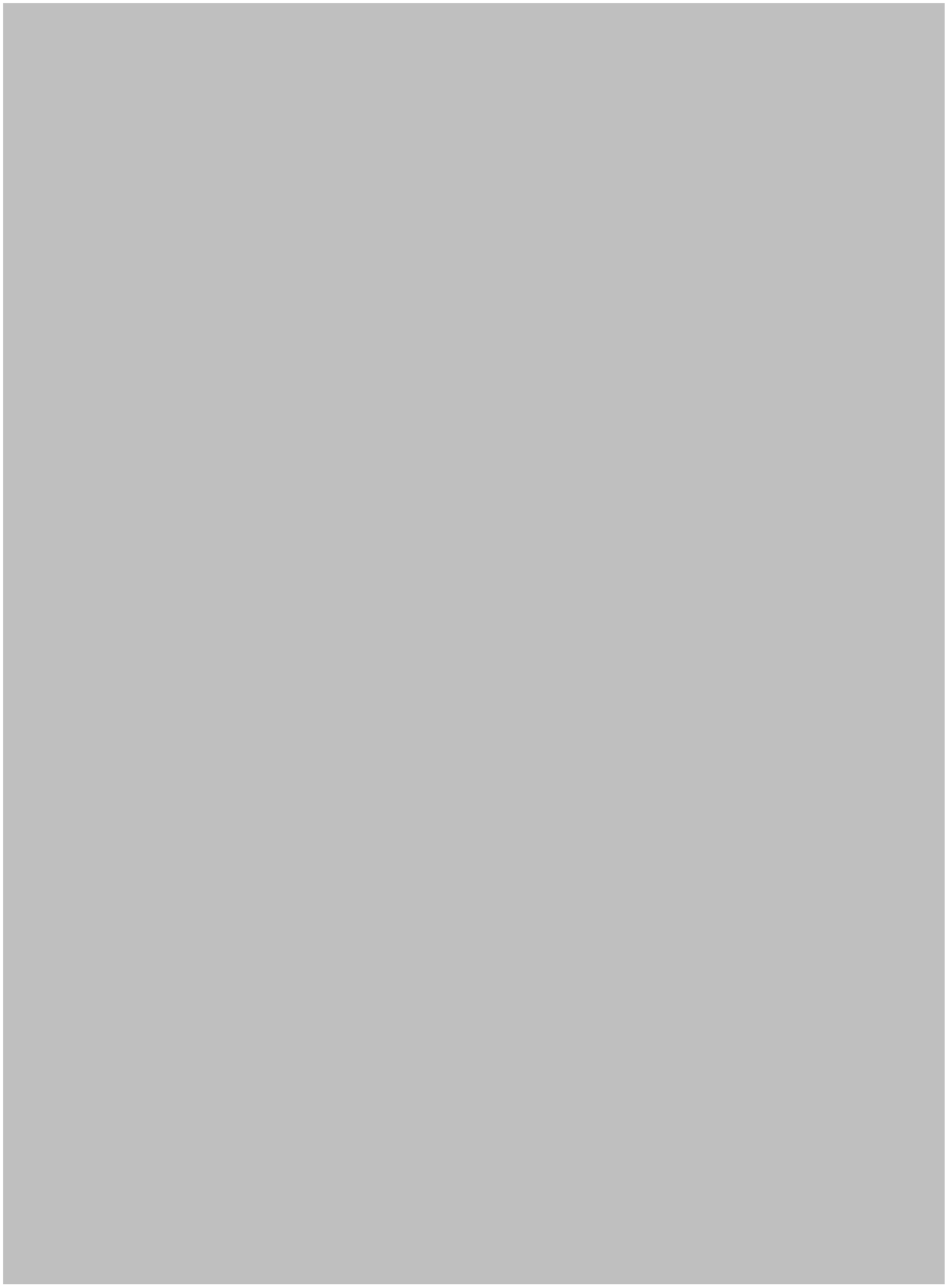
Appendices E: RTI Responses

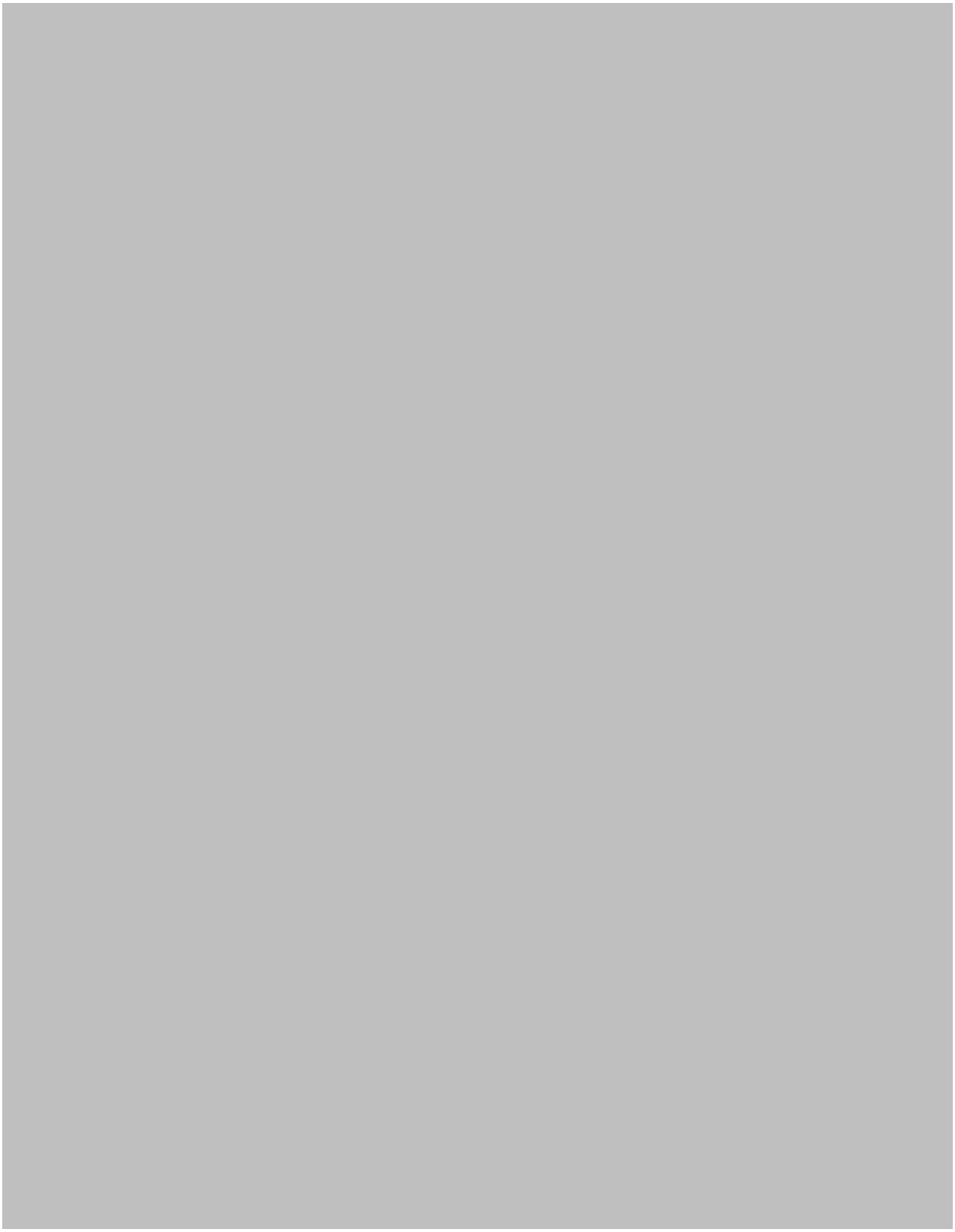
[Scanned copies of responses received by the author from the Ministry of Commerce, Government of India in response to the RTI applications filed by the author.]

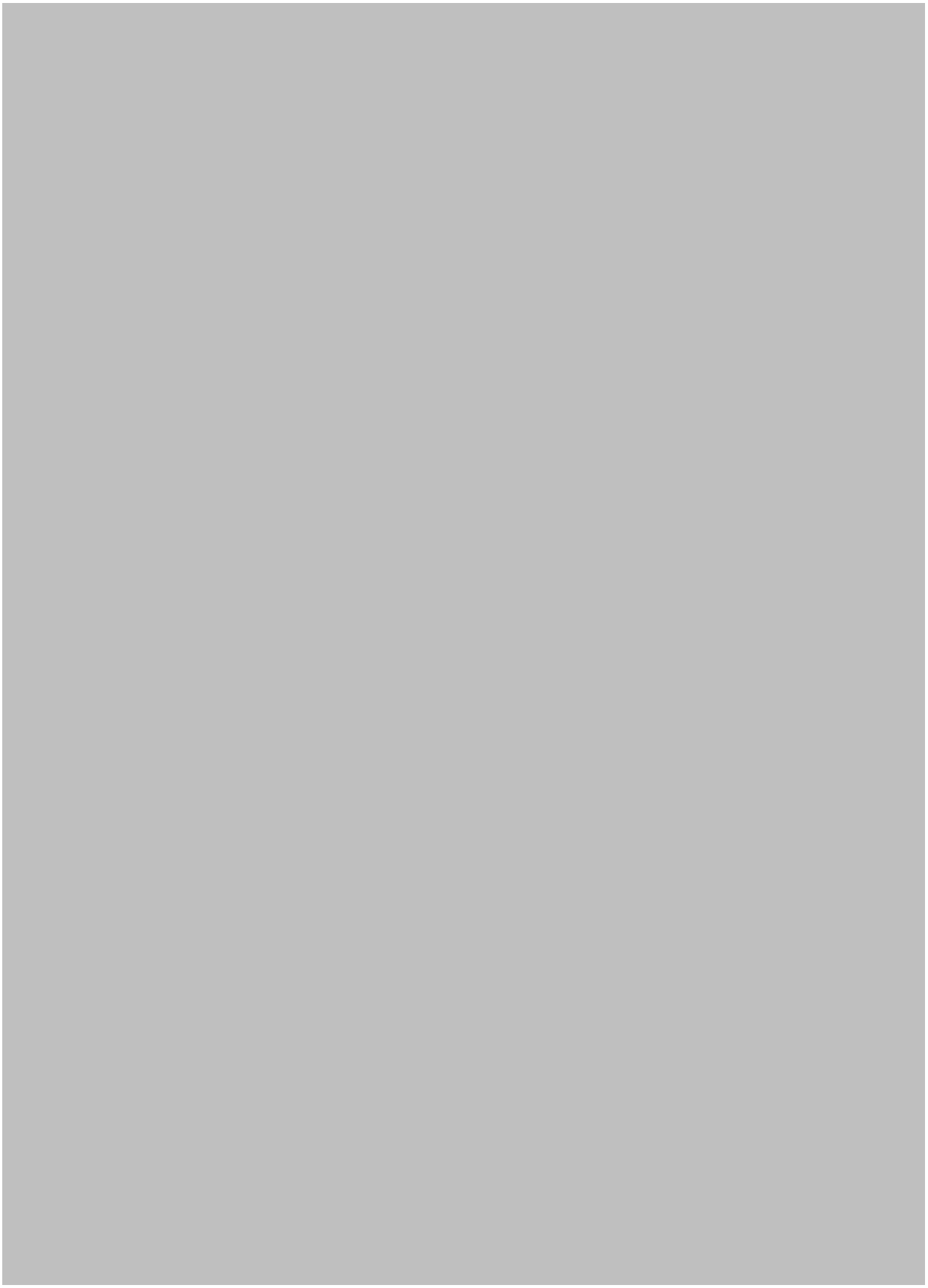












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