AN ADVISORY CENTER ON WTO LAW FOR MERCOSUR MEMBERS:

BRIDGING DISPARITIES THROUGH COLLECTIVE ACTION

by Roberto Di Sena Junior*

SUMMARY:

The literature generally recognizes that the WTO's dispute settlement system (DSS) has performed fairly well since its inception. However, despite its overall success, the system is far from being flawless and reforms have been envisaged notably by developing countries, which soon after the closure of the Uruguay Round realized that a more legalized DSS did not come gratuitously.

The rule-based system which took effect in 1995 was hailed by the international community as an important step toward bridging power gaps among Members and providing them with a fairer playing field where law, rather than force, would prevail. The new system did offer increased opportunities for developing countries to address grievances, but it also gave rise to unanticipated hurdles. Notwithstanding the gains in security and predictability, the current DSS is far more complex than the procedures available during the GATT era, requiring thus a sophisticated legal reasoning as well as specialized personnel that is notably scarce in developing and least developed countries.

Important structural changes are being considered under the auspices of the Doha Round, but along with these poor countries should also consider alternatives that could be implemented without other Members' acquiescence. The creation of regional legal clinics on WTO law is one of the alternatives to address domestic institutional deficiencies more cost-effectively and to overcome several constraints usually found by developing countries to access the new WTO DSM. That does not mean that

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they should neglect other reforms, but rather explore all options available in order to avoid that their rights are impaired by the impossibility or inability to bring a claim before the world trade court.

Given that developing countries lack a great deal of trade-related capacity to successfully bring claims at the WTO, and even when they do, litigation costs are frequently prohibitive, one alternative would be the pooling of human and financial resources at the regional level. Through a coordinated action, developing countries could maximize their limited expertise, reduce litigation costs, and make more credible threats under the shadow of a better legal counseling.

Developing countries can resort to other sources to obtain legal advice, but these are far from being satisfactory. The performance of the Advisory Centre on WTO Law (ACWL) in Geneva is extremely positive, nevertheless, its Executive Director holds the final decision on what claims to bring based on the policy of the Centre rather than on the policy of the country involved. The legal advice of the WTO Secretariat is necessarily impartial and provided by a limited staff, which is clearly insufficient to match the needs of the expanding membership of developing countries.

The current article proposes thus the creation of an advisory center on WTO law for the Members of MERCOSUR and further analyzes its technical advantages and political feasibility of this project. However, for the advisory center to be functional and to avoid its use against its own Members, the parties involved would have to reform firstly the current Protocol of Olivos to oblige Members to settle their reciprocal disputes at the regional level.

A regional legal clinic to assist MERCOSUR Members in their claims before the WTO would provide for tailored solutions that take into account regional specificities. Brazil and Argentina, two of the most active developing countries in the DSS, would broaden their technical expertise by sharing their experiences with one another and assisting Paraguay and Uruguay in their disputes. Moreover, a joint center would provide for the scales to reduce the threshold at which litigation becomes worthwhile and expand the overall participation of the involving countries.

Comment les pays en voie de développement peuvent-ils surmonter les défis d'accès au mécanisme de règlement de différends de l'Organisation mondiale du commerce (OMC) apportés par l'introduction d'un système notamment juridicisé, marqué par l'interprétation stricte des traités et l'existence d'une jurisprudence complexe et grandissante? Mis à part les changements négociés dans le contexte du « Programme de Doha », les pays en voie de développement doivent chercher des solutions originales à eux, telles que la création de centres régionaux sur le droit de l'OMC. Le présent article propose et analyse la mise sur pied d'un tel centre consultatif pour les pays du MERCOSUR afin

de faciliter leur participation dans le système commercial multilatéral et accroître les gains qu'ils peuvent en tirer du commerce international.

Introduction

The creation of the World Trade Organization (WTO) was accompanied by the promise of enhancing security and predictability in international trade relations, notably due to the establishment of a new dispute settlement mechanism where third parties were given the authority to make decisions based on law. The WTO was conceived as a rule-based organization to mirror the new international community that emerged with the downfall of the Berlin Wall, an international community no longer divided by ideology but united under the auspices of international law.

Law was supposed to deliver equal rights and equal opportunities in a changing world, based on the premises of sovereign equality and the peaceful settlement of international disputes. These circumstances strengthened the trend known as "legalization" that emerged at the end of the World War II and which foresaw the expansion of international law and the multiplication of international tribunals as paving the way to a new era of peace and prosperity. The idea was that law could change the fundamentals of international politics that would be otherwise marked by the quest for power and dominance over the others.

With the creation of the WTO, the literature announced the triumph of law over power in trade relations, particularly because the GATT dispute settlement mechanism (DSM) was replaced by a new court-like procedure in which third parties were given the authority to make strictly legal decisions and interpret treaties according to the general principles of international law. The new DSM was heralded as an important tool to leverage power disparities between rich and poor countries and was notably welcomed by developing countries, which were therefore at least initially optimistic that the WTO's dispute settlement provisions would be more successful than the GATT predecessor in responding to their needs. However, as with sovereign equality in international law, the equality of the Members in the WTO is more akin to myth than to reality and the costs of legalization seem to have been clearly underestimated by developing countries.

The benefits of legalization in general and especially in international trade relations are subject to a fierce debate, but the movement does seem to have positive consequences for weaker countries. Nevertheless, as in most situations, it does not come without important costs associated to the shift from a diplomatic to a rule-based DSM. High procedural costs and a growing complex jurisprudence may curtail the benefits accruing to developing countries from legalization, given that they are usually lacking both qualified human resources to play in this new technical forum and the scale to make investment in capacity building individually.

One of the options to help developing countries overcome their structural lack of expertise and scale to invest in capacity building programs oriented to their specificities would be the creation of regional legal clinics. This is an option for many developing countries in different regions, but for the sake of economy, the present article will specifically consider the technical advantages and political feasibility of establishing a center on WTO law for MERCOSUR Members, a free-trade agreement signed in 1991 by Brazil, Argentina, Uruguay and Paraguay. We argue that a legal clinic on WTO law for MERCOSUR Members would contribute to alleviate the most frequent hurdles faced by them in accessing the WTO DSM and would improve the overall participation of these countries in the system. This article is divided in three major sections: firstly we analyze the phenomenon of legalization in the world trade system and its related costs with emphasis on the costs to developing countries; in the second part we consider some possible reforms of the DSM that could render it more development-friendly; finally, we investigate the possibility of creating an advisory center on WTO law for the Members of MERCOSUR, a preferential trade agreement that comprises four South-American countries. The article concludes with its final remarks.

I- Legalization and its costs

a- **The move from GATT to the WTO**:

After the end of the Cold War, not only had the whole perception of international relations changed, but the world seemed to be finally ready to give a major step toward the institutionalization of trade relations. Multilateralism was the keyword at the late 1980s and as the negotiations of the Uruguay Round evolved, consensus emerged that reforming the existing GATT 1947 would be insufficient to cope with the new demands of the international community for greater security and predictability. As trade became more complex and important to both public and private actors, the international community recognized that depriving it of a proper legal framework would leave leeway for restrictive unilateral measures that would most likely impair its expected benefits. It was to combat the threat of unilateralism and the possible resort to "beggar-thy-neighbor" policies that the WTO was established, completing the Bretton Woods institutions conceived in the aftermath of the World War II.

With the end of the Uruguay Round and the creation of the WTO, the world experienced an important change in the approach to the regulation of international trade. The provisional system introduced in 1947 by the Protocol of Provisional Application of the GATT was finally replaced by a formal international organization mandated to oversee the compliance with trade rules and facilitate the negotiation of new norms through the establishment of a permanent forum. The scope of the WTO

is therefore considerably broader than that of the GATT 1947 and its multiple treaties. The texts, amounting to approximately 27,000 pages, equip the international community with more accurate rules about emerging issues such as intellectual property rights, trade in services, trade-related investment measures, dispute settlement and many others.

The birth of the WTO was also accompanied by an important change in the way disputes were settled: the positive consensus rule was reversed and the litigation process became more rules-based. These two major changes are told to have rendered the system more predictable and less susceptible to power politics, since disputes were now required to be based on a strict legal rationale deriving from the interpretation of treaties and subjected to the assessment of a standing Appellate Body mandated to appraise the legal interpretations developed by Panels.

During the old GATT, whenever a Contracting Party was found in breach of their obligations, a panel of experts could be created to examine it. The adoption of its report, however, relied on a positive consensus of all parties, which means that even the losing country was able to block its adoption and bring the whole process to a stall. The intentionally odd design of the GATT DSM can be explained by the fact that the treaty was a negotiating scheme with no legal international personality and did not say much about disputes or how to settle them. At the GATT, Contracting Parties had to rely on two vague articles: on the one hand, art. XXII disciplined the consultation process, which was not mandatory, had no established delays and loosely asked Contracting Parties to defer "sympathetic consideration" to others' requests; on the other hand, art. XXII asked for written representations or proposals in the event of unsuccessful consultations and, as a last resort, authorized the suspension of concessions (which was granted only once, but never applied during the GATT era).[1]

The main criticism of the GATT DSM were notably the following: a- it was inappropriate and ill-conceived because it stressed judicial solutions to problems that were really resolvable only through negotiations; b- it had become irrelevant because it was not used, except occasionally by the United States, and it was impractical to expand its usage; c- it was inefficient because of long delays; and d- it was ineffective because of its inability to ensure implementation of its decisions.[2]

The GATT DSM operated mainly on political grounds and despite the existence of third-party rulings, the autonomy of Panels was considerably reduced. Additionally, in the context of trade disputes,

[1] The case involved the United States and The Netherlands and despite sanctions had been authorized, they were never applied (The Netherlands – Income tax, BISD 23S/137 and 28S/114). On this subject and in a clearly ironic tone, Young says that "allegedly offending countries do not often find it in their interest to authorize retaliation against themselves" (**Dispute resolution in the Uruguay round: lawyers triumph over diplomats**, p. 392).
[2] Davey, **Dispute settlement in GATT**, p. 65.

the relative weight of the country in the international arena played an important role as to whether the demand would be analyzed or simply blocked. This feature was notably seen as a handicap by developing countries, but it also affected developed ones as well. The United States was particularly reproachful of the way things evolved, because although it was able to block unfavorable Panels, other countries could likewise do the same.

In spite of its many flaws, the overall assessment of the literature is that the GATT DSM performed fairly well and did manage to settle important cases.[3] It was only during the Uruguay Round, when countries started using disputes as a bargain chip to advance negotiations in other fields, that countries focused on the reform of the DSM.[4] The reformist movement was led by the United States, which was one of the first countries to raise the issue and propose the replacement of this free-for-all by a stable dispute resolution system that could be relied on to eliminate protectionist trade rules. It was subsequently joined by several developing countries that wanted to reform the existing system in order to render it more accurate and reliable, given that the loose discipline of the DSM was said to disadvantage weaker countries that could not impose their will through other means.

Despite the initial resistance of the European Communities and Japan, the position of the United States prevailed and, at the end of the Uruguay Round parties conceded to a highly sophisticated rule-based trade tribunal, marked by the existence of two instances and the adoption of the negative consensus rule, which means that henceforth a decision would be adopted unless all Members refuse it (a rather odd situation, since the complaining party should itself vote against the adoption of the Panel's report). With the new DSM, there was a major step toward the judicialization of the trade regime, which implied the replacement of the essentially diplomatic dispute settlement procedures, based on political bargaining between the disputing parties themselves, by a court-like mechanism in which third parties were given an autonomous authority to settle disputes by making decisions based on law.

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[3] Jackson remarks that "it is fair to say that this mechanism [the GATT DSM] was quite successful. It was also flawed, due in part to the troubled beginnings of GATT. Yet these procedures worked better than expected, and arguably better than those of most international dispute procedures" (**Sovereignty, the WTO and changing fundamentals of international law**, p. 137). See also Hudec, **The new WTO dispute settlement procedure: an overview of the first three years**, p. 8; Davey, **Dispute settlement in GATT**, p. 53; and Lim, **Law and diplomacy in world trade disputes**, p. 440.

[4] According to the data mentioned by Alter, "the GATT system resolved 53 disputes between 1948 and 1959; it was used successfully only 7 times in the 1960s, and 32 times in the 1970s. In the 1980s, countries significantly increased their use of the GATT dispute resolution system; but, as the number of cases rose, blocking of panels became a significant problem" (**Resolving or exacerbating disputes? The WTO's new dispute resolution system**, p. 784).

The new system is based on a detailed treaty, known as the "Understanding on Rules and Procedures Governing the Settlement of Disputes" (DSU), which has precise rules and deadlines concerning the functioning of Panels and the Appellate Body (AB).[5] It also reversed the positive consensus rule, granting Members the automatic right to a Panel, since its creation could no longer be blocked by resilient defendants.[6] The complex two-tier system was expected to deliver more security and predictability and to leverage power disparities between developed and developing countries. It has been characterized as the "jewel in the crown"[7] of the new post-Cold War trade regime and many developing countries believed they were better served by the reforms due to the promises of procedural transparency and unbiased decisions. The literature remarks that:

> Developing countries, which had long sought to level the GATT playing field with the larger industrial democracies, swung over to the legalist position. These countries gave their support to the proposal for strengthening the role of dispute resolution processes within the GATT structure because they thought a stronger dispute system would give them additional leverage in negotiating with wealthier states over protectionist laws that limited their ability to export to these states.[8]

The DSM that came along with the WTO represented a major change in the settlement of international trade disputes. According to Côté, the advantages of a more judicialized approach to trade dispute settlement can be classified into four areas: 1- it creates a common leverage among Members; 2- it contributes to the transparency of the dispute settlement mechanism; 3- it improves the predictability of national trade policies; and 4- it alleviates states from domestic pressure for the adoption of protectionist policies.[9] However, even if the new dispute mechanism represented an important step toward the leveling of asymmetries between developed and developing countries, it did not render the system flawless.

The higher level of legalization proved to be a double-edged sword and developing countries soon realized that the benefits accruing to them from a more rules-based DSM did not come without costs. The new DSM entails higher litigation expenses and requires a level of institutional capacity that is generally scarce or inexistent in most developing countries. As a scholar once stated, "countries with the

[5] See Appendix 3 of the DSU for proposed timetable for Panel work.

[6] See DSU, art. 2.4 and the footnote explaining the "consensus rule", where it reads: "The DSB shall be deemed to have decided by consensus on a matter submitted for its consideration, if no Member, present at the meeting of the DSB when the decision is taken, formally objects to the proposed decision". The DSU refers to a consensual decision on the establishment of Panels (art. 6.1), adoption of Panel reports (art. 16.4), adoption of Appellate Body reports (art. 17.14), and authorization for compensation and suspension of concessions (art. 22.6 and 22.7).

[7] Steger, **Peace through trade: building the WTO**, p. 17.

[8] Shell, **Trade legalism and international relations theory: an analysis of the World Trade Organization**, p. 848.

[9] Côté, **La participation des personnes privées au règlement des différends internationaux économiques**, p. 82.

bureaucratic and administrative capacity to follow the elaborate procedures reap the benefits of increased legalization. For countries without such capacity—smaller, poorer, developing countries— the potential benefits of legalization are offset by their difficulty in following the procedures".[10] Therefore, even if the reforms implemented during the Uruguay Round successfully rendered the DSM more predictable and reliable, as proclaimed in DSU art. 3.2,[11] the costs associated to these changes are not negligible and created a new hardship for some Members to access it.

b- **The costs of legalization**:

The conventional wisdom is that a more legalistic, rule-based DSM would be more likely to safeguard the interests of member governments with little bargaining leverage, since legal means are supposed to protect weaker actors against power-politics and unjustified claims by stronger actors.[12] This view was endorsed by the Brazilian Ministry of Foreign Affairs who once said that the strengthening of rules, including those concerning the settlement of disputes, has provided the world trading system with greater predictability and has brought benefits to all parties.[13] Nevertheless, despite the gains brought by legalization, some of its costs were not anticipated by developing countries at the Uruguay Round and soon turned into frustration, when they started to face problems in accessing the system and following procedures.

While changes in the DSM were hailed by developing countries, they underestimated the challenge imposed by a more legalized system, which relies on a high level of legal expertise that cannot be created overnight. This is an extremely sensitive problem for developing countries because they cannot easily mobilize qualified human resources to deal with such technical matters and when they can, the number of officials they normally deploy is gravely insufficient to follow all the procedures. As Mosoti remarks:

> The DS [dispute settlement] is complicated and expensive. Developing country Members need time to continually train domestic lawyers in the WTO disciplines and the practice of dispute settlement, to a level that would be equal or comparable to the legal skills at the easy disposal of developed Members. The participation of developing and least developed Members in the DS has been minimal due to the lack of adequate and skilled

[10] Kim, **Costly procedures: divergent effects of legalization in the GATT/WTO dispute settlement procedures**, p. 658.
[11] DSU, art. 3.2 mentions that "the dispute settlement system of the WTO is a central element in providing security and predictability to the multilateral trading system. The Members recognize that it serves to preserve the rights and obligations of Members under the covered agreements, and to clarify the existing provisions of those agreements in accordance with customary rules of interpretation of public international law".
[12] Petersmann, **Alternative dispute resolution: lessons for the WTO?**, p. 29.
[13] Amorim, **The WTO from a perspective of a developing country**, p. 96.

> trade lawyers. Any little success they have had in the DS has been severely constrained and ultimately at a heavy cost, adversely straining their scarce resources.[14]

The shortage of both financial resources and personnel is sometimes so blatant that countries chose to coordinate their participation in Geneva-based international organizations (including the WTO) from a different European capital or even from a Ministry at home. These are evidently second-best options, given that most important decisions are made in Geneva, sometimes far from the spotlight of formal meetings. The following table from Nordström depicts how uneven resources are distributed in Geneva[15], and although based on the data of 2003, it visibly shows that many poor countries can barely afford a representation in the headquarter city of the WTO and to participate actively within the organization.

TABLE 1 – REPRESENTATION IN GENEVA

Category	WTO mission (%)	Joint mission (%)	Non-resident (%)	Average number of delegates
Developed	80,0	20,0	0,0	10,6
Developing	28,1	58,4	13,5	5,5
Least developing	6,7	60,0	33,5	3,7

Source: Nordström, **Participation of developing countries in the WTO**, p. 11.

Footer summarizes the structural disadvantage of developing countries mentioning that:

> Many developing countries perceive the system to be weighed against them due to the costs of bringing complaints, or defending actions from other Members, the weakness of available remedies and the limited observance of special and differential treatment provisions in disputes involving developing country Members. One perception is that the most frequent users of the dispute settlement system, the Quad Group, have extensive human and financial resources on which to draw in bringing and defending complaints. They can draw on good legal talent in government (and occasionally from private law firms), they are well briefed by export interest groups and their commercial and diplomatic representation is global, allowing for extensive contacts within and outside the Geneva circuit. By contrast many developing country Members and LDCs, particularly those in sub-Saharan Africa are operating at the margins, or not at all when it comes to WTO participation.[16]

Given the lack of qualified personnel to deal with a complex range of treaties and an ever growing jurisprudence, one option for those who can afford it is to pay for foreign counseling whenever the complexity of the situation requires it. This is however an unsustainable situation in the long run, given that fees of specialized law firms can range from US $300/h to $800/h or more, a prohibitively

[14] Mosoti, **Does Africa need the WTO dispute settlement system?**, p. 79.

[15] Nordström, **Participation of developing countries in the WTO**, p. 11.

[16] Footer, **Developing country practice in the matter of WTO dispute settlement**, p. 88.

high cost for most developing countries and especially for those whose population struggles below the poverty line. To justify such investment, the country in question should be certain that the benefits generated by the removal of the trade barrier would supersede the procedural costs involved, which is not always the case for small countries that have a discreet participation in the international trade. This might lead to the situation where the WTO Member choose to bear an unlawful measure not due to the absence of legal mechanisms to reverse it, but rather due to the high costs entailed by institutional procedures themselves.[17]

The current WTO DSM evidences a clear option to adjudication and even if the resort to alternate dispute settlement procedures is not formally forbidden,[18] they are often seen as second-best alternatives. The problem with the third-party ruling, however, is that it usually requires a high level of legal expertise to present the case before the court (or in the case of the WTO, before the panelists) and develop arguments on a strictly legal basis, which might represent an extra challenge for developing countries, especially the poorest among them, not necessarily familiar with the technicalities of international pleas.

If paying high fees for foreign lawyers is not the best alternative, the training of national officials is not necessarily easier if developing countries wish to present their claims with a minimum chance of success. The academic and professional training of domestic officials in WTO-related issues is time and resource consuming, since expertise is not created overnight. Developing countries also face the menace of investing in the training of someone that might, eventually, end up working for a private law firm (national or foreign) or an international organization, attracted by a better pay check.

The lack of domestic institutional capacity is a problem that affects almost every developing country, even large ones such as Brazil, Argentina, India and South Africa. In spite of the fact that many of them have participated on a regular basis in trade negotiations since the Havana Conference of 1947, they still resort to foreign law firms, notably from the United States and Europe, to help them manage a complex set of rules and a growing jurisprudence.[19] Still, these countries have a well-developed private

[17] Shaffer mentions that "because of capacity constraints, many developing countries are less able to advance their interests in WTO negotiations, before WTO committees, and in dispute settlement as effectively. Not surprisingly, they face considerable trade barriers for the product markets of greatest importance to their economies, which developed countries label as "sensitive" (**Can WTO Technical Assistance and Capacity Building Serve Developing Countries?**, p. 6).

[18] Good offices, conciliation and mediation are allowed under DSU, art. 5 and arbitration for certain disputes that concern issues that are clearly defined by both parties is disciplined by DSU, art. 25.

[19] The Brazilian Ministry of Foreign Relations tends to privilege international law firms based in Brussels, Geneva and Washington to cushion their demands before the WTO DSB. This policy has already caused consternation at

sector and broad economic interests to justify, for instance, a trade battle over a topic such as agriculture or intellectual property rights.

To give an idea of the increase in the complexity of the jurisprudence that should be mastered by countries that wish to successfully resort to the DSM, Shaffer informs that the length of decisions skyrocketed with the creation of the WTO, passing from an average of a dozen pages to a range of 100-500 pages.[20] Evidently, costs of litigation naturally followed the complexity of disputes, burdening even more those countries that lack institutional and financial capacity to present their cases in court. The length of procedures also increased in the WTO and the deadline of six months and sixty days for the Panels and the Appellate Body respectively are rarely obeyed. This entails additional costs to all parties involved, creating imbalances for developing countries when they assess the cost-benefit ratio of bringing a dispute before the DSM.

Another problem that affects developing countries is that even when they want to provide training for local lawyers and public officials, they would have a hard time justifying a costly investment in somebody likely to deal with one case or less per year. As Shaffer says, "training internal counsel entails a significant long-term allocation of resources which is not cost-effective if a country is not an active player in the litigation system".[21] This situation is caused by the fact that developing countries account for a small share of international trade, which naturally reduces the likelihood of a dispute and, on the other hand, increases the proportional burden of capacity building programs. Therefore, given their lack of scale, most developing countries are unable to mobilize legal resources cost-effectively and to reap the advantages of a more legalized DSM.

In fact, given that a more legalized DSM is more resource-intensive in its demand, developing countries can actually be worse off under the current system than in the previous one. Overcoming this problem should be a high-priority topic for developing countries, but as mentioned before, some of the hardships, such as the lack of scale to bring claims and to train national counsels, are not easily tackled individually. In this case, there are two possible solutions: 1) promoting institutional reforms in order to render the DSM less costly and therefore more accessible to poor countries; and 2) creating mechanisms

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the national level, as reports the Globo, in a publication of August, 03, 2007 (**AGU trava disputa com Itamaraty no exterior,** http://www.mre.gov.br/portugues/noticiario/nacional/selecao_detalhe3.asp?ID_RESENHA=362636).

[20] Shaffer, **Weaknesses and proposed improvements to the WTO dispute settlement system: an economic and market-oriented view**, p. 2. Barral mentions that the Brazilian government developed, in partnership with private law firms, a successful three-month internship program to train young lawyers in WTO-related issues, an example that could be certainly be emulated by other countries (**The Brazilian experience in dispute settlement**, p. 15-16).

[21] Shaffer, **How to make the WTO dispute settlement system work for developing countries**, p. 17.

to pool resources among developing countries and make their threats more credible. In the following sections, we discuss both options.

II- Current policies and prospective reforms

a- **Technical assistance and capacity building**:

In order to help developing countries to address the problem of increased costs of litigation and enhance the legitimacy of the new trade regime, the WTO created several technical assistance and capacity building programs. However, one limitation that has been recurrently pointed out by developing countries is that these programs are donor-driven and do not take into account the special needs of the countries involved. Capacity building programs focus mostly on teaching developing countries how to comply with existing rules and not how to interpret them to their advantage or to explore possible treaty flaws.

Despite the existence of a division charged with coordinating capacity building programs in the WTO, its formal attachment to the Secretariat forces it to be impartial, which of course is not in the best interests of developing countries. If developing countries want to better integrate into the new DSM, the information they need is how to identify others' policies that are in breach of WTO obligations and not how to blindly comply with them. The Marrakesh Treaty was signed almost fifteen years ago and even poor countries now understand and manage fairly well the fundamentals of the world trading system. The challenge is not the domestic application of trade rules, but rather how to use them to reverse bad practices in countries that persist in adopting protectionist policies. That is why even if the existence of capacity building programs is welcomed by developed countries, its focus leaves much room for discussion about its true utility.

Apart from training programs for public officials from developing countries, the WTO Secretariat also provides free legal consultancy. The problem in this case is two-folded: on one hand the quantity of lawyers made available by the Secretariat is far below the demand, and on the other hand the problem of impartiality remains objectionable.[22] Normally when seeking legal advice, clients wish the lawyer to deliver you useful information on how to win the dispute and not a lesson about how the WTO treaties should operate in a perfect world. Instead, this is exactly what developing countries get when they resort to the legal consultancy of the Secretariat, which cannot break its vows of impartiality.[23] The

[22] See generally Van der Borght, **The advisory center on WTO law: advancing fairness and equality**, p. 724.

[23] DSU, art. 27.2 establishes that "the Secretariat shall make available a qualified legal expert from the WTO technical cooperation services to any developing country Member which so requests. **This expert shall assist the**

result of this odd combination is a partially-delivered assistance, which gives the impression of addressing the problem but does not actually fix it.[24] This scenario makes Michalopoulos advocate that capacity building programs should be controlled by developing countries, so they can better target their especial needs and incorporate their results. He says that "effective participation in the WTO and representation of developing country interests depends critically on the development of an adequate institutional capacity in the developing countries themselves".[25]

Another initiative to reduce the technical gap between developed and developing countries was the establishment in 2001 of the Advisory Centre on WTO Law (ACWL) in Geneva. Its operations are funded by Members' fees and by an endowment fund created with the donation of developed countries such as Canada, Denmark, Finland, the Netherlands and the United Kingdom. According to the agreement establishing the ACWL, its mandate is to provide legal training, support and advice on WTO law and dispute settlement procedures to developing countries, in particular to the least developed among them, and to countries with economies in transition.[26] Since its establishment in July 2001, the ACWL has prepared over 300 legal opinions, provided support in 25 WTO dispute settlement proceedings and has conducted six-month courses on WTO law every year since 2002.[27]

The ACWL provides legal advice on WTO procedures free of charge for Members and least developed countries on a limited number of hours set by the Management Board. The purpose of the ACWL is to provide services at a reasonable price, offering thus a more affordable alternative to private law offices, but litigation activities – as applicants, respondents or third parties in all types of WTO proceedings – are never free. In this case, fees paid by either Members or least developing countries

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developing country Member in a manner ensuring the continued impartiality of the Secretariat" (emphasis added).

[24] Shaffer mentions that "[...] capacity building programs can be controversial. Who defines the purpose of technical assistance and capacity building, and who oversees how funding is used, can shape programs toward different ends. Technical assistance programs can be relatively donor-driven to serve donor-defined interests, or they can be relatively demand-driven to serve interests defined within the recipient countries" (**Can WTO technical assistance and capacity building serve developing countries?**, p. 7).

[25] Michalopoulos, **The participation of developing countries in the WTO**, p. 19.

[26] Art. 2 of the ACWL agreement states the objectives and functions of the Center in the following terms: 1. The purpose of the Centre is to provide legal training, support and advice on WTO law and dispute settlement procedures to developing countries, in particular to the least developed among them, and to countries with economies in transition; 2. To this end, the Centre shall: a- Provide legal advice on WTO law; b- Provide support to parties and third parties in WTO dispute settlement proceedings; c- Train government officials in WTO law through seminars on WTO law and jurisprudence; d- internships and other appropriate means; and e- Perform any other functions assigned to it by the General Assembly.

[27] See ACWL website at www.acwl.ch.

range from US $25 to US $200 per hour according to the economic status of the country. Non-Members can also resort to the legal expertise of the Centre, but in this hypothesis, fees range from US $250 up to US $350 per hour, which in some cases represents only a fraction of what could have been demanded by private counsels.[28]

The literature is very optimistic about the performance of the ACWL, however, one critique that eventually comes out arises from the fact that decisions on whether to proceed with a case or not rely on the policy of the Centre rather than the policy of the country involved, and the developing country wishing to rely on the services of the Centre to bring a case can only do so if the Executive Director decides that the case has legal merit.[29] This might sound reasonable to avoid "*mala fide*" or less meritorious demands, but in the trade world it just reduces the prospects for developing countries to threaten credibly deviant WTO Members.

Before reaching the Panel phase, aggrieved WTO parties must necessarily pass through direct negotiations and only if these are unsuccessful, they are allowed to request the appointment of panelists. Since the right to a Panel has no expiry date, many Members choose not to exert it out of political, economic, or diplomatic considerations and use this possibility as a threat to advance by different means the same or a different topic of their agendas.[30] They keep their right to a Panel as a bargaining chip, always ready to be played in the advent of future disagreements. However, given the policy of the ACWL of filtering complaints to focusing on the most legally sound ones, the Members of the Centre might be deprived of this important card to threat recidivists with full ammunition in the event of a future violation.

After all, as for the Secretariat of the WTO and the ACWL, the so praised principle of impartiality might have unfavorable consequences for developing countries: on the one hand capacity building programs are important and necessary, but if not designed to address the real needs of developing countries, will only serve as a tool to legitimize the existing disparities between rich donor countries and aid-seekers; on the other hand, technical assistance provided by the Secretariat or the ACWL, if not

[28] For the range of fees charged by the ACWL and the differences between developing and least developed countries, as well as members and non-members, see Annex IV of the agreement establishing the Center.

[29] Van der Borght, **The advisory center on WTO law: advancing fairness and equality**, p. 728.

[30] To illustrate with a recent case, in 25 September 2007 Canada asked for consultations with the European Communities due to the prohibition, by The Netherlands and Belgium, of the importation and marketing of seal products within their territories (WT/DS369). Canada argued that the measures were contrary to the GATT and to the TBT, but although consultation had been held without success, Canada never pursued the case to the next phase and never requested the formation of a Panel to settle the case.

conceived in a broader fashion, will not help to level the power asymmetries that so deeply characterize the world trading system.

b- **Reforms under the DDA**:

The Doha Round was launched in 2001 at the fourth WTO Ministerial Conference with the main purpose to enhance the legitimacy of the world trading system by reassessing its mandate in order to cope with the increasing participation of developing countries and their especial needs. The discourse of the 1980s that a freer trade would naturally translates into prosperity and economic development soon proved to be more of a promise than a certainty, and developing countries realized that reforms implemented by the Uruguay Round were double-edged and sometimes far-reaching.

Promises not delivered and a much harder environment to implement trade policies at home contributed to the breakdown of the image that free-trade itself would suffice to bridge disparities between rich and poor and as soon as the WTO was established, claims to reform it came to light. Many of these changes concern the new DSM and should render it more accessible for Members that are in shortage of human and financial capital to claim their rights before the world trade court.

One of the reforms that could render life easier for developing countries is the creation of permanent WTO prosecutor. Currently, Members should pursue their rights on their own and at their expense, launching formal proceedings that start with mandatory bilateral negotiations and eventually end with the decision of the Appellate Body. The whole process is supposed to be fast and rule-based, but many deadlocks might come along the way and postpone the final decision. Additionally, since the interests involved cover millions of dollars, negotiations are hard and decisions extremely detailed. All this increases the costs of litigation, which might be sometimes discouraging for developing countries, especially taking into consideration that implementation of reports remains strictly power-based.

According to developing countries, the introduction of a WTO prosecutor, such as those existing in many United Nations "*ad hoc*" tribunals and in the International Criminal Court, would help alleviate the strain on complaining parties and contribute to the compliance with treaties in general. Since complaints would no longer depend on the capacity of Members to ask for redress, the idea of a prosecutor is mostly welcomed by developing countries and would further contribute to reduce the imbalances created by a more legalized, though costly, DSM.[31]

Mass and collective retaliation are two other reforms warmly welcomed by developing countries in order to raise their power of threat. In the current WTO system, the only Member allowed to suspend

[31] Srinivasan, **The dispute settlement mechanism of the WTO**, p. 1061.

concessions is the main complainant (third-parties excluded). Besides, according to DSU, art. 22.4, "the level of the suspension of concessions or other obligations authorized by the DSB shall be equivalent to the level of the nullification or impairment", meaning that sanctions are never punitive.

At the WTO, sanctions are always limited to the amount of the damage caused by the non-compliant Member and are normally determined by arbitration, a procedure that takes place after suspension of concessions is authorized by the Panel or the Appellate Body. If the defective party does not comply with the recommendations and rulings within the reasonable period of time set forth in DSU, art. 21.3, the aggrieved party may request an arbitration to determine the level of suspension of concessions. Additionally, the way the treaty was crafted encourages the non-compliant Member not to respect the first decision, since the burden to request the arbitration lies on the aggrieved party and no concessions or other obligations can be suspended during the course of the arbitration.[32]

Schwartz and Sykes say that the move from the GATT to the WTO does not seem to have added too much incentive to comply with decisions, since the new system indirectly offers the opportunity for the losing disputant to "buy out" of the violation at a price set by the arbitrator.[33] They argue that by limiting the retaliatory withdrawal of concessions to the equivalent harm caused, the current system seeks to ensure that the price for non-performance under the liability rule is not too high and that a party found to be in violation of its obligations can, if it so chooses, continue to violate them as long as it is willing to pay the price.[34] This situation favors, of course, developed countries, who have better financial conditions to "buy out" their non-compliance by allowing others to retaliate against their exports. The example that most typifies this is the "Bananas case" (WT/DS27), where Ecuador was granted the right to retaliate against the European Communities due to the refusal to change their regime for the importation, distribution, and sale of bananas, which had been found to breach WTO obligations. Given the bilateral trade between Ecuador and the EC and the disparity of the economy of the disputants, the sanctions imposed by the former was much likely to harm its own economy and

[32] DSU, art. 22.6.

[33] Schwartz and Sykes, **The economic structure of renegotiation and dispute resolution in the World Trade Organization**, p. 201.

[34] The position presented by Schwartz and Sykes seems a little too extreme, since the DSU, in several opportunities, reiterates that full compliance is preferable to suspension of concessions and that sanctions should be used as a last resort, if and when all other measures fail (see DSU, art. 3.7 and 22.1). Although the defective Member may be allowed to "buy out" its non-compliance, this seems to be a side effect of the reform of the DSM operated during the Uruguay Round, rather than its driven cause.

population (by raising the price of imported products) rather than to punish the EC for its misconduct.[35] Indeed, for smaller developing countries, retaliation is not an effective instrument because at the end they do not wield to pressure a party into compliance.

Besides the limit for suspension of concessions, there is also the question of "who" has the right to do it. The current system only authorizes main complainants to suspend concessions, which means that third parties are excluded. In order to participate in the DSM procedures as a third-party, a Member has to demonstrate before the Panel that it has a substantial interest in a matter.[36] Nevertheless, its role will be mostly in shaping the WTO's jurisprudence and in surveying the activity of Panels and the Appellate Body. Within the WTO, third-parties are not allowed to impose sanctions on non-compliant Members or appeal a decision.[37] If a Member wants to safeguard its right to eventually impose sanctions against non-compliant Members, it has necessarily to request a Panel of its own, even if the dispute might be eventually referred to the original Panel wherever possible.[38]

In order to empower developing countries, some analysts envisage a reform under the DDA to grant both mass and collective retaliation. The first proposal suggests raising the cap for the suspension of concessions, thus allowing punitive sanctions, whereas the second one advocates that whenever a developing country is in the position of a successful complainant, collective retaliation should be available automatically.[39]

Another possible solution to increase the threat of sanctions imposed by developing countries is to make them retrospective. For the moment, suspension of concessions is based on the damage caused from the moment direct negotiations are requested and are always prospective ("*ex nunc*").[40] This means that if the WTO Member was in breach of its obligations for several months or years before anyone challenged it before the DSB, the damage caused up to the moment where the complaint was filed is not subject to compensation and does not enter in the calculation of the compensation and suspension of concession authorized by DSU, art. 22. Allowing retrospective compensation ("*ex tunc*"),

[35] For further information on the "Bananas case", see O'Connor, **Remedies in the World Trade Organization dispute settlement system – The Bananas and Hormones case**.

[36] DSU, art. 10.2.

[37] DSU, art. 17.4.

[38] DSU, art. 10.4.

[39] Mosoti, **Does Africa need the WTO dispute settlement system?**, p. 82.

[40] On this subject, Steger remarks that "there were some antidumping and countervailing duty cases in the 1980s and 1990s in which the panels had recommended that the duties be paid back, but most of those were contested by the United States and were not adopted" (**Peace through trade: building the WTO**, p. 247).

especially in a situation where a developing country is involved, would increase the amount due by non-compliant parties and certainly raise the burden of non-compliance.

These and many others reforms are advanced by developing countries under the auspices of the Doha Round, such as the creation of permanent panels; a permanent WTO prosecutor, charged with the identification and prosecution of violations; the payment of procedural fees (total or in part) by the losing developed party; and monetary payments to compensate violations. All abovementioned proposals would most likely improve the leverage of developing countries; however, they rely on difficult multilateral negotiations, whose outcome is hard to anticipate, especially in a period where the credibility of the DDA is seriously impaired. In the current context of trade negotiations, where uncertainty reigns and negotiations are barely progressing, developing countries should consider other options to raise their leverage before rich countries and improve their bargaining power within the DSM.

Multilateral action is always preferable and the possible refinements in the DSU would advantage many more countries than those who push for the reforms. Nevertheless, developing countries should not neglect other possible options to tackle the structural deficiencies within the multilateral trading system, especially if they can act on a smaller scale and circumvent the difficult acquiescence of other WTO Members. The creation of regional legal clinics on WTO law is one such possibility that can give more leverage to developing countries without compromising their vows in favor of multilateralism made at their accession to the WTO. The following section analyses this proposition at the level of the MERCOSUR (Common Market of the South), a preferential trade agreement signed in the early 1990s by Argentina, Brazil, Paraguay, and Uruguay.

III- The advisory center on WTO law for MERCOSUR

a- **Technical advantages and political feasibility**:

MERCOSUR was created in 1991 by the Treaty of Asuncion and is a well established trade agreement that comprises two major players in South America: Brazil and Argentina. It envisages the establishment of a common market in the Southern cone and counts several protocols and side agreements on different domains ranging from cultural to criminal cooperation.[41] The complex structure

[41] Arbitration, immigration, drug trafficking, educational integration and acknowledgment of diplomas, consular cooperation, disposal of nuclear material, legal aid and biodiesel are some of the subjects treated by some of MERCOSUR protocols. The bloc also signed framework agreements with different countries (including the USA, India, Morocco, Egypt, Israel, Canada, Singapore, Jordan and Turkey) and other regional blocs (such as the European Communities and the Cooperation Council for the Arab States of the Gulf). For further information, see www.mercosur.int.

of the MERCOSUR[42] and the legal "*acquis*" developed over almost two decades of existence reinforces the credibility of the bloc, which also possesses a two-tier dispute settlement system in place since 2005.

The idea of creating a legal clinic on WTO law is not new and it has already resulted in the establishment of the abovementioned ACWL. Regional clinics, however, can prove to be quite useful, especially if created in the context where regional integration is not a one man project, but rather the result of a sustainable diplomatic effort, as seems to be the case of South America. The advantage of creating a legal clinic is to share the expertise of a multinational team of WTO law specialists and to maximize the use of scarce human and financial resources available in the region by multiplying the number of cases in which a certain lawyer or public official could work at.

As previously mentioned, developing countries, even big and relatively influent ones such as Brazil, Argentina, South Africa and India, struggle to train and maintain in their ranks a good number of professionals able to operate the complex WTO law and jurisprudence. Even the Brazilian diplomacy, for instance, that has participated actively in multilateral trade negotiations since the end of the World War II, sometimes has to resort to private counseling to cushion its claims.

Creating a single joint center on WTO law, on which governments of state parties could rely to constantly scrutinize the trade policy of other Members and charged with supporting them before WTO disputes, would help them share the financial burden and multiplying the expertise by gaining scale. The following table shows the number of complaints filed by each member-country of MERCOSUR and for the bloc as a whole. We also highlighted the most frequently invoked agreements by each one of the four countries listed below:

TABLE 2 – PARTICIPATION OF MERCOSUR MEMBERS IN THE WTO DSS				
	Complainant	**Defendant**	**Third Parties**	**Invoked Agreements**
Argentina	15	16	20	SCM, GATT, ADP
Brazil	24	14	49	SCM, GATT, ADP, TRIPS, TRIMS, Safeguards,

[42] According to the Protocol of Olivos, art. 1, the structure of MERCOSUR comprises the following bodies: I. The Council of the Common Market (CCM); II. The Common Market Group (CMG); III. The MERCOSUR Trade Commission (MTC); IV. The Joint Parliamentary Commission (JPC); V. The Economic-Social Consultative Forum (ESCF); VI. The MERCOSUR Administrative Secretariat (MAS).

				Agriculture
Paraguay	0	0	15	-
Uruguay	1	1	5	GATT
MERCOSUR	40	31	89	-

Source: **WTO**, data from June 2009.

An advisory center on WTO law involving all four MERCOSUR Members and charged with briefing and supporting all of them in procedures would be beneficial in several ways:

- it would provide tailored solutions that take into account regional specificities;
- Brazil and Argentina, two of the most active developing countries in the DSM, would broaden their technical expertise by sharing their experiences with one another and assisting Paraguay and Uruguay in their disputes;
- it would improve the prospects of participation of Paraguay and Uruguay in the DSS, countries that could otherwise be discouraged from bringing claims due to their high associated costs;
- it would improve the expertise of public officials involved in WTO-related matters by multiplying the number of cases in which they would be required to perform (as claimants, defendants or third parties);
- the larger number of claims would probably translate into a wider range of agreements challenged, giving a broader experience for professionals, instead of risking to specialize in a single subject and outsource the others possible claims to private law firms;
- by pooling human and financial capital, all countries involved would be able to mobilize resources more cost-effectively;
- it would also create scales, thus reducing the threshold at which litigation becomes worthwhile;
- the center would also improve the cohesion of MERCOSUR Members, adding a new domain of cooperation to the MERCOSUR; and
- since the "know how" of the center would only be mobilized in a case involving MERCOSUR Members against other WTO Members, it would contribute to the regional settlement of regional disputes by the underused mechanism created by the Protocol of Olivos in 2002 (and entered into force in 2005).

Given their advantages, the fact that such a consultancy center has not been created yet is quite astonishing. However, the fear of sharing classified information of local industries and sharing expertise

with other countries in a domain as sensitive as international trade can be referred as two of the reasons why the project never became into light. Tackling the problem at the regional level, especially within a well-established bloc such as the MERCOSUR, could help alleviating natural suspiciousness that surrounds such an endeavor.

The center could be headquartered in Geneva, where normally most of the personnel of all four countries that deals with WTO disputes reside, and staffed by MERCOSUR nationals. It should be funded by equal contributions from its Members,[43] who would engage in deploying the necessary individuals (diplomats, lawyers, economists and trade analysts) charged with delivering legal advice to governments, briefing them about the dubious trade policies adopted by other WTO Members and supporting them before WTO DSM procedures (in direct negotiations, as claimants, defendants or third parties). The center would, thus, work as a "public law firm" and their functions would be very similar to those performed by the ACWL, with the difference that they would not be impartial and the decision of whether to bring a claim or not would not be subject to a board, but rather to national interests.

The feasibility of the project is reinforced by the strong ties existing in the region (long lasting regional integration, permanent negotiating forum, complex structure encompassing multiples areas, historical and political bonds, etc.) and the prospects of improving the leverage of involved countries in the world trading system, with positive results for all of them. Nevertheless, to advance this project, some obstacles should be lift in order to avoid the expertise of the center to be used in disputes among Members, which would be quite illogical. The following section addresses the changes that should be performed in order to prevent this scenario.

b- **The way to proceed**:

MERCOSUR's dispute settlement system was provisionally established in 1991 by the Treaty of Asuncion, then replaced by the Protocol of Brasilia and last reformed by the Protocol of Olivos. It establishes that "any disputes between the State Parties regarding the interpretation, application or breach of the Treaty of Asuncion, the Protocol of Ouro Preto, the protocols and agreements executed within the framework of the Treaty of Asuncion, the Decisions of the Common Market Council, the Resolutions of the Common Market Group and the Instructions of the MERCOSUR Trade Commission

[43] As for the MERCOSUR's Administrative Secretariat (see Protocol of Ouro Preto, art. 45), the advisory center on WTO law should be funded by equal contributions from all four States Parties.

will be subject to the procedures established in this Protocol".[44] It creates thus the formal mechanism to solve disputes arising out of the interpretation and/or application of the MERCOSUR legal framework.

The Protocol of Olivos came into light after a controversial dispute involving Brazil and Argentina concerning the application of antidumping measures against Brazilian exports of poultry. At first, Brazil resorted to the existing Protocol of Brasilia to solve the problem at the regional level. However, since there was no antidumping agreement in the MERCOSUR, panelists resorted to the one available at the WTO, but interpreted it in a manner apparently contrary to the WTO jurisprudence. After an unfavorable decision rendered by MERCOSUR panelists, the Brazilian government started a new procedure before the WTO, creating an embarrassing situation for the bloc and for itself. The decision was reversed, but it triggered the reform of the system to prevent similar events.

The problem is that the Protocol of Olivos does not make compulsory the jurisdiction of MERCOSUR, but rather allows their Members to choose between the regional DSM and other DSM that the aggrieved party might eventually be part of, such as the WTO. The Protocol of Olivos states that "disputes falling within the scope of application of this Protocol that may also be referred to the dispute settlement system of the World Trade Organization or other preferential trade systems that the MERCOSUR State Parties may have entered into, may be referred to one forum or the other, as decided by the requesting party". It goes on saying, however, that "once a dispute settlement procedure pursuant to the preceding paragraph has begun, none of the parties may request the use of the mechanisms established in the other fora".[45]

To make the creation of a center on WTO law among MERCOSUR Members feasible, firstly the possibility of bringing claims amongst Members should be cast out. Allowing a MERCOSUR Member to bring a claim before the WTO against another would make the utility of the center questionable, since its expertise could not be used in such cases. It would imply a duplication of efforts which is absolutely irrational, especially in a scenario of shortage of expensive and limited resources. To circumvent this, the jurisdiction of MERCOSUR should become mandatory, which implies a reform in the Protocol of Olivos. This prospect is not so strenuous, since the Protocol of Olivos put in place a provisional DSM that should be reviewed before the implementation of a common external tariff for the common market.[46]

Another problem to be surmounted is the fact that both Paraguay and Uruguay are already members of the ACWL. The treaty establishing the ACWL states that "the obligation of a Member to

[44] Protocol of Olivos, art. 1.1.
[45] Protocol of Olivos, art. 1.2.
[46] Protocol of Olivos, art. 53.

make annual contributions during the Centre's first five years of operation in accordance with paragraph 2 of Article 6 of this Agreement and Annex I to this Agreement shall not be affected by the withdrawal of that Member from this Agreement".[47] However, since Paraguay and Uruguay are founding Members, they could withdraw without incurring in any financial burden, since the creation of the ACWL dates to 2001.

The withdrawal of Paraguay and Uruguay from the ACWL would not be mandatory for the success of the regional legal clinic on WTO for MERCOSUR, but it could spare both countries an extra financial burden that should not be incurred unless necessary. Besides, according to the last ACWL's report on operations, Uruguay never used the services provided by the Centre in a contentious case and Paraguay only did it once.[48] Participating in the regional center would be preferable provided that both countries negotiate with Brazil and Argentina for several years and share with them a similar agenda of commercial interests and disputes (antidumping measures, subsidies, safeguards, high tariffs on agricultural products etc.). Besides, the fact of counting with the solid experience of Brazil and Argentina in the WTO DSM would definitely be of great value for the two smaller countries, contributing to the development of a valuable national expertise and allowing them to bring claims or participate in procedures based on more sounded legal advice.

Final remarks

There is no doubt that litigation in the WTO is expensive and requires extremely qualified professionals able to support claimants throughout complex procedures, which may last a few weeks or several years. The move toward legalization evidenced by the WTO DSM was praised as an important step in leveling the structural differences between developing and developed countries. Benefices, however, do not come for free and developing countries soon realized that the new DSM, even if less biased and power prone, entailed some unanticipated costs.

Human and financial resources are two elements that normally are not abundant in poor countries and the lack of scales may also discourage some of the WTO Members from pursue their proper rights and have a "proper day in court", as formally conceded by the reversal of the "positive consensus" rule. Notwithstanding the many refinements introduced by the Uruguay Round, the WTO DSM is far from flawless and developing countries have a bad time accessing the system, a problem that

[47] ACWL, art. 12.

[48] Paraguay resorted to the services of the ACWL in the case "European Communities – Conditions for the granting of tariff preferences to developing countries" (WT/DS246), where it acted as a third-party (ACWL, **Report on operations 2008**, p. 24).

cannot be tackled by the simply adoption of more transparent and reliable procedural rules. The reversal of the positive consensus rule was definitely a very important advancement in the way trade disputes are settled, but granting all Members a day in court does not necessarily mean that they will resort to the system as frequent as they may, given the high costs associated to bring claims.

If hiring foreign lawyers, sometimes with doubtful results, may be too expensive for developing countries, the lack of scale might deter some of them of investing in the training of their own national experts. Besides, since the compliance with decisions, even in the more legalized WTO DSM, relies essentially on power, the claimant always risks wining and not getting its prize. Additionally, even if the defendant complies with the decision, the advantages in terms of tariff reduction or increase in exports are sometimes negligible, given the size of the market of the claimant and the costs associated to the demand. Undoubtedly, in a scenario with scarce and expensive resources, cost-benefit assessments play an important role in deciding whether a breach of a WTO treaty should be pursued or simply tolerated. This situation may push developing countries to solve disputes amicably – which is not necessarily bad – and possibly accept second-best offers in the absence of a credible threat that can be used against powerful defendants.

As a way to circumvent some of the hurdles faced by developing countries in bringing their claims before the WTO, the current articles proposes the creation of regional legal clinics, that could deliver a tailored solution and increase the cohesion of existing regional and sub-regional integration projects. Our proposition focused on the MERCOSUR, but the same reasoning could be applied for other regional bodies sharing especial features similar to those found in MERCOSUR – historical bonds, strong regional integration, etc.

Regional cooperation as way to integrating local economies into a more competitive market has been discovered long ago. Developing countries should now give them a different challenge to strengthen their reciprocal relations and raise their threat against possible non-compliant Members in the WTO. A legal clinic on WTO law within the MERCOSUR framework would certainly deliver this, helping reducing costs, allocating resources in a more cost-efficient fashion and creating scales necessary to reduce the threshold at which litigation becomes worthwhile. Collective action might be an important tool in tackling the problem of accessing the WTO DSM, helping them reap the benefits of a more legalized system.

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