Handling WTO disputes with the private sector: the triumphant Brazilian experience

HANDLING WTO DISPUTES WITH PRIVATE SECTOR: THE TRIUMPHANT BRAZILIAN EXPERIENCE

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ABSTRACT

Multiple scholarly works have argued that developing country Members of World Trade Organisation (WTO) should enhance their dispute settlement capacity to successfully and cost-effectively navigate the system of WTO Dispute Settlement Understanding (DSU). It is one thing to be a part of WTO agreements and know the WTO rules, and the other to know how to use and take advantage of those agreements and rules in practice. The present investigation seeks to conduct a detailed examination of the latter with a specific focus on critically examining public private partnership (PPP) strategies that can enable developing countries to effectively utilise the provisions of WTO DSU. To achieve this purpose, the article examines how Brazil, one of the most active DSU users among developing countries, has strengthened its DSU participation by engaging its private stakeholders during the management of WTO disputes. The identification and evaluation of the PPP strategies employed by the government and industries in Brazil may prompt other developing countries to determine their individual approach towards PPP for the handling of WTO disputes.

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Assistant Professor of Law, Law Department, ITAM University, Mexico City. E-mail: amrita.bahri(at)itam.mx. The usual Disclaimer applies.
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1. INTRODUCTION

The WTO dispute settlement system is a remarkable example of 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]

The 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'[3], the governments can develop bargaining strategies which they can employ to amicably resolve (and diffuse) trade conflicts and thereby protect their industries' trade interests in the 'shadow of a potential WTO litigation'[4].

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" through effective negotiation with (or successful litigation against) other Member States. Favourable "terms-of-trade" can further generate wide economic, social and

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[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.']

[3] 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.

[4] 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].

environmental benefits for its economic sectors and society at large.[5] The overarching ambit of WTO dispute settlement is now encompassing areas beyond 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[6], green technology[7], consumer welfare[8], public health[9] and purely social concerns[10]. Hence, one can understand how, against a limited legal representation by Member States, WTO DSM can generate far-reaching economic and non-economic benefits for governments, businesses and other private entities. However, the DSU participation benefits come at a cost which may not be equally affordable by all WTO Members.

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 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 of non-compliance.[11] This demand for greater resources has posed many participation challenges to developing countries at WTO DSM.[12]

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[5] Gallanter (n 4) 579.

[6] 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].

[7] *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].

[8] See, for example, *US-Tuna* case [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]

[9] 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].

[10] 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].

[11] 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.

[12] For a detailed analysis of participation challenges faced by developing countries at WTO DSU, see the following scholarships: Busch and Reinhardt, 'The WTO Dispute Settlement Mechanism and Developing Countries' (n 11); Chad P Bown and Bernard M Hoekman, 'WTO Dispute Settlement and the Missing

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).[13] These challenges are "capacity-related"[14] as they can largely be attributed to paucity of the legal knowledge, financial power and political influence, or '… more simply, of law, money, and politics.'[15] In light of this situation, it becomes pertinent to raise the following two questions: Can developing countries enhance their WTO dispute settlement capacity? If the answer to the first question is yes, which are the most cost-effective and viable options for addressing the capacity-related 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).[16] The *second* option is to find solutions at the domestic

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Developing Country Cases: Engaging the Private Sector' (2005) 8(4) Journal of International Economic Law 861; 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; 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.

[13] Bohanes and Garza (n 12) 48; Ewing-Chow (n 12) 671.

[14] The term "capacity" in the article 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. [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]; 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.]

[15] Gregory C Shaffer, Marc Busch & Eric Reinhardt, 'Does Legal Capacity Matter? A Survey of WTO Members' (2009) 8 World Trade Review 559, 572.

[16] For instance, developing countries have proposed following changes to the multilateral rules of dispute settlement: 1. Introduction of retrospective and mandatory financial compensation and collective suspension of concession as effective remedies for enforcement of awards. {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}; 2. The creation of a fast track and simplified procedure of adjudication for cases with established precedents. {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}; 3. The creation of a WTO Fund which can provide them with financial assistance during the conduct of dispute settlement proceedings {World Trade Organization, Dispute Settlement Body, Special Session, 'Text for the African Group Proposals on Dispute Settlement

level.[17] The study centers its focus on the *second* option because of the following *two* reasons:

First, it is difficult to dispute that most of the DSU participation challenges faced by developing countries are deeply rooted in the domestic context of these countries and therefore solutions can best be found at the domestic level. For example, paucity of lawyers and government officials trained and experienced in WTO law can, to some extent, be blamed for high litigation costs as the lack of domestic legal expertise necessitates hiring expensive overseas lawyers.[18] 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.[19] *Second*, litigation of a dispute at WTO DSU is largely dependent on how that dispute is handled at the domestic level. For example, 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 generally stands a relatively lower chance of success at the international level.[20] Hence, in practice, the future of WTO

Understanding Negotiations' submitted by Kenya in the name of African Group [TN/DS/W/42] 24 January 2003}; 4. The strengthening of special and differential treatment provisions in order to make them precise, effective and operational {World Trade Organization, General Council, 'Preparation for the Fourth Session of the Ministerial Conference' [WT/GC/W/442] 19 September 2001}.

[17] There are many advocates of this approach. Some prominent scholars have proposed the following strategies: 1. 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 12)]; 2. 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 12) 79-88]; 3. Creation of domestic procedures and institutions for the management of WTO disputes [Ewing-Chow (n 12)]; 4. 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].

[18] 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.']

[19] 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.

[20] 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

litigation is partially predetermined by the manner in which it is handled at the domestic level. On the basis of these arguments, the study argues that the capacity constraints should directly be dealt with at the domestic level, and therefore it is essential for developing countries to develop domestic strategies for information-gathering, monitoring, consultation, litigation and enforcement of awards.

This study investigates and analyses, through the dispute settlement experience of Brazil, the above-mentioned capacity-building option which calls for developing in-house strategies for international dispute settlement. With the help of Brazil's case study, the article examines multiple domestic capacity-enhancing strategies including the inter-ministerial handling of foreign trade disputes, 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. However, the study focuses particularly on the last mentioned strategy, i.e., government-industry coordination.

In essence, exporters and importers are the real 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.[21] Every trade disagreement which grows into a formal legal action at WTO DSU (if not resolved or diffused by way of negotiations or consultations) generally emanates from cross-border commercial transactions between exporters and importers or business entities and public sector authorities.[22] Moreover, exporters and importers can generally gather information, evidence and documents concerning foreign trade measures and their impact during the course of conducting their everyday business activities.[23] Hence, some coordination between government and industry, in most cases, is embedded in the nature of WTO dispute settlement proceedings.

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. This argument is based on the hypothesis that an effective partnership

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having an adequate number of experienced legal, economic, and diplomatic staff and a well informed and active private sector.']

[21] 'Although private business operators do not have access to the WTO DSU, 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.].

[22] 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.

[23] Gene M Grossman and Elhanan Helpman, *Special Interest Politics* (The MIT Press 2001) 4.

arrangement between government and industry can cost-effectively enhance the dispute settlement capacity of developing countries. To examine and establish this hypothesis, the article focuses on Brazil's dispute settlement partnership experience as it seeks to examine three specific issues: *first*, how can dispute settlement partnerships play a capacity-enhancing role in developing countries; *second*, how a particular government in a developing country can coordinate with the affected private stakeholders during the handling of foreign trade disputes; *third*, what problems, if any, can the government face in doing the same. Selection of Brazil, as against other developing Member States, for the purpose of this investigation can be justified on the basis of following *three* reasons:

First, Brazil has emerged as a global leader in international trade.[24] As a part of major trading alliances including WTO, MERCOSUR[25], G-20[26], Cairns Group[27] and BRIC[28], 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.[29] 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.[30] Brazil has gained international repute not only for the quantity but also for the quality of its participation at WTO DSU.[31] The nature and extent of its participation in international trade and international trade adjudication exhibits its continuing commitment towards expanding its in-house ability to further utilise WTO DSU provisions.

Second, Brazil has made significant progress in overcoming the participation challenges, as it has learnt to utilise WTO DSM more effectively than other WTO Members from the

[24] 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 Database 2015]

[25] It is a regional trading bloc in South America. For more information, see MERCOSUR <http://www.mercosur.int/> accessed 8 July 2015.

[26] 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.

[27] It is a coalition of agricultural exporting countries. For details, see The Cairns Group <http://cairnsgroup.org/Pages/default.aspx> accessed 8 July 2015.

[28] It is a trading alliance of major emerging market economies. For more information, see The BRICS Post <http://thebricspost.com> accessed 10 November 2014.

[29] The WTO Database 2015.

[30] The data includes the cases filed from January 1995 to June 2015.

[31] 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.

developing world. At the same time, it is important to note that Brazil too has faced various participation challenges at WTO DSM. For example, in the year 1999, *Canada – Aircraft*[32] and *Brazil - Aircraft*[33] disputes 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 the successful WTO litigation and compliance proceedings.[34] However, following these disputes, the Brazilian management of trade disputes has undergone a significant transition, and hence, an investigation of its dispute settlement approach can provide useful lessons to its peers, i.e., other developing country users of WTO DSU.

Third, Brazil has actively coordinated with industries with the help of a specialised institutional procedure established for the management of foreign trade disputes.[35] Due to the nature of its political economy and institutionalised partnership strategies, it has become one of the most active developing country users of dispute settlement partnership approach. Hence, from a legal realist's perspective, it will be useful to assess Brazil's relevant experience to provide practical insights to other developing countries. With the wealth of Brazil's dispute settlement and private sector participation experience, the present study can usefully review and analyse the characteristics, weaknesses and the capacity-building potential of PPP approach.

The article, in the following section, provides a brief overview of the political economy of Brazil as it is important to understand the nature of dispute settlement strategies, in particular, the nature of dispute settlement partnerships in the light of the country's domestic conditions. It further provides a brief description of the Brazilian institutions and procedures involved in the overall management of foreign trade disputes. Following this, the article in section 3 analyses the ways in which several trade disputes were managed by the government and the private sector in Brazil. This enables the study to analyse, from a practical point of view, the characteristics and limitations of Brazilian dispute settlement partnership strategies. In section 4, the article provides a further analysis of the features of the Brazilian PPP mechanism which have enabled this developing country to overcome its WTO capacity-related challenges. It also examines certain limitations of the institutionalised mechanism of PPP in Brazil. Section 5 provides concluding remarks.

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[32] 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.

[33] 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.

[34] Interview with Celso de Tarso Pereira, Permanent Mission of Brazil to the WTO (Geneva, Switzerland, 16 September 2013).

[35] For further details, see Section 2 and 3.

2. THE 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.[36] The Brazilian Government continues to control many strategic sectors of the economy including power generation and telecommunications. Very complex and detailed set of rules still govern the registration and operation of businesses.[37] 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 used 'privatisation' and 'deregulation' as tools to move towards a moderately free market economy.[38]

Brazil 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.[39] 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

[36] '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 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.

[37] 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, arts 7 and 8.

[38] Pio (n 36) 4.

[39] World Trade Organization, 'Trade Policy Review-Brazil', Report of the Secretariat, WT/TPR/S/140 (1 November 2004), pp. 19, 37 [as cited in 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) 27]. Jatkar (n 31) 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.']

and opportunities for the country.[40] In response to these changes, the government underwent a massive reorganisation. In particular, to respond to the demands of multilateral trade obligations after the establishment of WTO, and more particularly, to manage foreign trade disputes under the rule-oriented WTO DSM, Brazil established a specialised 'three pillar' dispute settlement mechanism.

Shaffer's work indicates that the Brazilian 'three pillar' dispute settlement mechanism '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")'.[41] Coordination between these three pillars has better enabled the government to manage trade disputes with the help of public private coordination.[42] A more detailed and comprehensive illustration of this institutional framework is provided in the figure below.

[40] Jatkar (n 31) 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.']

[41] 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, 423. Findings further confirmed in interviews with Celso de Tarso Pereira (n 34) and Eduardo Chikusa, Permanent Mission of Brazil to the WTO (Geneva, Switzerland, 16 September 2013).

[42] Bown and Hoekman, 'WTO Dispute Settlement and the Missing Developing Country Cases' (n 12).

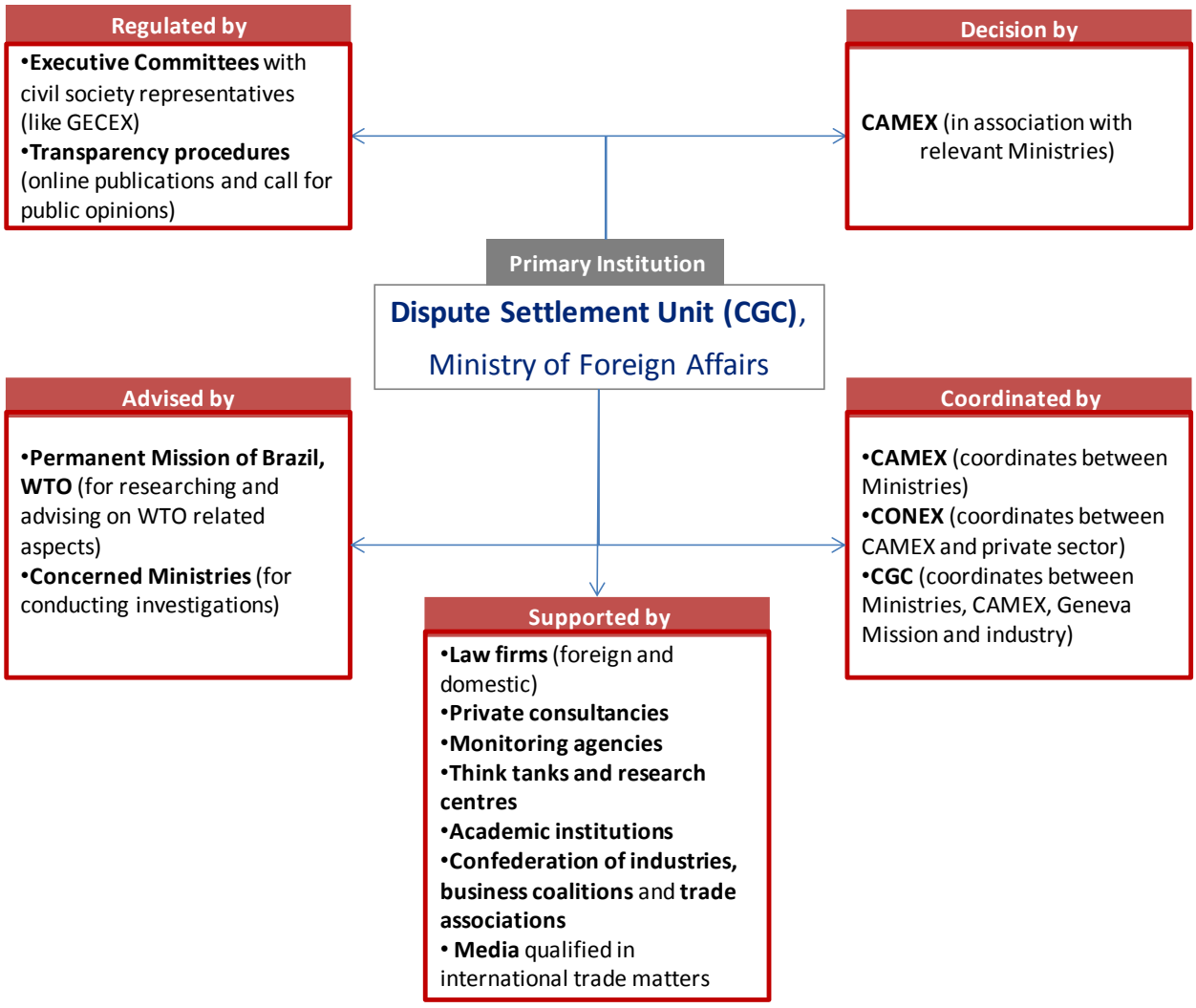

Figure 1: Institutional Framework in Brazil

The figure above identifies the Brazilian public and private sector participants that are currently engaged in the overall management of WTO disputes. A brief discussion of their functions and dispute settlement procedures is provided below.[43]

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.[44] The Ministry's long standing interest and expertise accumulated over the past decades in international trade are

[43] Detailed procedural analysis in Shaffer, Badin and Rosenberg (n 41) 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 (n 34) and Eduardo Chikusa (n 41).

[44] The Constitution of the Federative Republic of Brazil, art 21.

the main reasons behind its continued central position in WTO matters including dispute settlement. A specialised dispute settlement unit, known as the 'General Coordination of Disputes' (CGC)[45], is established under the Ministry for seeking coordination with the private sector, initial examination of disputes, and presentation of cases at WTO DSM. The private sector in Brazil assists CGC during various stages of dispute settlement, mainly with the help of trade associations, consultancies and law firms.[46]

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.[47] 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 such applications and investigation of trade barriers.[48] This practice of filing well-documented and supported applications by affected private stakeholders and the government's initiation of investigation upon receiving such complaints draws similarities between the Brazilian PPP arrangements and the ones formed between the European Commission and the affected European businesses with the help of a formal mechanism known as "Trade Barrier Regulation (TBR)".[49]

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.[50] It is at this stage that the concerned Ministries carry out a detailed investigation, wherein they further examine the legal, economic and political viability of pursuing the dispute. They prepare an investigation report, along with their recommendations and relevant information, which is

[45] 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.
[46] Ibid.
[47] Interview with Celso de Tarso Pereira (n 34).
[48] Ibid.
[49] The mechanism provides a right to European businesses to petition the European Commission if their trade interests are infringed. Trade Barrier Regulation (TBR) mechanism is provided in 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.
[50] Confirmed in interview with Celso de Tarso Pereira (n 34).

subsequently forwarded to an inter-ministerial department known as the Inter-Ministerial Foreign Trade Chamber (CAMEX)[51]. Based on the recommendations provided by the Ministries, and on the basis of its political-diplomatic analysis of the situation, 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.[52]

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.[53] 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.[54] 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.[55] 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.

CAMEX is constituted under the Ministry of Development, Industry and Foreign Trade, along with several other Ministries.[56] It interlinks these Departments and coordinates issues relating to trade (including the settlement of foreign trade disputes) among different government departments. 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 is 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.[57] This development is similar to the EU's creation of the Market Access Advisory Committee, which provides

[51] 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.
[52] Interview with Celso de Tarso Pereira (n 34).
[53] Interview with Eduardo Chikusa (n 41).
[54] Shaffer, Badin and Rosenberg (n 41) 431.
[55] Ibid; Interview with Eduardo Chikusa (n 41).
[56] Other ministries are: Ministry of State Chief of Staff; Foreign Affairs; Farm, Agriculture, Livestock and Supply; Planning, Budget and Management; Land Development.
[57] 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.

an institutional interface between the EU Commission and the business community in Europe.[58]

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 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'.[59] The union 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.[60]

Think tanks and research centres in Brazil also 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 International Negotiations (ICONE).[61] 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)[62] is a non-profit based think tank which seeks to 'foster dialogue between different actors, public and private…'.[63] It is mainly engaged in sponsoring research programs, commissioning studies on international issues, and organizing roundtables, symposia and debates. It is also interesting

[58] The European Commission has 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. For further details, see 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.

[59] 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.

[60] 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* (Cornell University Press 1997) 36, 45.

[61] For details, see ICONE <http://www.iconebrasil.org.br/> accessed 25 June 2013.

[62] 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.

[63] Ibid; Shaffer, Badin and Rosenberg (n 41) 452 [The authors note that CEBRI has been founded by a 'group of intellectuals, businessmen, government authorities, and academics'.]

to note that the Center is fully sponsored by exporting companies, trade associations and private law firms in Brazil.

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.[64] 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.[65] 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.[66] These internships have enabled law students and professionals to gain experience and expertise in WTO laws. The growth of interns and young professionals has in turn assisted the private sector and the government to conduct disputes in a cost-effective manner as they have gained enhanced access to legally marshalled information and evidence at a comparatively affordable rate.[67] This trend has further increased the enthusiasm and demand for courses in international economic law at universities, leading to an overall enhanced trade law expertise and awareness in the country.

Finally, 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.[68] This development suggests that national media can play an instrumental role in the enhancement

[64] For example, they are offered at its Permanent WTO Mission, at the Brazilian embassy at Washington DC and at the Brasilia Dispute Settlement Unit.

[65] Interview with an official, Government of Brazil [Name and details withheld].

[66] Interview with Celso de Tarso Pereira (n 34) [The interviewee confirms the following: 'The Permanent Mission of Brazil at Geneva had organised an internship program 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.']

[67] Interview with an official, Government of Brazil [Name and details withheld]; Shaffer, Badin and Rosenberg, 'Winning at the WTO' (n 41) 54-55 [Authors note that interns were hired by the industries in the *EC-Bananas* arbitration hearings and the *Brazil-Tyres* Panel hearings.]

[68] 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.

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. In particular, 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.

The democratic nature of governance, an organized export-oriented economic climate and the specialised public and private sector institutions in Brazil have triggered the formation of public-private alliances during the management of WTO disputes. The following section, with the help of selected WTO cases, analyses the nature and characteristics of these dispute settlement partnerships formed in Brazil.

3. PUBLIC PRIVATE COORDINATION: ANALYSIS OF SELECTED TRADE DISPUTES

This section introduces and analyses four WTO disputes that were conducted through varied forms of coordination between the government and private stakeholders in Brazil. With the help of these cases, the section analyses the manner in which the public and private sector agencies have coordinated in WTO disputes, and the extent to which they have acted in accordance with the above-mentioned institutional and procedural frameworks established for dispute settlement coordination. The primary purpose of this analysis is to identify those characteristics of PPP strategies that have introduced *effectiveness* into the overall management of foreign trade disputes in Brazil. The *effectiveness* or success of government-industry coordination, in the context of this article, 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 the countries' WTO dispute settlement capacity.

3.1 The Aircraft cases

As mentioned earlier, the *Canada – Aircraft*[69] and *Brazil - Aircraft*[70] cases were a wake-up call for the Government of Brazil as they outlined the need to expand its domestic dispute

[69] 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.
[70] 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.

settlement capacity.[71] These disputes are significant as they have changed the outlook and approach of the government towards the handling of WTO disputes. These cases illustrate the potential role that can be played by the affected industries in WTO litigation, and therefore, the capacity building potential of PPP mechanism.

These challenges were initiated by Canada and Brazil (against each other) to protect the interests of their respective aircraft industries.[72] 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 Subsidies and Countervailing Measures (SCM) Agreement.[73] 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.[74]

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.[75] 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.

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. 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

[71] Interview with Celso de Tarso Pereira (n 34).
[72] 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.
[73] Agreement on Subsidies and Countervailing Measures (15 April 1994) LT/UR/A-1A/9 arts 3, 27, 27.4, 27.5.
[74] 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.
[75] Jatkar (n 31) 2.

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 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.[76] 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 the company's privatisation, continued to retain some control in its functioning. This meant that the officers in control of the company were either public officials or private officials working under close supervision and guidance of the public officials. This state of affairs resulted in open *channels of communication,* and resultantly, a relationship of *confidence* between the government and company officials. Hence, the case suggests that smooth conduct of dispute settlement procedures requires a relationship of confidence and trust between government and industry, and this can possibly be established if there are effective channels of communication and information between the two.

Finally, the case outlines that 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 partnership formed between the two. This arrangement indicates that the WTO dispute settlement partnerships are generally based on resource-exchange, reciprocity and interdependency between the government and industries.

3.2 EC-Export Subsidies on Sugar (Brazil)

The *EC — Export Subsidies on Sugar (Brazil)*[77] 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

[76] Interview with Celso de Tarso Pereira (n 34).
[77] 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.

EC's provision of export subsidies to its sugar industry. Brazil alleged that the EC's Common Agricultural Policy (under Council Regulation[78]) 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[79], the SCM Agreement[80], and the General Agreement on Tariffs and Trade (GATT) 1994[81].

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.[82]

The CGC and CAMEX provided an institutional gateway for the sugar industry to approach the government for the protection of its exporting interests. The presence of these public sector institutions transformed the nature of informal coordination formed during the previously litigated *Brazil – Aircraft*[83] case into an institutionally prescribed partnership. With the help of these institutions, lawyers and economic consultants assisted the government during the investigation, preparation and litigation of the dispute.[84] Their services were paid for by the industry, i.e., the sugar cane associations (mainly UNICA)[85].

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'.[86] The lawyers and consultants were marshalling the legal and commercial arguments and briefs; the Ministries were vetting, editing and finalising them; and the industry representatives were being consulted extensively by the Ministries throughout the entire process.[87]

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[78] 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.
[79] Agreement on Agriculture (15 April 1994) LT/UR/A-1A/2 arts 3.3, 8, 9.1(a), (c), and 10.1.
[80] Agreement on Subsidies and Countervailing Measures (15 April 1994) LT/UR/A-1A/9 arts 3.1(a) and 3.2.
[81] General Agreement on Tariff and Trade 1994 (15 April 1994) LT/UR/A-1A/3 arts III:4 and XVI.
[82] 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.
[83] 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.
[84] Shaffer, Badin and Rosenberg (n 41) 383.
[85] See UNICA: Sugarcane Industry Association, About Us <http://english.unica.com.br/> accessed 7 November 2013.
[86] Interview with Celso de Tarso Pereira (n 34).
[87] Ibid.

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.[88] They enabled the industry and the government to *confide* in each other as they provided a *trustable* channel of interaction between the industry associations and the ministries. Moreover, media 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.[89] As a result, successful litigation of the case became very important for the political leadership. Positive outcome of the litigation was exhibited as one of the main achievements of the democratic government during electoral campaigns that were concurrently taking place in the country.[90] This finding reaffirms that media in democratic countries can play an instrumental role in the domestic management of trade disputes.

Finally, the above description usefully outlines a possible composition of PPP arrangements. It can clearly be observed that 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.

3.3 US – Upland Cotton

The *US — Upland Cotton*[91] 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

[88] Shaffer, Badin and Rosenberg, 'Winning at the WTO' (n 41) 67, 80.

[89] '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.

[90] Ibid.

[91] 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.

"upland cotton industry" were inconsistent with the SCM Agreement[92], the Agreement on Agriculture[93], and the GATT 1994[94]. The Panel upheld the challenge. At the stage of appeal, the AB substantially upheld the Panel's findings.[95]

Research indicates that the actual expenditure incurred in the dispute was approximately two million US dollars.[96] 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.[97]

The CGC 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)[98].[99] CGC shared the information (provided by the industry) with the Ministry of Agriculture, and hence it served 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.[100]

The complex nature of the case made it difficult for the government to collect the required factual and financial resources. It therefore reached out to the industry (producers, manufacturers, exporters of 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.[101] The cotton industry at this stage was

[92] 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.
[93] Agreement on Agriculture (12 April 1994) LT/UR/A-1A/2 arts 3.3, 7.1, 8, 9.1, 10.1.
[94] General Agreement on Tariffs and Trade 1994 (15 April 1994) LT/UR/A-1A/3 art III:4.
[95] 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* (Volume 2, Peterson Institute Press 2006) 235.
[96] Calculations based on empirical investigation conducted in Shaffer, Badin and Rosenberg (n 41) 460.
[97] 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.
[98] ABRAPA: About Us <http://www.abrapa.com.br/institucional/Paginas/A-ABRAPA.aspx#quemsomos> accessed 28 October 2013.
[99] Interview with Celso de Tarso Pereira (n 34); 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.].
[100] Pedro de Camargo Neto, Former Deputy Minister in the Ministry of Agriculture [Shaffer, Badin and Rosenberg (n 41) 449].
[101] Ibid, 459.

insufficiently resourced to finance the litigation and to assist the government throughout the case.[102] A government official confirms that 'the cotton industry was fragile and not very organized during these years'[103]. 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.[104] 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.[105]

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.[106] 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.[107] Their working was closely supervised and guided by the government lawyers at CGC.[108]

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.[109] 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 the introductory section, that PPP is a vital requirement for conducting WTO litigations, especially when the complainant or the respondent is a

[102] 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'.]
[103] Interview with Celso de Tarso Pereira (n 34).
[104] '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...'.]
[105] Interview with Celso de Tarso Pereira (n 34).
[106] Ibid.
[107] Ibid, 460; confirmed in interview with Eduardo Chikusa (n 41).
[108] Interview with Eduardo Chikusa (n 41).
[109] Shaffer, Badin and Rosenberg (n 41) 463.

resource-constrained developing country. 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. 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.

It is also 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.[110] Similarly, it may not be possible for economic and technical experts to interpret and incorporate commercial information and analysis into the legal texts.[111] A successful litigation, especially in cases with a complex or technical nature, may therefore require a team consisting of lawyers, economists and subject-specific experts. Collaborative work by different experts ensures that the gaps between legal analysis, economic explanations and commercial evaluation are not left unfilled.

The case also puts into focus a situation where 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.[112]

Finally, the case also confirms that an organized private sector is an essential requirement for the formation of effective PPPs. 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 newly constituted 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. The case indicates that 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. 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.

[110] Interview with Moushami Joshi (n 18).
[111] Interview with an official representative, TEXPROCIL (Mumbai, India, 27 June 2013) [Name withheld].
[112] Interview with Niall Meagher, ACWL (Geneva, Switzerland, 11 April 2013).

3.4 EC - Measures Affecting Soluble Coffee

In *European Communities — Measures Affecting Soluble Coffee*[113], 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.[114]

The industry association partnering the government in this matter was the Brazilian Soluble Coffee Industry Association (ABICS). The cost incurred during the investigation and consultation stage was mainly borne by the coffee industry.[115] 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.[116]

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.[117] 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.[118] 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.'[119]

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[113] *European Communities — Measures Affecting Soluble Coffee*, WT/DS209, in consultations on 12 October 2000.

[114] 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.]

[115] Interview with Celso de Tarso Pereira (n 34).

[116] Shaffer, Badin and Rosenberg (n 41) 491.

[117] 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.

[118] Osava (n 117).

[119] Ibid.

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 its coffee industry in a situation where the EU's protectionist policies were also injuring the interests of its other industrial sectors.[120] 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.

The present dispute 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.[121] 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.[122] Such regulatory problems can especially emerge in countries which have high levels of corruption and poor observance of 'rule of law'.

Dispute settlement partnerships can 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.[123] 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.[124] 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.[125] This is a potential limitation 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.

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[120] Ibid.

[121] A Brazilian government representative referred to this as the problem of 'clashing interests' between private and public sectors. {Interview with Government Representative, Brazil [Name and details withheld]}.

[122] 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.]

[123] Gene Grossman and Elhanan Helpman, 'Protection for Sale' (1994) 84(4) The American Economic Review 833.

[124] Grossman and Helpman, *Special Interest Politics* (n 23) 241.

[125] Deshman (n 122) [The article demonstrates a situation of corporate regulatory capture with the help of a case study of World Health Organization.]

4. BRAZILIAN PUBLIC PRIVATE PARTNERSHIP: FURTHER ANALYSIS

4.1 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.[126] A government official confirms that 'it has been possible to adjust and revise our approach and financing procedures with every case we have conducted'.[127]

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. In other words, the Brazilian PPP is institutionalised, but unlike the EU's TBR Mechanism, it is 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.[128]

It is *dynamic* as the procedures have gradually evolved according to the changing domestic conditions and the nature of disputes litigated and defended by the government. Different strategies of dispute settlement and PPPs have evolved at different times. Some of these 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 privately-hired counsels in WTO hearings, creation of specialised and dedicated institutions and procedures, and development of domestic legal expertise through the provision of internships and training. These features have facilitated *effective* exchange between the government and industries,

[126] Interview with Celso de Tarso Pereira (n 34).
[127] Ibid; Interview with Eduardo Chikusa (n 41).
[128] Ibid; Veiga (n 43) 178.

and hence, they have played a capacity-building role. These developments and strategies can therefore be considered by other developing countries which are seeking to establish such flexible, ad-hoc 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.[129] 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.[130] 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, an inter-ministerial institution established for the management of foreign trade concerns, 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.

Brazil's WTO participation is further strengthened with the help of its wealthy and large industries such as oil and aircraft, as large entrepreneurs with significant trading stakes can better participate in the management of disputes. 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 also strengthened the dispute settlement capacity of Brazil. One of the most widely proposed reasons for Brazil's success at WTO DSM is its "organised private sector", which is a vital requirement for the establishment and smooth functioning of the proposed partnership.[131]

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[129] Shaffer, Badin and Rosenberg (n 41) 404.

[130] Ibid.

[131] 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

The significance of an organised private sector is two-fold. *First*, it facilitates an industry to represent a wide economic 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.[132] 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 due to limited financial resources, political influence and commercial stakes.[133]

The wealthy businesses, even in the absence of an industry representative, may still be able to assist the government with the required financial and evidential resources. However, 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.[134] 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.

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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.

[132] Grossman and Helpman, *Special Interest Politics* (n 23). ['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…']

[133] Bohanes and Garza (n 12) 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.']

[134] 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]}.

4.2 Regulatory Threat: A Possible Shortcoming

Dispute settlement partnerships have frequently been formed between the government and different industry sectors in Brazil and these partnerships have often enabled their 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.[135] However, the partnership has not been 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.[136] 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.[137]

These observations lead to a possible inference that PPP arrangements can generally 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 formation of dispute settlement partnership may lead to a situation of *discrimination* between the '*haves*' and the '*have-nots'* industries in Brazil. This is a potential limitation of PPP approach. However, it is beyond the scope of this investigation to suggest strategies for engaging those 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 can be explored by future researchers.

These observations, along with above-mentioned regulatory concerns, point to the fact that the formation of PPPs without a regulatory framework may result in a discriminatory and broadly jeopardizing protection of special economic interests. More so, amidst the stark wealth inequality in Brazil, its PPP arrangement can fall short of granting an equal *right of*

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[135] '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' (*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.

[136] Interview with Government Representative, Brazil [Name and details withheld].

[137] 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.

access to all economic sectors because the treatment of "rule of law" remains 'tilted' in favour of wealthy and politically influential businesses in Brazil.[138] Hence, it is important for a partnership arrangement 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. 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. 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.

The starting point of devising regulatory provisions could be the study and examination of existing regulatory practices which certain Member States have followed. For example, the US and the EU have introduced certain initiatives to regulate their WTO dispute settlement partnership operations. The US Department of Commerce pursues the practice of "calling for comments" and holding "public hearings" with the stakeholders, interested persons and the public at large with respect to foreign trade issues and dispute settlement.[139] As part of its transparency commitments, it also publishes its determinations concerning petitions filed by the private sector, along with the 'description of facts on which such determination is based'.[140] 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.[141] The Commission also regularly publishes its determinations, statement of reasons, dispute settlement updates, status and progress reports and briefs filed at WTO.[142]

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[138] Pio (n 36) 4.

[139] 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 US Trade Act 1974, ss 305 (b) (1) (A), 302 (a) (4), 306 (c) (2). {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}

[140] US Trade Act 1974, s 301 (d) (3) (c) (iii).

[141] 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'. (For full citation, see n 49).

[142] See Council Regulation, arts 8(1) (a) and 12. (For full citation, see n 49).

Brazil has also realised the emerging need to deal with potential regulatory challenges, and this is evident from several transparency provisions and practices the government has employed. For instance, it has employed the practice of seeking public opinion on proposed trade policies, bilateral negotiations, trade disputes and resolutions.[143] Besides that, the Brazilian Ministry of Commerce has published 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 the Ministry of Commerce appoints representatives from civil societies and social service agencies to its various governmental committees including the Management Executive Committee (GECEX).[144] These provisions have, to some extent, enhanced transparency in the Brazilian management of trade disputes.[145] Developing countries with similar domestic circumstances (such as the levels of corruption and the state of "rule of law") should consider the proposed PPP approach in light of these regulatory concerns and the discussed transparency-enhancing practices that can regulate such partnerships.

4.3 Formal versus Informal PPP Arrangements

Dispute settlement partnerships could either be formal or informal in nature. Formal partnerships are those where private entities are granted a right to approach their government if and when their trade interests are infringed by a foreign practice. Correspondingly, the government has an obligation to administer and examine the concerns and complaints received from the private entities. For instance, the US has a formal PPP mechanism that provides a right to its private stakeholders to petition the United States Trade Representative (USTR) if their trade interests are infringed.[146] On the other hand, partnership arrangements that are formed without such formal rights and obligations, through casual exchange between government and industry, are considered as informal partnership arrangements. When examined in accordance with this typology, the Brazilian partnership approach is largely informal. This informal and flexible arrangement of PPP in Brazil has worked well in various WTO cases. Nevertheless, the Brazilian government is discussing the potential benefits and viability of introducing a formal system of PPP.[147] The question of whether a formal mechanism of PPP (similar to the one in the US) will be more effective than the present informal means of PPP is difficult to answer. A government official has observed the following:

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[143] 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.

[144] 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.

[145] Pio (n 36).

[146] Section 301 procedure (Sections 301-310, Trade Act of 1974). For full citation, see n 139 .

[147] Interview with Eduardo Chikusa (n 41).

> [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.[148]

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. This observation is 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 Brasilia, to which they are often very responsive.'[149]

On the other hand, there are clear advantages of a formal PPP arrangement. A formal mechanism can empower industries.[150] The mechanism can provide a right for private stakeholders to approach its government if and when its trade interests are infringed by a foreign practice.[151] Such a right can become particularly useful for industries which otherwise lack 'political or financial traction to attract the attention of their national government'.[152] A formal mechanism can help such industries secure a share of their government's resources for resolving their market access problems. Moreover, a formal partnership, similar to the US's Section 301 mechanism[153] and the EU's TBR mechanism[154], can provide for well-defined procedures of coordination and management of foreign trade disputes. Robustly defined unambiguous procedures are advantageous for encouraging and guiding private-public solicitation and resource exchange in a transparent, predictable and well-established manner.

The above arguments and counterarguments demonstrate that it is very difficult to provide a definite answer to the dilemma of whether Brazil should follow the footsteps of the US and the EU by establishing a formal PPP mechanism for the future management of trade

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[148] Ibid.
[149] Interview with Private Sector Representative (28 October 2013) [Name and details withheld].
[150] Interview with a trade lawyer (26 June 2016) [Name and details withheld]
[151] Debra Johnson and Colin Turner, *European Business: Policy Challenges for the New Commercial Environment* (Taylor & Francis 1998) 319.
[152] Interview with a trade lawyer (26 June 2016) [Name and details withheld]
[153] See n 139.
[154] See n 49.

disputes. It is also difficult to address the highly contentious issue of whether a formal PPP system is more effective than an informal system of coordination. However, solving this dilemma, which can potentially be a promising area for future scholarship, is beyond the scope of this research.

5. CONCLUDING REMARKS

The present investigation has explored the possibilities of engaging the private sector in the intergovernmental process of WTO dispute management, the elements required for government-industry coordination, and the reforms that will be required, particularly in developing countries, for ensuring the predictability of rules or procedures governing the reciprocal exchange of resources. The challenges confronting PPP approach and the suggested proposals discussed in the previous sections have outlined 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.

The Brazilian PPP experience should prompt other developing countries to seriously consider establishing effective procedures of PPP for the enforcement of international trade rights. The argument here is based on the premise that the research findings have confirmed the capacity-building potential of dispute settlement partnership approach. However, a similar strategy for dispute settlement cannot as such 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. Hence, this article in no manner suggests that the above-mentioned features of PPP mechanism or a common procedure of interaction can produce similarly positive results in all developing countries. Multiple domestic conditions, including the nature of political governance, structure of economy, political circumstances, policies and social values, and bureaucratic frameworks in a country can shape and influence the functioning and effectiveness of PPP strategies, and hence, a common mechanism cannot be viable or beneficial to all. However, the strategies and features of PPP mechanism identified and analysed in this article can be examined by other developing countries in accordance with their individual circumstances and requirements.

It is essential for developing countries to devise a clear roadmap of how to enhance their WTO dispute settlement capacity. It is also important that specific provisions and procedures are devised for the handling of disputes and formation of partnerships. 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, regulatory or an

institutional framework, as long as the procedures of partnership and dispute management are robustly defined to enhance the transparency and predictability of rules.

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 above findings and discussions provide an illustration of *how* developing countries can engage private stakeholders for the utilization of DSU provisions and *how* they can enhance their dispute settlement capacities with the help of such domestic, ad-hoc and dynamic partnerships. In other words, the study provides 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. Developing countries can "learn lessons" by peer reviewing the dispute settlement partnership experience of Brazil. They can observe how Brazil has gradually overcome the problems, at least to some extent, which they face today at WTO DSU.