

Do WTO Rules Create a Level Playing Field? Lessons from the Experience of Peru and Vietnam*

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*The author thanks Marc Busch, Thomas Cottier, Joseph Damond, Judith Goldstein, Eduardo Perez Motta, and John Odell for comments on the paper, and thanks Anbinh Phan and Courtenay Dunn for valuable research assistance. The research benefited greatly from interviews with officials involved in the negotiations, who have not been cited by name at their request.

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Introduction

Scholars of international relations and the NGO groups protesting on the streets of Seattle in 1999 share a common assumption. Both believe that less developed countries are at a disadvantage when negotiating with more powerful counterparts. Smaller market size makes it ineffective for developing countries to use threats of retaliation in order to combat discrimination against their goods. In contrast, retaliation measures taken by larger economies can easily cause severe damage to a smaller economy. This leaves developing countries vulnerable to discriminatory trade policies adopted by their major trade partners.

In spite of their apparent lack of bargaining leverage, however, in some negotiations developing countries have been able to achieve positive outcomes – even the overturn of protectionist measures against their exports by the United States and EU. Simply evaluating the relative market power of the two sides in an economic negotiation is inadequate. As Odell argues, the strategies used in the negotiation process matter as much as the material resources of each participant.¹ In addition, the institutional context of the negotiation can generate pressure for liberalization.² For trade negotiations, the institutional context is shaped by the the General Agreement on Tariffs and Trade (GATT) and its successor the World Trade Organization (WTO). The GATT/WTO system upholds trade rules that apply equally to rich and poor countries alike and are enforced by a third party adjudication process to settle disputes. The WTO dispute settlement procedures provide developing country members with a distributive tactic that helps them to negotiate the reduction of trade barriers against their products.

This chapter argues that the use of legal adjudication allows developing countries to gain better outcomes in negotiations with their powerful trade partners than they could in a bilateral negotiation outside of the institution. There are four mechanisms that are important: guarantee for the right to negotiate, a common standard for evaluating outcomes, the option for several countries to join a dispute, and incentives for states to change a policy found to violate trade rules. Developing countries that use these institutional mechanisms by initiating complaints based on a strong legal case and in cooperation with other states

¹Odell 2000.

²Davis 2003.

will improve their capacity to gain concessions from other states. In contrast, developing countries that are not WTO members, or members that do not use the dispute settlement system, will often be unable to negotiate any concessions from more powerful states.

The first section of the chapter addresses the ways in which legal adjudication provides additional bargaining leverage for developing countries, and it also reviews studies on how developing countries have fared within the dispute system. The following two sections present case studies of negotiations with a small developing country demanding an end to protectionist regulations by a major trade partner. Using the approach of controlled comparison, the case studies were selected as negotiations that raise similar trade interests for two pairs of countries with roughly parallel positions in the international economy. Membership in the WTO is the key variable of difference.

The first case represents the options available to a developing country WTO member. Facing European labeling policies that discriminated against its scallops and sardines exports, Peru participated in two WTO disputes that brought about changes in the problematic policies. The second case represents the situation of a developing country that cannot appeal to WTO rules for leverage. As a non-WTO member, Vietnam must negotiate to maintain access for its catfish exports to the U.S. market on the basis of the Bilateral Trade Agreement. Ultimately, Vietnam was unable to prevent the United States from adopting a labeling regulation and anti-dumping suit that discriminate against Vietnamese catfish. The two cases are useful to illustrate contrasting kinds of negotiations under conditions of asymmetric power.

The labeling cases raised similar strategies pursued by the United States and EC to protect against fish imports that threatened influential producer groups. The cases are also parallel in that both Vietnam and Peru offered an initial compromise solution that was rejected. Of course, there are important differences between the two pairs of negotiating countries. The economic interests and political institutions of the United States and EC are likely to influence their negotiating behavior. Nevertheless, there is little reason to expect that the EC is substantially more favorable to free trade or more supportive of the WTO than the United States – both represent major trade powers that have a large stake in the multilateral trade system, and both have adopted policies that could be challenged

as violations of the WTO rules.³ One could also question whether Peru and Vietnam are comparable. Politically Peru shifted from dictatorship to democracy in 2001 with the election of President Alejandro Toledo, while Vietnam has remained in the hands of the communist leadership even as the government has loosened state control over some sectors of the domestic economy. Vietnam and Peru are both poor countries, but Vietnam at \$430 per capita income is ranked by the World Bank as a low income country while Peru at \$2050 per capita income is ranked as a lower middle income country.⁴ Yet both clearly lack the market power to counterbalance the United States or Europe and are dependent on access to these valuable markets for their goods. Looking at power alone would lead one to expect that Peru and Vietnam would be unable to prevail over the EC or United States, which were determined to protect their domestic producer interests.

The examination of labeling policy is important because internal non-tariff regulations are among the most problematic trade barriers. Food labeling in particular has become controversial. A new set of agricultural trade disputes have arisen regarding the use of geographical indications to recognize regional specialties as distinct products. Trade talks about genetically modified products and food safety have also come down to a debate over appropriate labeling policies. Indeed, concern about implications for this broader set of food labeling issues heightened interest in the two WTO disputes discussed in this chapter.

1 Legal Framing as a Source of Bargaining Leverage

The creation of common rules is the key mechanism by which the multilateral system of trade rules reduces the importance of market power. The trade rounds in which members negotiate new rules rely on consensus procedures that allow any country to hypothetically exercise a veto over the content of the rules. In practice, however, the major powers have tended to dominate in this setting.⁵ As a consequence, developing country priority

³Over the period from 1995 to 2003, 81 complaints have been filed against the United States and 47 complaints have been filed against the EC (with another 15 complaints against individual member states).

⁴World Bank, Gross National Income per capita 2002 (Atlas Method, U.S. dollars), <http://www.worldbank.org/data/databytopic/GNIPC.pdf> accessed 28 July 2003.

⁵Steinberg 2002.

areas such as agriculture and textiles have been the slowest to liberalize. This is a major source of inequality in the gains from the free trade system. Nevertheless, some progress is possible – the linkage between negotiations on multiple sectors and issue areas during trade rounds has brought some agricultural liberalization.⁶ As has been witnessed at the Brussels meeting in 1990 during the Uruguay Round and at the Cancun meeting in 2003 during the Doha Round, developing countries can use their veto power to influence progress during trade rounds. Once a new GATT/WTO agreement has been adopted, developing countries can appeal to the rules system for fair treatment and hold other countries to fulfill the commitments they have made. Further, by working together in coalitions developing countries have shaped the agenda-setting process and set limits on agreements.⁷ Chapters two, three, and four explain how coalitions can help developing countries do better in negotiations despite the power imbalance.

The strength of the trading system lies in its ability to bring states to comply with most of the rules most of the time. The main enforcement mechanism of the WTO is the adjudication process set forth in the Dispute Settlement Understanding (DSU), which strengthened the earlier GATT dispute settlement procedures. All members have the right to file a complaint and have a panel of trade experts rule on whether a policy measure represents a violation of the rules. The proceedings go forward according to a schedule with time limits, but there is always the option to negotiate a mutually agreed upon settlement. Indeed, more than half of disputes are settled before a ruling. When cases are not settled early, then the panel rules whether the policy is a violation. Yet even then, compliance is elective. Since there is no police enforcement for an international court, states have the choice to change their policy, offer compensation, or accept the likelihood that other states will retaliate against their goods.⁸ Voluntary compliance occurs through negotiations about whether and how a state will change a policy that has been ruled a violation. In the case of a failure to satisfy the complainant, there may be further panel proceedings and eventual authorization of sanctions. The state may still refuse to comply with the ruling. The legal procedures encourage compliance by shaping incentives for different policy choices, but

⁶Davis 2004.

⁷Ricupero 1998.

⁸Bello 1996, 417.

filing a complaint does not deterministically produce a particular outcome.

Legal framing describes the degree to which “the negotiation occurs within the bounds of formal rules and appeals to third party mediation.”⁹ The key distinction lies in the impartial standard to evaluate the policy according to rules accepted by all participants. The choice of an institutional context for adjudication of disputes frames the negotiation to give priority to legal arguments over political criterion. This kind of framing arises from procedural constraints, as distinct from the psychological framing discussed in chapter three. In the WTO dispute settlement process, legal framing is highest during the adjudication phase conducted by the panel and following its ruling, but legal framing characterizes the entire dispute settlement process both during the consultation phase before establishment of a panel or during settlement talks between parties at any point later in the process.

The decision to file a legal complaint under the WTO dispute procedures represents a distributive tactic because the complainant demands a unilateral policy change from the defendant. Since the complaint itself responds to a perceived failure by the defendant to fulfill its obligations under the WTO, however, this move often represents a defensive rather than aggressive trade policy. For developing countries, the dispute mechanism offers an alternative recourse when bilateral negotiations fail to resolve a trade problem. While the United States and EU have unilateral policy options, developing countries often lack the power to even bring a larger country to the negotiating table to seriously address their concerns.

There are four ways in which legal framing helps developing countries counter discrimination against their exports by more powerful countries. First, the option to file a legal complaint allows developing countries to force a developed country to come to the negotiating table and discuss their request. Second, the DSU makes international trade law the standard for reaching an agreement. Third, use of shared legal rules facilitates finding allies with related interests to support the case. Fourth, the long-term economic interest in supporting the rules encourages compliance with rulings. Without the framework provided by the dispute settlement process, a developing country is likely to encounter refusal to negotiate by powerful countries, arbitrary standards, limited interest from third countries

⁹Davis 2003, 50.

in their trade problem, and lack of leverage to bargain for concessions.

Simply getting a wealthy trade partner to agree to talk about its protectionist trade barriers is difficult for a developing country. Clearly, developed countries will have the upper hand in a negotiation that resorts to retaliation and counter-retaliation. Moreover, developed countries can use side-payments to bribe weaker countries to overlook their use of unfair trade barriers for their sensitive products. Since developing countries have less economic and political resources to provide side-payments of their own, they will be unable to persuade developed governments to change existing policies without some external leverage. Filing a complaint obligates the two sides to engage in bilateral consultations, and the DSU guarantees WTO members the right to a panel. As a result, members cannot simply adopt a unilateral position and refuse to discuss a trade problem. In contrast, this is all too often the case when a developing country makes a request at the bilateral level.

The adjudication process not only focuses the negotiation on the single issue, it also forces both sides to make a consistent argument based on existing law. This prevents the kind of moving target that occurs when there is no agreed upon standard for evaluating different arguments. In a legal dispute, the narrow focus on the single issue and the use of established principles reduces the flexibility for choosing among different negotiation tactics. Since developing countries lack the power to issue threats and side-payments or to unilaterally determine the standard of evaluation, in practice this constraint binds the developed country more than the developing country.

The use of multilateral rules for adjudication of a bilateral dispute also facilitates the formation of coalitions around a legal complaint. Because the individual case will hold a precedent for similar policies, the set of states participating in a case will include both those with a material interest in the immediate trade issue as well as those concerned about the legal implications of the case. The DSU agreement allows different levels of participation by multiple states.¹⁰ Often states join consultations, with an average of three members requesting to join consultations for individual disputes. States with a substantial interest in the matter can also participate in the panel stage of the dispute process as a third party,

¹⁰DSU Article 4.11 allows other members to request to join consultations. Articles 9 and 10 establish procedures for multiple complainants and third parties.

which grants them the right to submit views to the panel. Out of the 98 panels that have issued reports to date, all but eight included third party participants.¹¹ While typically only a few members join as third parties, some cases will draw much wider interest. For example, nineteen members ranging from Japan and Canada to Belize and Suriname were third parties in Ecuador's complaint against the EU banana import regime. In other cases, a state may decide to file a complaint on the same issue after another state has filed a complaint. The filing of multiple complaints has become quite common, with a leading recent example being the nine cases against U.S. steel safeguards.¹²

For developing countries that may be hesitant to sue their major trading partner, following after another country initiates a complaint reduces the legal and political cost. In a kind of legal bandwagoning, a developing country can join a case with a developed country and benefit from the legal arguments and bargaining influence of the other complainants. As a third party, developing countries can learn how the process works with little investment. As a co-complainant with a developed country, a developing country gains both legal advice and enforcement power if the dispute ends up going all the way to sanctions.¹³ Disputes with multiple complainants and third parties add collective pressure against the respondent. In the case against the EC banana import regime, Latin American governments were helped by the United States being another complainant that issued sanctions when the EC did not change its policy following the ruling (see chapter eight for a fuller account of this dispute case).¹⁴ In addition to the greater market power for enforcement, a broader group of complainants diffuses the political damage to any particular bilateral

¹¹<http://www.worldtradelaw.net/dsc/database/partiespanel.asp> accessed 19 January 2004.

¹²The EC, Japan, Korea, China, Chinese Taipei, Brazil, Norway, New Zealand, and Switzerland all filed cases under the heading "United States - Definitive Safeguard Measures on Imports of Certain Steel Products". The EC was the first to file a case (DS248) on 7 March 2002.

¹³Both third parties and co-complainants receive the submissions of other parties to the dispute. Informal consultations among interested parties regarding the case are also a source of advice on tactics.

¹⁴Ecuador, Guatemala, Honduras, Mexico, and the United States stood as complainants in the case, "European Communities – Regime for the Importation, Sale, and Distribution of Bananas" (WT/DS27). After the policy was ruled a violation of WTO rules in 1997 and a revised policy was also found to be in violation of the rules, the complainants were authorized to issue sanctions in 1999. Even then, however, a mutual agreement was not reached until April 2001.

relationship.

The institutional context of the negotiation shapes the negotiation process for bringing compliance. Many perceive retaliation as the means to enforce dispute rulings. If true, developing countries with small markets would be unable to inflict sufficient pain to enforce rulings in their favor. Indeed, one of the demands for reform of the DSU put forward by developing countries in the Doha Round calls for a right to collective retaliation for cases that involve developing country complainants. Such reforms may prove helpful, but nevertheless, underestimate the enforcement power that exists independent of retaliatory capacity. Hudec emphasizes that authorized retaliation almost never occurred under the GATT rules and yet most complaints filed were resolved to the satisfaction of the complainant.¹⁵ The WTO agreement strengthened provisions for retaliation (Article 22.2), but requests for authorization of retaliation remain infrequent – only 15 of 305 disputes since 1995 have led to a request for retaliation authority.¹⁶ Moreover, some of the most outstanding compliance failures are cases where retaliation by the U.S. or EC was authorized.¹⁷

While the mere potential for retaliation certainly shapes the negotiation process, incentives unrelated to retaliation are also at work. Many scholars have concluded that the need to uphold the overall credibility of the rules system leads countries to comply with rulings.¹⁸ Either trade interests, or a sense of “shaming” could account for an independent compliance pull from international rulings.¹⁹ When compliance is not motivated by the actual retaliation from the individual participant to the dispute, then market size becomes unimportant – even small states are able to use rules to shame and punish bigger states. There have been several cases in which developing countries have used the rules to gain compliance from developed country governments.²⁰

¹⁵Hudec 1993.

¹⁶<http://www.worldtradelaw.net/dsc/database/retaliationrequests.asp> accessed 23 January 2004.

¹⁷Since the Community Pillar has authority for economic policies, following WTO practice I will refer to the European Community (EC) when referring specifically to trade policies.

¹⁸Kovenock and Thursby 1992; Jackson 1997; Hudec 2002.

¹⁹Johnston 2001.

²⁰In one example in the early years of the WTO, Costa Rica filed a complaint, “United States - Restrictions on Imports of Cotton and Man-made Underwear” (WT/DS24/1). After panel and appellate body rulings in favor of Costa Rica, the United States agreed to end its quotas restricting the import of cotton

This compliance pressure from a violation ruling operates through domestic politics.²¹ Leaders need a justification to give their domestic regulatory agency and lobby groups before they can change policies that were adopted to protect sensitive sectors. Small countries cannot afford side-payments to sweeten the deal or threaten retaliatory consequences. Thus their demands are all too easy to ignore for a developed country. Why would leaders choose to face political backlash at home with nothing in return? The need to comply with international law, however, provides political cover for making such difficult policy reversals. Refusal to change the policy would damage a rules system that brings gains from free trade for many other sectors while compliance with the ruling represents fulfillment of international obligation to support the international trade system.

On the other hand, some aspects of the dispute process disadvantage developing states. Many have pointed out that developing countries lack representation in Geneva and legal resources to adjudicate cases. The increasing number of legal reviews under the strengthened procedures of the new WTO dispute rules places a “premium on sophisticated legal argumentation” that may work against developing countries.²² Ostry warns that the new dispute settlement system is so technical and evidence intensive that it requires “a level of legal expertise rare in non-OECD countries and therefore pots of money to purchase Northern legal services.”²³ Even U.S. and EC trade authorities rely on extensive private-sector support for trade disputes that is unlikely to be available in developing countries.²⁴ The comparative advantage in legal skills held by countries such as the United States augments the power disparity.

Since legal services can be purchased, the question is whether developing countries can afford to do so. The expense and difficulty of managing a complicated legal case clearly inhibit many developing countries from even filing a complaint. It is notable that least developed countries have initiated only one WTO dispute while the more advanced developing countries such as India and Brazil have been frequent users of the dispute system. Developing countries as a group have initiated 36 percent of the 304 complaints notified to

underwear from Costa Rica.

²¹Davis 2003.

²²Busch and Reinhardt 2002, 467.

²³Ostry 2002, 288.

²⁴Shaffer 2003.

the WTO by December 2003.²⁵ Of these cases, 54 complaints were issued by lower income developing countries, with 30 of these being against high income members.²⁶ Some have relied on their own legal counsel while others have hired leading international law firms. Since 2001, developing countries have also had the option to receive legal training or hire legal counsel from the Advisory Centre on WTO Law, which was established to provide discounted legal services for developing countries. A report by the Mexican delegation to the WTO on the problems of the DSU for developing countries concluded that “Financial aspects of engaging in a WTO dispute do not seem to be at the core of the problem.” The report cites the availability of low cost legal assistance from the Advisory Centre on WTO Law and the relative insignificance of legal fees relative to the value of export losses from a trade barrier.²⁷ While legal costs may reduce the number of cases initiated by developing countries, they are not insurmountable for many governments.

The historical record provides mixed evidence about whether developing countries have fared better or worse in legalized disputes than other countries. Some find that economic weight has not been a major factor influencing the conduct of dispute settlement.²⁸ Others emphasize that larger states gain better trade outcomes in dispute settlement through the leverage they gain from their market size.²⁹ Busch and Reinhardt, show that there is a gap in the ability of developing countries to gain positive outcomes compared to developed countries.³⁰ In an evaluation of 380 GATT/WTO dispute outcomes from 1980–2000, Busch and Reinhardt show that developing country complainants were able to gain partial or full concessions for 63 percent of their complaints in comparison with the record of developed

²⁵WTO, “Update of WTO Dispute Settlement Cases,” WT/DS/OV/18 (23 December 2003) p.2.

²⁶Lower income refers to the low income and lower middle income categories of the World Bank, which would include both Vietnam and Peru. Of the 30 disputes representing asymmetric power conditions, 13 were initiated by low income members and 17 were initiated by lower middle income members. <http://www.worldtradelaw.net/dsc/database/classificationcount.asp>. Accessed 19 January 2004.

²⁷“Diagnosis of the Problems Facing the Dispute Settlement Mechanism: Some Ideas by Mexico,” Proposal presented to the WTO DSU Body, Geneva (November 2003) p. 5-7.

²⁸Horn, Mavroidis and Nordstrom 1999; Goldstein and Martin 2000; Busch 2000; Guzman and Simmons 2002.

²⁹Bown 2004.

³⁰Busch and Reinhardt 2003.

countries, which gained partial or full concessions for 72 percent of their complaints.³¹ This is a disturbing sign that the playing field is not entirely level, yet also indicates that developing countries do surprisingly well to hold their own despite their weaker economic position. More importantly, Busch and Reinhardt argue that developing countries do poorly during the early consultation period, rather than because of bias in rulings or difficulty to get concessions after a favorable ruling. Their statistical analysis shows that once a panel has been established, income does not have a significant effect on outcomes. If developing countries are in a weaker position in the informal negotiations that precede establishment of a panel, then one must wonder how do they fare in their bilateral negotiations outside of the dispute settlement process? Looking more closely at the negotiation process will help to reveal whether and how GATT/WTO dispute settlement improves outcomes for developing countries relative to the alternative of negotiations outside the WTO.

2 Peru Takes on European Food Labeling Policies

The EC has erected formidable barriers to protect its primary sectors from imports. Not only has this pitted it against the United States, but also developing countries. A report by Oxfam placed the EC at the top of their list for holding double standards with its trade barriers against agricultural imports from developing countries.³² While some developing countries benefit from preferential trade agreements with Europe, most cannot penetrate the high tariffs that protect the European market or compete with the subsidized European products in world markets. At other times EC regulations act as trade barriers, as happened when two labeling regulations harmed Peruvian exports of scallops and sardines to Europe. This section will discuss how skillful use of legal tactics and joint effort with other WTO members helped Peru to prevail on the EC to change its labeling regulations.

Governments frequently regulate labeling policies for the sake of providing the consumer with accurate information. For example, regulations may require specification of contents and product names or the addition of health warnings. The challenge for international trade law is to distinguish between policies that legitimately regulate labeling policies and

³¹Busch and Reinhardt 2003, 725.

³²Oxfam 2002, 98.

those that act as trade barriers. The legal framework for labeling policies relates generally to the GATT principles of non-discrimination and national treatment (Articles 1 and 3 of GATT 1994). These rules stipulate that the products of one state shall not be treated less favorably than the products of another state or than domestic products. More specific rules for such regulations are found in the Agreement on Technical Barriers to Trade (TBT).³³ Too many standards or arbitrary procedures for setting standards would indirectly or directly impede trade. Labeling policies represent one kind of non-tariff barrier that could be used to discriminate, such as by reserving the common marketable name for domestic products. The TBT Agreement stipulates that technical regulations should not have the effect of creating unnecessary obstacles to international trade (Article 2.2), and encourages members to use relevant international standards as a basis for their technical regulations whenever possible (Article 2.4). For example, the Codex Alimentarius Commission establishes guidelines that are accepted as the benchmarks for international standards on food regulations. Its standards are based on recommendations from scientific committees that are approved by members. However, since the TBT Agreement recognizes national governments right to choose higher levels of protection for legitimate objectives to protect public welfare and the environment, there is much room for interpretation.

When changes in the application of regulations regarding labeling standards harmed Peru's exports to the EC market, it used the above rules framework to demand that the EC change its regulations.

Convincing the French that a Scallop is a Scallop

One of the first disputes initiated under the new WTO dispute settlement rules and TBT Agreement related to a French regulation for the labeling of scallops. In May 1995, Canada requested consultations with the EC regarding the French government order laying down official names and trade descriptions of scallops. The regulation prohibited Canada from marketing its particular species of scallops under the description "noix de coquille Saint-Jacques", by which name scallops are traditionally known in France. Instead Canadian

³³First established in the 1973-79 Tokyo Round, the TBT was extended and clarified in the Uruguay Round.

scallops were designated to be labeled simply as petoncles, a less esteemed word used for scallops.³⁴ Canadian exporters reported substantial decrease in the volume of exports after the labeling change went into effect. The Canadian government had negotiated a temporary solution in bilateral talks, but after France subsequently annulled this agreement, Canada formally requested consultations under the rules of the WTO DSU. The EC represents the member states in WTO negotiations, so even though it was a French regulation, Canada filed its complaint against the EC and subsequent talks were engaged in by EC negotiators. In its complaint, Canada stated that Canadian scallops were being given less favorable treatment than the like national product with the result that Canada suffered nullification of its rights under the WTO agreement, and it claimed the French measure was not consistent with the TBT Agreement.³⁵

Since the regulation also applied to scallops from Peru and Chile, they requested to join Canada in its consultations with the EC. These consultations were held on 19 June 1995 and were a chance to reach a negotiated solution. When no mutually acceptable agreement could be found, Canada requested establishment of a panel 10 July 1995. At this stage Peru and Chile were closely following the Canadian lead and initiated independent requests for consultations. As was to be expected given Canada's experience, no compromise was found during Peru and Chile's consultations with the EC. In September, Peru and Chile each sent a request to establish a panel and specifically asked that it should be convened of the same panel members as served on the panel between the EC and Canada.³⁶

The case illustrates the advantages of legal bandwagoning for developing countries. Peru knew that the Canadian delegation had evaluated the legal case as strong enough to justify filing a complaint. As co-complainants, Peru and Chile were able to view the Canadian written submissions and be present during the Canadian presentations to the panel, and the Canadian negotiating team also offered legal advice on the issues. Moreover, since the same panel would see both cases, the legal arguments made by the Canadian delegation

³⁴ *The Financial Times*, 21 July 1995.

³⁵ Request for Consultations by Canada, "European Communities – Trade Description of Scallops" WT/DS/7/1 (24 May 1995).

³⁶ DSU Article 9.3 calls for the same persons to serve as panelists in cases with multiple complainants on the same matter.

would be referenced for the Peruvian and Chile cases. If the EC had refused to change the policy after a violation ruling, Peru would not have been alone in trying to bring about compliance.

The adjudication process went forward with meetings in October and December of 1995, and a concluding session in February 1996. During this stage there was little room for negotiation as each side presented their legal case. Panelists are expected to judge the legal status of the policy rather than to mediate a compromise solution. The panel issued its interim ruling March 14, 1996. This opened the period for comments by the participants on the ruling before it would be made public.

The period between the interim ruling and its public release represents an opportunity for a return to negotiation among the parties. Only they know the contents of the ruling, and they have the option to go forward with its public release or to reach a mutually agreeable settlement without any public release of the panel report. In the first five years of the WTO, nearly one-fourth of the panels established never issued a ruling (62 of the 80 panels issued rulings).³⁷ In this case, the negotiations were quite extended, and the parties requested three postponements of the final report. Finally on May 10, the parties announced a mutually agreed settlement. According to Article 12.12 of the DSU, the panel then released a description of the case and solution but not the panel's legal evaluation of the policy. The announced solution included an exchange of letters in which the EC representative said the French government order would be replaced by a new order that would allow marketing of scallops under the name "noix de coquilles Saint Jacques" as long as the scientific name of the species and country of origin were also indicated.³⁸ The new draft order was included with these texts and would take effect within two months. A Peruvian negotiator said early settlement was possible because the ruling favored Peru, and the EC then "gave in completely."³⁹

The solution that seems so obvious was only possible when the negotiation took place directly after release of the ruling. The French government had backed out on the earlier

³⁷Busch and Reinhardt 2002, 468.

³⁸Notification of Mutually Agreed Solution, "European Communities – Trade Description of Scallops" WT/DS12/12, WT/DS14/11 (19 July 1996).

³⁹Official of Peru's delegation in Geneva. Telephone interview by author. 30 July 2003.

bilateral settlement reached with the Canadians, and the EC had refused compromise during consultations with Canada, Peru, and Chile when it faced the certain initiation of a panel. The direct prospect of a negative ruling, however, persuaded the EC to compromise. At that stage, the EC had to offer enough of a concession to satisfy Canada, Peru, and Chile because any one of the participants could have insisted on release of the panel report that favored their position. Since this was the first case regarding the TBT Agreement EC officials may have been reluctant to have a precedent set with broader implications for other policies that contained potential violations of the TBT.

Going All the Way on Sardines

A similar food labeling policy was used by the EC against imports of sardines from Peru. The EC Regulation (Council Regulation 2136/89) adopted 21 June 1989 forbid marketing of fish under the name sardine, unless it was the species common to Sardinia and found in the Atlantic ocean and Mediterranean Sea (*Sardina pilchardus Walbaum*). The regulation had not been enforced, and Peru had developed a market niche in Germany for its sardines under the label of “Pacific Sardines”. The problem arose in 1999, when the European Commission began to enforce the regulation by refusing to allow the import of the Peruvian fish under that label. EC officials suggested that the species from Peru (*Sardinops sagax sagax*) should instead be marketed as “pilchards” or “sprats”, in order to protect consumers and avoid confusion.⁴⁰ Peru declared that this was simply a disguised effort by Europe to protect its local fishermen.

Peru first initiated bilateral negotiations with the EC. Peru offered to label the fish Pacific Sardines or Peruvian sardines, but the European response was that this still allowed market confusion because different species would be sold under the name sardines. A Peruvian government official involved in the dispute said that for two years Peru tried to reach a negotiated settlement through bilateral contacts at all political levels.⁴¹ The EC would not compromise on its position that the product name sardines must be reserved exclusively for the European species.

⁴⁰ *The Financial Times*, 17 June 2002.

⁴¹ Official of Peru’s delegation in Geneva. Telephone interview by author. 30 July 2003.

Unable to reach agreement through bilateral negotiations, Peru formally filed a complaint to the WTO and requested consultations. This forced the EC to the negotiating table. Consultations presented the EC with an opportunity to make a compromise and avoid the panel process.

Peru had a strong legal basis for its complaint. Not only could it appeal to the more general principles of the GATT and TBT Agreements, but it also had grounds to appeal to TBT Article 2.4, which calls for members to use existing international standards as a basis for their technical regulations. The Codex Alimentarius Commission has a standard for canned sardines and sardine-type products that clearly lists the Peruvian species among several others in its definition of sardines. This standard, which had been adopted in 1978, called for the European species to be called by the name sardines alone, while other species should be labeled “X sardines” with the modifier indicating the country, geographic area, species, or common name of species in country where sold.⁴² In its request for consultations filed with the WTO, Peru referred to this standard to claim that the European regulation represented an unjustified barrier to trade.⁴³ An official of the WTO secretariat said “From the beginning, it was clear what direction this case would take – the EC regulation was a trade barrier. I am surprised it went to a panel.”⁴⁴

Despite the high probability of a legal ruling in favor of Peru, the EC would not compromise early. The Peruvian official described the European position: “It was clear during the consultations that we must go forward with our complaint. They offered to use only the scientific name without allowing the use of sardines in the label, and they were not moving on this point.”⁴⁵ Peruvian exporters said the scientific name was not marketable.

An official of the EC delegation agreed that the sardines issue seemed like a case that should have been settled early. He said, “The threat of a panel clearly gives impetus to find a solution,” but also commented that it depends on the political reality in the

⁴²Codex Standard for Canned Sardines and Sardine-Type Products (CODEX STAN 94-181 Rev. 1995), www.codexalimentarius.net/standard_list.asp accessed 25 July 2003.

⁴³Request for consultations by Peru, “European Communities–Trade Description of Sardines” WT/DS231/1 (23 April 2001).

⁴⁴WTO official. Interview by author. Geneva, 7 May 2003.

⁴⁵Official of Peru’s delegation in Geneva. Telephone interview by author. 30 July 2003.

community whether the threat of a panel will be sufficient.⁴⁶ In this case, fisheries represent a sensitive sector, and among members, Spain, France, and Portugal had sardine producers that compete with Peru and could be expected to oppose the change. The original policy was a Council regulation so that there was the question of whether member approval would be necessary to change the policy. Moreover, the major exporter of sardines to EC markets that competed with Peru was Morocco. Morocco stands as a beneficiary of special economic relations with the EC, already holding an association agreement with the EC that lowers trade barriers and having nearly completed the process of concluding a free trade agreement.⁴⁷ As a result of the political difficulty to compromise on these interests, the EC continued to uphold its position that the name sardines must be reserved for the one species.

Peru was at a disadvantage because it lacked experience and trade law expertise. One of the lead negotiators for Peru said “We are a small delegation and this was my first case. It is hard because we are competing in an unfair situation – they have cases all year long and have specialists on every aspect of trade law.”⁴⁸ Fortunately, Peru’s delegation received the help of the Advisory Centre on WTO Law, which had been established in 2001 as an independent intergovernmental organization to provide a low cost alternative for developing countries that need legal expertise in order to participate in the dispute settlement system. For a membership fee, developing countries gain access to low-cost legal services rather than paying the fees of a private law firm, which can easily reach \$300,000 for a WTO case.⁴⁹ Fees are based on relative income of the member, so that Peru was charged only US\$100 an hour for legal services.⁵⁰ Peru’s legal counsel admitted that without these services, they would not have been able to manage the case on their own.⁵¹ At every stage, from the selection of panel members, preparation of the legal briefs

⁴⁶Official of EU delegation in Geneva. Interview by author. Geneva 5 May 2003.

⁴⁷http://europa.eu.int/comm/trade/issues/bilateral/regions/euomed/index_en.htm accessed 31 July 2003.

⁴⁸Official of Peru’s delegation in Geneva. Telephone interview by author. 30 July 2003.

⁴⁹*The Financial Times*, 24 October 2002.

⁵⁰The rates range from \$25 for least developed countries to \$200 for the highest income developing country members. <http://www.acwl.ch/> accessed 20 January 2004.

⁵¹Shaffer and Mosoti 2002, 15.

and response to questions from panelists, to the negotiation of possible settlement options, Peru's delegate was accompanied by a lawyer from the Centre.

Peru also benefited from the contribution of interested third parties. Although Peru was the only country to file a complaint, Canada, Chile, Colombia, Ecuador, Venezuela and the United States all participated in the process as third parties. The United States presented an oral statement that supported Peru's argument that the EC measure violated TBT Article 2.4: "There is ample evidence indicating that the EC measure, if anything, undermines the EC's objectives, since European consumers have in fact come to know the Peruvian product as a form of sardine, and will likely be confused by the use of other names. Indeed, the use of a proper descriptor prior to the term "sardine," as provided for in the international standard, appears to be a very effective means of assuring transparency and protecting the consumer."⁵² The U.S. official also responded to questions from the panel that several sardine species were sold by U.S. fishermen to many parts of the world but were not exported to the EC because of the restrictive labeling requirements, and that these same fish could be sold in the United States under the name sardines.⁵³ Finally, meeting later before the Appellate Body review of the panel decision, USTR Associate General Counsel Dan Mullaney neatly rebutted a central claim of the EC legal defense: "The EC claims that its Sardine Regulation is based on this international standard, because it adopts the first part of the standard, even though it contradicts the second part. If the EC's assertion is correct, then a regulation that permits *only non*-European species to be marketed as kinds of sardines – and prohibits European sardines from being marketed as sardines at all – would also be based on the international standard. Even the EC would presumably agree that this would be the incorrect result."⁵⁴

⁵²USTR, Oral Statement of the United States at the Third Party Session with the Panel (28 November 2001), "European Communities – Trade Description of Sardines" (DS231). http://www.ustr.gov/enforcement/2001-11-28_USoral.pdf accessed 31 July 2003.

⁵³USTR, Responses of the United States to Questions from the Panel From the Third Party Session (7 December 2001), "European Communities – Trade Description of Sardines" (DS231). http://www.ustr.gov/enforcement/2001-12-07_QA.pdf accessed 31 July 2003.

⁵⁴USTR, Statement of the United States at the Oral Hearing (13 August 2002), "European Communities – Trade Description of Sardines" (DS231). <http://www.ustr.gov/enforcement/2002-08-13-eusardines-oralst8.pdf> accessed 31 July 2003.

NGO groups also played a supportive role. The UK Consumers' Association worked with a UK law firm to prepare a ten page letter, which Peru attached to its panel submission. The letter both referred to the EC regulation as "base protectionism in favour of a particular industry within the EC" that "Clearly acts against the economic and information interests of Europe's consumers."⁵⁵ Since the EC argument was primarily justified in terms of avoiding consumer confusion, the support of a European consumer organization was especially helpful for Peru. Indeed, the WTO panel cited the letter in its ruling.

After the panel released its interim ruling, Peru and the EC tried to negotiate an early settlement. The EC offered to change the regulation so that it would allow the species of sardines included in the Codex regulation to be labeled as sardines as long as the scientific name of the species and country name were also included on the label. This would meet the Codex standard suggestions for one way to modify "X sardines." For Peru, however, this was still short of its first choice to be able to label the fish as "Pacific Sardines." In light of their legal victory, it would have been difficult for the Peruvian government to justify to their domestic industry why they chose to settle for a compromise. In addition, Peru's delegation hoped that having the ruling accepted by the Dispute Settlement Body would help them for future cases of a similar nature. A Peruvian negotiator said that they might have accepted early settlement if allowed to call the fish "Pacific Sardines," but that the EC officials said they could only offer the option that added the scientific name. The Peruvian negotiator said, "If we were to settle at interim stage and not have the ruling become public, then they must give us what we want and not just what they want – we are giving away something and can't do that for free."⁵⁶ The stronger legal case encouraged Peru to push harder with its distributive strategy to demand full concessions from the EC.

Why did the interim negotiation fail for the sardines case when it had succeeded in the earlier scallops case? One difference in the two cases was that Codex has only established specific standards for salmon, sardines, tuna and bonito and has more general standards for all other fish and shell fish. Thus the ruling on scallops was based on Article 2.2 that regulations should be "no more trade-restrictive than necessary". The Codex standard for

⁵⁵Shaffer and Mosoti 2002, 16.

⁵⁶Official of Peru's delegation in Geneva. Telephone interview by author. 30 July 2003.

sardines made Peru's legal case even stronger than it had been for the scallops dispute where no such specific international standard existed. This made Peru less willing to compromise. At the same time, having the panel ruling based on Article 2.4, which states that technical regulations should be based on international standards, made the precedent less far-reaching. In a politically savvy legal strategy, Peru had urged the panel to follow judicial economy and make a ruling on its first legal claim about Article 2.4 if this was sufficient, and only address its other legal claims related to Article 2.2 if necessary. The panel followed this request, and found the case sufficiently strong to rule the EC measure inconsistent with TBT Article 2.4 because it was not based on the existing international standard. This reduced the EC concern about the precedent of the ruling, so it had less need to offer a major concession at the interim stage and avoid public release of the panel report.

Indeed, the public release of the ruling may have been necessary for EC trade officials to justify to the Fisheries Commission that the regulation would have to be changed.⁵⁷ Political opposition made early concessions difficult, but the ruling strengthened the argument that change was necessary. In the scallops case, only French interests were at stake because it was a French regulation. This may have made it easier to reach internal agreement to compromise early in order to prevent a precedent harmful to all members. The sardines policy, however, directly affected the interests of several members. The greater difficulty to reach an internal agreement in the sardines case prevented the EC from offering an early settlement – a negative ruling was necessary to overcome opposition to changing the policy.

The panel released its ruling 29 May 2002. The report found the EC regulation inconsistent with Article 2.4 of the TBT Agreement and recommended that the Dispute Settlement Body request the EC to bring its measure into conformity with the TBT Agreement. The EC decided, however, to appeal the panel ruling. After further legal proceedings, the judges of the Appellate Body released their ruling on 26 September 2002. The Appellate Body ruling upheld Peru's arguments on every major point, with a few exceptions that had no substantive impact for the case.⁵⁸ The Appellate Body respected Peru's request to only

⁵⁷Official of EU delegation in Geneva. Interview by author. Geneva 5 May 2003.

⁵⁸The Appellate Body allowed the submission of *amicus curiae* briefs from an individual and from Morocco, although declaring that the contents were not necessary for deciding the appeal. This latter

evaluate the legal merits of the case based on Article 2.4, and responded to the EC objection to parts of the panel ruling that held implications for an interpretation of Article 2.2 – these references were struck from the panel report and declared to be without legal effect.⁵⁹

After the legal process concluded, the participants still had to reach a mutually acceptable agreement. On the one hand, the ruling set the parameters for what was expected of the EC. It had to change its regulation to conform with the TBT Agreement. The exact form of the new regulation, however, was left to the discretion of the EC. If not satisfied by the new regulation, Peru had the option to file for an Article 21.5 implementation panel. In the months that followed, officials negotiated everything from whether the name sardines would be followed or preceded by the country name or the scientific name to the size of type to be used on the labels. The original deadline for EC compliance came in April, but a request for an extension until July was granted. Peru's officials were satisfied when the EC officials offered a proposal that would allow the use of the name sardines, followed by the scientific name of the species in small italics.⁶⁰ The Commission published the new regulation (EC no 1181/2003), which would allow those species recognized by the Codex standard to be labeled as sardines joined together with the scientific name of the species.⁶¹ Peruvian exporters were disappointed that they would have to append the scientific name rather than use simply the name "Peruvian Sardines" or "Pacific Sardines", but the EC had the right to choose any option that complied with the TBT standard and Peru's officials felt that the outcome was a success on the main point to be allowed to use the word sardines on the label.⁶²

Peru's officials said that the ruling had provided the basis for their ability to get a good outcome from the EC. "We have to have a panel ruling or we get nothing. Winning the decision has been viewed as controversial for members, and was protested by Peru during the proceedings and by many others afterwards.

⁵⁹"European Communities – Trade Description of Sardines" WT/DS231/AB/R (26 September 2002): 95.

⁶⁰Official of Peru's delegation in Geneva. Interview by author. Geneva, 5 May 2003.

⁶¹European Commission, OJ L165, 3 July 2003, p. 17-18.

⁶²Official of Peru's delegation in Geneva. Telephone interview by author. 30 July 2003.

panel ruling opens space for negotiation and strengthens our position.”⁶³ A second official concurred that the WTO case was essential to getting the outcome given that the EC had shown no signs of compromise during bilateral negotiations or during the consultation phase of negotiations after filing a complaint. Moreover, the costs were low so that officials were confident that the market gains would easily recoup the financial cost of pursuing the WTO case. The Advisory Centre on WTO Law clearly played an important role to reduce legal costs and to manage the case. Peru appears not to have suffered from any adverse political costs. During the dispute there were no threats of significance issued against Peru and officials did not feel that there had been any damage to bilateral relations.⁶⁴

With the help of discounted legal advice, and contributions from UK consumer groups and third party opinions, Peru was able to win a major case and bring about compliance by the EC. The case serves as an example to other developing countries that the dispute system can help a small country get a fair hearing and reach a satisfactory outcome.

3 Vietnam and the Catfish Dispute

In order to consider the counterfactual of a developing country that faces a similar problem but cannot choose a strategy of WTO adjudication, I next examine a negotiation by a non-WTO member, Vietnam, against the United States. This case highlights the disadvantages faced by developing countries that do not have recourse to WTO adjudication when facing discrimination against their exports. The dispute revolved around unilateral policies by the United States taken against imports of Vietnamese catfish.

The U.S.-Vietnam Bilateral Trade Agreement

The institutional framework for U.S.-Vietnam trade relations is based on a bilateral treaty concluded as part of the process of normalization in diplomatic relations between the two countries. Until 1994, the United States and Vietnam did not have any trade relations due to the trade embargo imposed since the end of the Vietnam war. The lifting of the embargo

⁶³Official of Peru’s delegation in Geneva. Interview by author. Geneva, 5 May 2003.

⁶⁴Official of Peru’s delegation in Geneva. Telephone interview by author. 30 July 2003.

by President Clinton only opened the way for a trickle of bilateral trade. Since Vietnam still lacked most-favored-nation status, goods from Vietnam faced substantially higher tariffs than those from other countries.⁶⁵ The path to full normalization of relations involved lengthy negotiations for a bilateral trade agreement. Concerns about full accounting for prisoners of war and human rights in Vietnam made the return to normalization politically sensitive in the United States, while it was also a major step in the market-oriented *doi moi* reforms being undertaken by the Vietnamese Communist leadership.

The U.S.-Vietnam Bilateral Trade Agreement (BTA), signed 13 July 2000 and entering into effect in 2001, was a comprehensive agreement that brought far-reaching internal reforms in Vietnam and produced a doubling of bilateral trade in its first year. With MFN recognition, Vietnam gained access to U.S. markets on the same terms as WTO members. Average U.S. tariffs on imports from Vietnam fell from around 40 percent to around 3-4 percent. In exchange, Vietnam agreed to lower its own trade barriers by 25-50 percent on goods, grant market access for services, and provide regulations to protect intellectual property rights. This involved major overhaul of domestic policies and the legal system, and decisions that would expose weak sectors such as banking and telecommunication industries to competition. An official of the Vietnamese Embassy in Washington D.C. described the reforms as a revolution, and said that the prospective gains from the agreement had been important to overcome opposition from those who would lose out.⁶⁶ The U.S. negotiators saw the rising economic potential of Vietnam and demanded these comprehensive reforms with the view that this moment was “the best leverage we’ll ever have” and could be used to get Vietnam to open their market.⁶⁷ At the same time, supporters of the agreement in both the United States and Vietnam could sell the liberalizing policies as a stepping stone towards Vietnamese accession to the WTO.

The BTA is closely modeled on the WTO agreements. Many sections such as those

⁶⁵The Trade Agreements Extension Act of 1951 suspended MFN treatment for communist countries. By the time that the United States granted MFN status to Vietnam starting in 1998 (on a provisional basis with the need for annual renewal of the Jackson-Vanik waiver), only six countries did not receive MFN treatment.

⁶⁶Official of the Vietnamese Embassy to the United States. Interview by author. Washington, D.C., 11 July 2003.

⁶⁷Former USTR official. Interview by author. Washington D.C., 15 July 2003.

on national treatment and intellectual property protection are directly taken from the relevant passages in the WTO agreements. Most importantly for the questions that later arose regarding labeling policy for catfish, the text from TBT Article 2.2 is adopted in Article 2:6b of the BTA text.⁶⁸ The United States and Vietnam committed not to have regulations that would create unnecessary obstacles to trade.

One major exception to the parallel structure of the BTA and WTO agreements, however, is the lack of a formal dispute settlement mechanism. While the WTO and even some regional agreements such as NAFTA provide for adjudication of trade disputes, the BTA simply establishes a “Joint Committee on Development of Economic and Trade Relations” that is given a mandate to serve as a forum for consultations over problems regarding implementation of the agreement (Chapter VII Article 5).

Therefore, when in the first months after the start of the agreement Vietnam faced an unexpected protectionist measure by the United States against its catfish exports, there was nowhere for Vietnam to turn for third party mediation. The BTA reduction of tariffs and the growth of a promising industry for Vietnam resulted in a surge of Vietnamese catfish into U.S. markets – increasing from 5 million pounds of frozen fillets in 1999 to 34 million pounds in 2002, and capturing 20 percent of the U.S. market.⁶⁹ Declining prices intensified the difficulties for U.S. producers, who in 2001 experienced a thirty percent drop in the average earnings from a kilogram of catfish.⁷⁰ The U.S. Association of Catfish Farmers of America (CFA), representing the catfish farmers concentrated in a few southern states of the United States, soon lobbied for measures to restrict the import of Vietnamese catfish. Although the U.S. catfish market is a mere \$590 million, in both countries the dispute over catfish exports has taken on larger political significance and influenced how both sides view the bilateral trade relationship.

⁶⁸Agreement Between the United States of American and the Socialist Republic of Vietnam on Trade Relations. Mimeograph available at USTR Reading Room, 1724 F St, N.W., Washington, DC.

⁶⁹*The Washington Post*, 13 July 2003.

⁷⁰*The Far Eastern Economic Review*, 6 December 2001.

The Labeling Dispute

The first stage of the “catfish war” involved a U.S. decision to change a labeling policy and its refusal to negotiate any compromise of that regulation. The U.S. industry had invested in developing high-quality, farm-raised catfish and dramatically increased sales through a skillful marketing campaign. When Vietnamese catfish began making inroads into the U.S. market, with some being sold as “Cajun Delight Catfish” or other such names, the domestic industry struck back with its own advertising campaign against the Vietnamese fish. They claimed that the Vietnamese fish were lower quality because they were raised in “Third World rivers.” Representative Marion Berry from Arkansas even referred to the danger that Vietnamese catfish were contaminated by lingering Agent Orange sprayed by the United States during the war.⁷¹ Such xenophobic advertising did not prevent 30 percent of U.S. seafood restaurants from serving Vietnamese catfish.⁷²

When the labeling issue first arose, USTR officials went to technical experts at the Food and Drug Administration (FDA) for advice. The FDA officials said that they could not revoke the right for Vietnam to use the catfish label with a modifier such as “Vietnamese catfish”, since the Vietnamese product was a kind of catfish. At the time, “The Seafood List, FDA’s Guide to Acceptable Market Names for Seafood Sold in Interstate Commerce 1993” listed twenty different kinds of fish including the Vietnamese species as eligible for marketing with a label including the word catfish. Vietnam had readily agreed to any labeling policy requiring it to identify country of origin and/or use “Mekong Catfish” on labels.⁷³ FDA inspectors who visited Vietnam confirmed that quality standards complied with FDA requirements, and the U.S. Embassy in Vietnam reported that it had found “little or no evidence that the U.S. industry or health of the consuming public is facing a threat from Vietnam’s emerging catfish export industry.”⁷⁴ The matter would have ended

⁷¹*New York Times*, 5 November 2002.

⁷²*The Far Eastern Economic Review*, 6 December 2001.

⁷³Indeed, the marketing controversy was less the result of Vietnam’s exporters than about the American wholesale retailers and supermarkets that were adding labels they thought would make the product sell better. Former USTR official. Interview by author. Washington D.C., 15 July 2003.

⁷⁴U.S. Embassy report cited in Senate debates. Agriculture, Conservation, and Rural Enhancement Act of 2001, Senate debate 18 December 2001 [S13427].

there if it had been up to the USTR and FDA.

Determined to maintain their hold on the domestic market, the CFA engaged southern politicians to legislate a change in U.S. regulations to prevent Vietnam from being able to sell its fish as catfish. Their central claim held that the basa and tra catfish (*Pangasius bocourti* and *Pangasius hypophthalmus*) from Vietnam were a different product from the U.S. channel catfish (*Ictaluridae*). There was not a specific international standard regarding the labeling of catfish. The *Saigon Times Weekly* (26 January 2002) quotes Carl Ferraris, a researcher from the California Academy of Sciences, to support the Vietnamese claim that the basa and tra fish are catfish – among over 2,500 kinds of catfish around the world known by that name. The fish database of the International Center for Living Aquatic Resources Management with sponsorship from the FAO lists over seven hundred fish species with “catfish” in the name.⁷⁵ The CFA and its supporters, however, argued that only the one species, *Ictaluridae*, should be called catfish.

In the closing days of debate on an appropriations bill, southern representatives inserted an amendment to change the FDA regulation. The amendment would prevent the FDA from processing fish labeled as catfish unless it was of the species *Ictaluridae*. One Vietnamese negotiator who had tried to urge reconsideration, said the issue was decided “purely by domestic politics – we have no leverage.”⁷⁶ Their best effort was to contact the Congressmen who had helped to support the BTA and the normalization of U.S.-Vietnam relations, such as Senators John McCain and Phil Gramm. These senators spoke out strongly against the measure when the bill came up before the Senate. McCain condemned the amendment and the process by which it had been passed:

In fact, of the 2,500 species of catfish on Earth, this amendment allows the FDA to process only a certain type raised in North America – specifically, those that grow in six Southern States. The program’s effect is to restrict all catfish imports into our country by requiring that they be labeled as something other

⁷⁵<http://www.fishbase.org>. Accessed 28 July 2003. Specific reference for entries on *Pangasius bocourti* and *hypophthalmus* are from T.R. Roberts and C. Vidthayanon (1991). “Systematic revision of the Asian catfish family Pangasiidae, with biological observations and descriptions of three new species” *Proceedings of the Academy of Natural Sciences, Philadelphia*. 143: 97-144.

⁷⁶Official of the Vietnamese Embassy to the United States. Interview by author. Washington, D.C. 11 July 2003.

than catfish, an underhanded way for catfish producers to shut out the competition. With a clever trick of Latin phraseology and without even a ceremonial nod to the vast body of trade laws and practices we rigorously observe, this damaging amendment ...literally bans Federal officials from processing any and all catfish imports labeled as they are – catfish. ...It patently violates our solemn trade agreement with Vietnam, the very same trade agreement the Senate ratified by a vote of 88 to 12 only 2 months ago. The ink was not dry on that agreement when the catfish lobby and its congressional allies slipped the catfish amendment into a must-pass appropriations bill.⁷⁷

Despite such impassioned speeches, the measure was adopted as part of the 2002 Farm Act.⁷⁸

There was some effort by the Senators who opposed the amendment to use the WTO cases on labeling to strengthen their argument. Both the scallops and sardines disputes were mentioned as a similar labeling restriction that the U.S. had opposed when it was European policies harming U.S. producers. The Southern representatives claimed that the difference between the fish species at hand was much greater than the related WTO cases.⁷⁹ Examples were given that the U.S. and Vietnamese fish were as different as a yak and a cow. Unlike Peru, however, Vietnam could not file a complaint to the WTO and have a more neutral source decide what should count as a catfish. Given no choice but to accept the measure, Vietnamese exporters labeled their fish as basa and tra.

The Anti-dumping Determination

When even the food labeling barrier did not restrain imports, the U.S. catfish industry switched tactics to file a petition in June 2002 requesting anti-dumping measures against the imports from Vietnam. The CFA petition claimed that Vietnam was selling its fish in U.S. markets at prices below the cost of production with injurious effects on the U.S. industry.

Dumping is considered a threat to fair trade conditions and competitive markets when

⁷⁷Agriculture, Conservation, and Rural Enhancement Act of 2001, Senate debate 18 December 2001 [S13426].

⁷⁸The provisional measure became permanent in Section 10806 of the 2002 U.S. Farm Act, which became law 13 May 2002 (public Law 107-171).

⁷⁹Agriculture, Conservation, and Rural Enhancement Act of 2001, Senate debate 18 December 2001 [S13429].

an exporter sells goods at a higher price in its home market while disposing of surplus capacity in foreign markets at lower prices. Domestic laws to counter dumping predate international trade rules, and have been recognized by the GATT and now the WTO rules.⁸⁰ The United States accepts petitions from industries that claim to suffer from foreign dumping of like products, and undertakes two parallel investigations before making a final determination. The first investigation is supervised by the International Trade Administration within the Department of Commerce (DOC), which evaluates the normal price of the foreign product in order to determine whether it has been sold below price in U.S. markets. The ruling of dumping, however, must also be accompanied by a finding of injury. The International Trade Commission hears evidence from both sides on whether the imports have caused damage to the domestic industry. Positive findings in both investigations result in the application of anti-dumping duties on the foreign product.

Problems arise, however, when anti-dumping policies become an alternative form of protection for weak import-competing industries. Given that the investigation of dumping and industry damage occur under the auspices of domestic law and national administrative officials serve as the judge in a dispute between a national and foreign industry, there is the possibility for bias in favor of the home industry. The initiation of an investigation alone can help the domestic industry and harm the exporter by creating market uncertainty about future trade (when imposed, duties are retroactive such that importers may become hesitant to buy from an exporter under investigation).⁸¹ Cooperation with the investigation also imposes considerable administrative costs on the export firms that must provide detailed information about their business operations.

After having declared that the Vietnamese product was fundamentally different from U.S. catfish, now the anti-dumping suit depended upon defining the same fish to be a like product. According to U.S. law, an anti-dumping petition must be initiated by a domestic industry that produces a like product with the imported good subject to investigation. This determination of like product, however, is made on a case-by-case basis when the petition is first accepted and again later when officials evaluate the injury to domestic industry from

⁸⁰GATT Article 6 allows use of anti-dumping duties when there is evidence that dumping causes material injury to competing domestic industries.

⁸¹Palmer 1996, 279.

imports. As such, the definition of like product is often a matter of disagreement.⁸² The President of the American Seafood Distributors Association said during a hearing about the anti-dumping case that “changing the name of Vietnamese catfish to basa should have been sufficient grounds to protect the market name of the domestic catfish producers and thus give them the product differentiation that should have ruled out the need to pile on with a dumping suit as well. The fact that we are here today to perform the alchemy of turning basa back into catfish strikes me and the organization that I lead as nothing short of a convoluted action to serve only one master. It’s protectionism.”⁸³

After the CFA filed their petition, Vietnamese officials tried to prevent initiation of an investigation. Contacts with the U.S. government were pursued at all levels. The DOC, however, was obligated by law to initiate the investigation so long as the CFA petition met their checklist as a valid claim (e.g. petitioners account for more than 50 percent of production of domestic like product, present evidence of injury from imports with data for calculation of estimated dumping margin, and follow necessary procedures). The petition from the CFA, which estimated that there should be a finding for a 144-190 percent dumping margin on the Vietnamese fish, was found to meet these standards.⁸⁴ Neither requests from Vietnam’s officials nor letters from senators expressing concerns about broader relations could be taken into consideration at this stage.⁸⁵ The DOC approved the start of an investigation, referring to the case as concerning “certain frozen fish fillets from Vietnam” in light of the naming controversy.

The first hurdle for Vietnam was to try and prove that prices in Vietnam should be used in the calculation of normal prices. The CFA requested that Vietnam should be considered a non-market economy, which would mean that a surrogate country would be used for pricing calculation under the assumption that real prices could not be estimated in a state-controlled economy. This judgment was made on an economy-wide basis rather

⁸²Palmeter 1996, 268.

⁸³U.S. International Trade Commission. Hearing report for Investigation no. 731-TA-1012 in the matter of certain frozen fish fillets from Vietnam. 17 June 2003.

⁸⁴Department of Commerce “Initiation of Anti-dumping Duty Investigation: Certain Frozen Fish Fillets From the Socialist Republic of Vietnam.” *Federal Register* vol. 67 no. 142 (24 July 2002): 4837-40.

⁸⁵Department of Commerce official. Interview by author. Washington D.C., 11 July 2003.

than through examination of the specific sector.⁸⁶ As a result, even though the catfish producers in Vietnam are a group of companies and small-scale farmers that generally operate by market principles, and there was no evidence to show they had received government subsidies or price directives, the economy was judged to be a non-market economy.⁸⁷ The non-market finding pushed the investigation into the realm of hypotheticals – Brink Lindsey of the Cato Institute condemned the process for determining non-market economy prices: “Basically, you can come up with any dang number you want to.”⁸⁸ In the case of Vietnam, prices from Bangladesh were used to estimate what it would cost to produce fish in Vietnam if it operated on market principles.

Vietnam found itself forced to wage a legal fight in U.S. trade courts. This being the first anti-dumping case for Vietnam, they were completely lacking in expertise. DOC officials had weekly meetings with officials from the Vietnamese embassy and traveled to Vietnam to offer a seminar to help the companies that were required to submit extensive surveys on their business operations. The complexity of anti-dumping procedures, however, required legal expertise. The Vietnamese government hired a U.S. law firm to represent their interests in consultations regarding the case, while the Vietnamese exporters represented by the Vietnam Association of Seafood Producers (VASEP) hired another law firm to present their case before the DOC and ITC.

Proceedings went forward as an administrative investigation run strictly according to U.S. anti-dumping laws. The DOC made its preliminary determination for dumping duties in January 2003. Based on the DOC calculations, which drew on a regression wage rate for Vietnam’s labor costs and Bangladeshi prices for inputs and pricing of fish, the DOC determined that 38-64 percent anti-dumping tariffs should be applied.⁸⁹ The lower rate would apply to the large companies that had cooperated with the investigation by providing information, while the higher “Vietnam wide” rate would apply to all of the small

⁸⁶The DOC anti-dumping manual lists provisions regarding a market-oriented industry that might have been appropriate for the case. Vietnam unsuccessfully tried to prove the more general claim that the entire economy was market-based.

⁸⁷Official of trade industry association. Interview by author. Washington D.C., 11 June 2003.

⁸⁸*The Washington Post*, 13 July 2003.

⁸⁹Department of Commerce. “Notice of Preliminary Determination of Sales at Less Than Fair Value,” 68 FR 4986 (31 January 2003).

Vietnamese catfish producers who had lacked the information or resources to participate in the investigation. These smaller producers, who compose 40 percent of all those employed in the catfish industry in Vietnam, are the most market driven and least likely to be able to afford selling products below price.⁹⁰

The next phase opened a window for negotiation. Vietnam requested to negotiate a suspension agreement, which is an effort by the government of the industry that is charged with dumping to reach a settlement with the DOC. Although infrequent, such agreements have been reached by means of fixing import prices to an agreed level and/or administering a quota similar to a voluntary export restraint. The DOC then would suspend the dumping investigation and not issue a final determination on dumping. In this case, the officials from the Vietnamese delegation and the DOC could not reach a mutually acceptable agreement on the price level and quota size. An official from the Vietnamese side said that the DOC took an inflexible approach, starting off with a high price and low quota, and only agreeing to increase the quota if the price was also increased. The Vietnamese side had begun with a request for a relatively low price and high quota, and then came back having modified their own offer slightly to include a higher price. After another failure to reach agreement, the Vietnamese came back with a more substantial concession from their original proposal. DOC officials, however, had hardly changed their original position and agreed that the first offer had been the final offer. Since the Vietnamese side estimated that the DOC offer would be equivalent to 60-80 percent tariffs, they rejected it and let the anti-dumping investigation continue.⁹¹

DOC officials said that the negotiations for a suspension agreement were undertaken in good faith and that the legal obligations of U.S. anti-trust law requires that any suspension agreement must stop the undermining of prices that causes the domestic industry damage. They must also worry about a suspension agreement that leaves the petitioning domestic industry dissatisfied, because then it could launch an appeal. An earlier suspension agreement with Russia on hot-rolled steel was appealed by the domestic industry. In that case, the DOC agreement was upheld. If an agreement were overturned, however, it would

⁹⁰Official of trade industry association. Interview by author. Washington D.C., 11 June 2003.

⁹¹Official of the Vietnamese Embassy to the United States. Interview by author. Washington D.C., 11 July 2003. Official of trade industry association. Interview by author. Washington D.C., 11 June 2003.

be a bureaucratic nightmare to roll back the provisions of an agreement that had already begun implementation. Fear of an appeal from domestic industry restrained the DOC from considering any concessions. In the end, there was no overlap between their offer and the what Vietnam was willing to accept.⁹²

In contrast, a U.S. anti-dumping investigation against imports of fresh tomatoes from Mexico provides an example of a successful negotiation to reach a suspension agreement. After the DOC initiated the investigation 18 April 1996, Mexico filed a request for consultations under the WTO dispute settlement procedures with a complaint that the U.S. investigation violated its WTO commitments.⁹³ The WTO case never advanced to the panel stage, however, since Mexico and the United States reached a suspension agreement three months later.⁹⁴ This agreement provided for reference prices and was accepted by the Mexican exporters. The right to file a WTO complaint represents one tactic that may be useful to challenge dumping charges with a weak factual basis and even to gain leverage during negotiation of a suspension agreement.

Vietnam considered using threats to gain leverage in the dispute. The *Economist* reported that Vietnam was threatening to launch an anti-dumping suit of its own against the subsidized imports of U.S. soybeans.⁹⁵ In the end, however, threats were rejected as not serving Vietnam's own interests – there seemed little point in harming industries such as Cargill when the government was trying to encourage more investment by such companies. Moreover, it was unlikely that the United States would be moved by threats from a country with such a tiny market. In 2002, U.S. exports to Vietnam had a total value of 580 million dollars, which is tiny relative to U.S. total exports of 693 billion and relative to its exports to other countries in the region (U.S. exports to China that same year were \$ 22 billion, and its exports to Thailand were \$ 4.9 billion).⁹⁶

The DOC and ITC issued their final positive findings of dumping and injury after further hearings to evaluate the arguments presented by both sides. In its defense against

⁹²Officials of the Department of Commerce. Interview by author. Washington D.C. 11 July 2003.

⁹³Request for Consultations by Mexico, "United States–Anti-dumping Investigation Regarding Imports of Fresh or Chilled Tomatoes from Mexico. WT/DS49/1 (8 July 1996).

⁹⁴Federal Register (61) 56617 [A-201-820] (1 November 1996).

⁹⁵14 December 2002.

⁹⁶Foreign Trade Division <http://www.census.gov/foreign-trade/balance/> accessed 30 July 2003.

the dumping charges, the Vietnamese side tried to use the earlier Congressional debate to argue that basa and tra fish were indeed different products from U.S. catfish and were not any more responsible for the troubles of the catfish industry than were exports of other fish species like sole. Statistical evidence was presented to show that imports of Vietnamese catfish did not influence U.S. catfish prices. This was countered by the CFA legal team, which argued that the labeling policy had not prevented basa and tra from competing with U.S. catfish, and offered its own statistical analysis to show that imported Vietnamese fish did have an impact on domestic catfish prices.⁹⁷

One of the most strongly contested points in the legal briefs regarded whether valuation of the factors of production should be based on an integrated process of raising fish or on the purchase of a whole fish. The Vietnamese producers claimed their use of an integrated process was a source of comparative advantage, and that their actual factor inputs and production process should be used in the calculation of the normal price.⁹⁸ Instead, the DOC used the cost of whole fish purchase in Bangladesh along with the cost of other inputs - including water costs. The DOC justified this as necessary in order to find comparable data in Bangladesh for the construction of surrogate prices. The DOC explanation also questioned the degree of integration in the Vietnamese production of catfish.⁹⁹ The DOC calculations produced an estimated normal price much higher than the price that Vietnamese catfish were sold in the United States. The final determination issued in July 2003 called for dumping duties of 37-64 percent.¹⁰⁰

Vietnam's government protested the outcome, saying the case against it had been groundless.¹⁰¹ Press reports in both Vietnam and the United States mocked the notion

⁹⁷U.S. International Trade Commission. Hearing report for Investigation no. 731-TA-1012 in the matter of certain frozen fish fillets from Vietnam. 17 June 2003.

⁹⁸U.S. International Trade Commission. Hearing report for Investigation no. 731-TA-1012 in the matter of certain frozen fish fillets from Vietnam. 17 June 2003.

⁹⁹International Trade Administration. Final Decision Memorandum (June 16, 2003) p.41 (copy of public memo on file in DOC records room).

¹⁰⁰Department of Commerce. "Notice of Final Anti-dumping Duty Determination of Sales at Less Than Fair Value and Affirmative Critical Circumstances: Certain Frozen Fish Fillets from the Socialist Republic of Vietnam." FR 68, no. 120 (23 June 2003): 37116-121.

¹⁰¹*The Financial Times*, 24 July 2003.

that Vietnamese catfish farmers or the Vietnamese government had the money to engage in dumping its fish below cost.¹⁰² A U.S. trade expert who had followed the case said it was unfathomable that Vietnam was dumping fish in the U.S. markets, but that the determination was possible because “reality was thrown out” when the DOC constructs prices for non-market economies.¹⁰³ The use of figures from Bangladesh that were calculated with different years according to data availability and the use of data from India when there was inadequate data from Bangladesh contributed to the sense that the dumping margins had been determined arbitrarily. After the final decision, Vietnamese officials protested that it had been unfair to ignore the efficiency gains from their integrated production process that allowed them to sell the fish at a lower price.

There was little doubt about the devastating effect of the outcome for Vietnamese exporters. After the preliminary duties were imposed in January, the export of Vietnamese catfish to the United States had been down 30-40 percent, and the announcement that these duties would now be permanent is expected to deal the final blow to effectively close off the market.¹⁰⁴

Release of the final determination was the end of the case from the perspective of U.S. law, and there was no opening for Vietnam to negotiate the outcome. It could file an appeal for review by the Court of International Trade, but this remains a U.S. Court that places the burden of proof on the challenging party to show the determination is not based on substantial evidence – the court will not overturn the agency’s statutory interpretation so long as it could be conceived of as a permissible construction of the law.¹⁰⁵ For Vietnam, further legal bills with little hope for a change in the regulation made the option of appeal unattractive.

This contrasts with the option for WTO members to file a complaint and force the government that has applied anti-dumping duties to defend its decision as meeting WTO standards. The Anti-Dumping Agreement specifies rules and procedures for application

¹⁰² *The New York Times*, 22 and 25 July 2003; *Vietnam News Agency*, 10 July 2002, <http://www.vietnamembassy-usa.org/news/newsitem.php3?datestamp=20020710154153>.

¹⁰³ Former USTR official. Interview by author. 15 July 2003.

¹⁰⁴ *The Financial Times*, 24 July 2003.

¹⁰⁵ Palmeter 1996, 277.

of anti-dumping duties, such as what facts are necessary to make a finding of dumping and injury.¹⁰⁶ Dispute settlement has been used to challenge cases where the methodology to calculate dumping or injury were questioned. Since 1995 there have been 51 separate requests for consultations regarding anti-dumping.¹⁰⁷ Indeed, the same day that the determination was made on Vietnam's catfish, the ITC also approved anti-dumping duties on semiconductors from Korea. The Korean government immediately announced it would appeal the decision to the WTO.¹⁰⁸ While anti-dumping laws are legal under international trade law, states can also be held accountable to justify the application of its procedures in any given case. Dispute panels have often ruled against anti-dumping policies where rules of thumb used by administrative authorities in calculating margins fail to hold up before an international standard of review.¹⁰⁹ For example, when India filed a complaint against EC anti-dumping duties applied to imports of bed linen from India, the panel ruled against the EC measure on several grounds, such as inconsistencies in the calculation of the amount for profit in its construction of the normal price.¹¹⁰ Following the ruling, the EC amended its anti-dumping duties according to the recommendation of the panel ruling.

For WTO members, the option to legally challenge an anti-dumping finding in the WTO may even deter the imposition of anti-dumping duties against their products. One study of U.S. anti-dumping activity from 1980 to 1998 finds that GATT/WTO membership reduces the likelihood of the U.S. government making a positive decision to impose anti-dumping duties, when controlling for other economic factors likely to influence the anti-dumping finding.¹¹¹ Members that actively use the dispute system are even less likely to be targeted. This would mean that non-members face the double disadvantage that they are more likely to face anti-dumping duties against their products and they will have no recourse to challenge these duties.

¹⁰⁶Jackson 1997, 255-257.

¹⁰⁷This total represents requests for consultations under the Anti-Dumping Protocol listed at http://www.wto.org/english/tratop_e/adp_e/adp_e.htm accessed 23 January 2004.

¹⁰⁸*The Financial Times*, 24 July 2003.

¹⁰⁹Hudec 1993, 345.

¹¹⁰Report of the Appellate Body, "European Communities—Anti-dumping Duties on Imports of Cotton-type Bed Linen from India" WT/DS141/AB/R (1 March 2001).

¹¹¹Blonigen and Bown 2003, 266.

One can only speculate about whether Vietnam would be able to win a ruling against the U.S. measure in this case if it were able to file a complaint. There might be grounds for Vietnam to contest the like industry definition as well as the methodology of calculation. Virginia Foote, the president of the U.S.-Vietnam Trade Council, said “I think that if Vietnam was a WTO member, it could bring the case to the WTO and we would see if Vietnam was considered dumping its products in the US market according to international standards.”¹¹² Whether or not Vietnam could have used WTO dispute proceedings successfully in this case, there is a perception that Vietnam is more vulnerable because it does not have this option. One Vietnamese negotiator said that not being able to appeal to the WTO put them in a weaker position, and added that if Vietnam had been a WTO member the CFA would have still filed its petition, but Vietnam would have had more tools to negotiate with.¹¹³ One consequence of this case was a renewed urgency to join the WTO. Demetrios Marantis, chief legal adviser to the U.S. Vietnam Trade Council in Hanoi, said that the government had accelerated its effort to join the WTO after this case in the hope that it would receive more favorable outcomes in the future from multilateral settlement of trade disputes.¹¹⁴

On the basis of the BTA, Vietnam has been able to more than double its exports to the United States. While the agreement has brought mutual benefits, the treaty also directly reflects the unequal power relationship. Vietnam had to undertake a major overhaul of its policies to gain MFN access to U.S. markets. Yet when the United States adopted policies against Vietnam’s successful catfish exports, Vietnam had no bargaining leverage. The bilateral agreement lacked the institutional framework for dispute settlement, and Vietnam had few options against unilateral U.S. policies. Vietnam was unable to hold the United States accountable to its commitments, or even insist that the legal text of the BTA should serve as the basis for negotiation over trade disputes. Switching standards, U.S. policy could at the same time declare Vietnamese basa and tra fish to be completely different

¹¹²Nguyen Vinh “Say no to any sanction against Vietnam” at <http://www.usvtc.org> accessed 11 August 2003.

¹¹³Official of Vietnam’s Embassy to the United States. Interview by author. Washington D.C., 11 July 2003.

¹¹⁴*Business Week*, 24 November 2003.

from catfish and a like product with catfish. Thus a labeling regulation that appears to blatantly represent an unnecessary obstacle to trade was established and a controversial anti-dumping decision goes unchallenged.

4 Concluding Remarks

Food labeling involves domestic regulations with both legitimate concerns about consumer information and opportunities for hidden protectionism. Increasingly countries try to use geographical indicators or quality distinctions to maintain advantages for local producers – reduction of the tariffs, quotas, and subsidies that long protected sensitive primary goods sectors leaves labeling regulations as the last barrier. As difficult trade disputes continue to occur, it will be important for both sides to engage in negotiations based on science rather than arbitrary justifications. The WTO rules are a key factor to influence whether even small countries can insist upon use of common standards.

The first hurdle for a developing country is to get its more powerful trade partner to engage in a negotiation to find a mutually acceptable solution. There is little that a small country can do when requests to discuss a trade problem are ignored as happened to Vietnam. The United States refused to negotiate with Vietnam after legislating a unilateral change of its labeling policy. Then the United States took an inflexible position during negotiations to suspend the anti-dumping investigation. In contrast, the WTO adjudication process mandates at least an effort at negotiation during the consultation phase, and guarantees the right of members to a panel judgment on their complaint. Thus even when the EC refused to offer any concessions during bilateral talks and during the DSU consultation phase, it had to face Peru in court.

The second challenge is to shape the terms of agreement to conform with common rules rather than the will of the more powerful. An important role of the WTO is to establish a clear set of standards to regulate trade. Any member can appeal to these rules when calling for non-discriminatory treatment of its exports. Thus Peru could use the WTO adjudication process to force the EC to engage it in a negotiation based on the standard of WTO policies for labeling. With its legal complaint, Peru could also focus the discussion on the exact

article in the agreements that it felt was most beneficial for its argument. Vietnam should have been able to use a legal standard for leverage because the BTA and TBT Agreement include the same text prohibiting regulations that serve as unnecessary obstacles to trade. Without an appeal to the WTO, however, it could not force the United States to take this standard into consideration. Moreover, when the representatives for Vietnamese catfish producers tried to use the same arguments presented by the CFA during the labeling dispute to counter the like product definition in the anti-dumping dispute, their case was rejected. Outside of an institutional context with established standards and procedures, more powerful countries can pick and choose any standard to justify the policy they choose.

Thirdly, the WTO dispute settlement process can help developing countries by means of legal bandwagoning. Having several countries join together to argue against a particular interpretation of the rules bolsters the legal arguments and legitimacy of the complaint. For a developing country it can be especially useful to have legal points addressed by developed countries as part of the panel hearing process.¹¹⁵ Where Vietnam stood alone, Peru had Canada and the United States along with other developing countries jointly arguing its case. At the same time, the pressure for eventual compliance grows with the number of countries that could potentially issue sanctions. Even more important than the weight of sanctions, normative pressure from the entire membership supports the obligation for compliance. This shift in the cost analysis is critical for developing countries who fear damaging bilateral relations and lack both legal expertise and retaliatory capacity.

Finally, the WTO process brought compliance by changing the alternative to a negotiated settlement. Within the WTO dispute system, the EC had to be concerned about a ruling that would set a precedent with broader impact. This encouraged early settlement in the scallops case. For the more narrow legal case regarding sardines, winning the ruling gave Peru the leverage to bring a policy change that it had been unable to reach in bilateral talks. On the other hand, even though Vietnam was losing trade benefits that it could legitimately have expected from the BTA, there was no mechanism for it to challenge

¹¹⁵This could be a double-edged sword, since third parties could also support the defendant and argue for a negative ruling. The addition of third parties will only help a developing country that is making an uncontroversial legal claim for compliance with treaty obligations. Under these circumstances, however, it is likely that a broader coalition offers support.

the U.S. labeling policy. While Vietnam offered concessions towards a compromise on the dumping problem, the DOC refused to compromise. Developing countries lack the market power to issue threats or bribes, but those that are members of the WTO can use its dispute mechanism to challenge such domestic legal proceedings. A negative ruling raises the costs of continued protection so that governments will be more cautious about upholding the protectionist demands of their domestic industry.

The negotiation process matters in terms of how well states use the institutional system. WTO membership is a necessary condition to gain leverage through legal framing, but members must also opt to use the rules by initiating a complaint. Choosing to initiate a complaint together with other members further enhances bargaining leverage while reducing costs. Chapter 8 demonstrates how creative legal tactics in managing a dispute case (Ecuador's complaint against the EU banana import regime) can improve the negotiation outcome. As this chapter has shown, the possibilities for using skillful negotiation tactics to improve outcomes are extremely limited for states outside of the WTO.

Dispute settlement mechanisms in bilateral free trade agreements also have significant effects on the context for compliance bargaining between trade partners. These dispute mechanisms offer some of the advantages of legal framing found in the WTO dispute settlement. Yet the WTO provides developing countries with the option to enhance their leverage through coalition action, which was important in the case of Peru. As the proliferation of bilateral free trade agreements expands the options for managing trade problems, the choice of negotiation forum will become an important first step in negotiation strategies.

Many have feared that legal costs transfer the power asymmetry of bilateral negotiations into WTO disputes. Certainly developing countries suffer from their lack of comparative advantage in international trade lawyers and are unable to afford to hire a U.S. law firm for every case. Discounted legal services offered by the Advisory Centre on WTO Law, however, are an important step that reduces this problem. Moreover, as developing countries build experience using the DSU, they can begin to improve their skills. Participating as a third party or co-complainant offers a kind of apprenticeship for states to learn how to effectively use the rules to their advantage.¹¹⁶

¹¹⁶Statistical analysis of 72 developing countries from 1995 to 2002 shows that those with more experience

Through examination of specific cases, this chapter highlighted how legal framing of the negotiation allows a developing country to gain a better outcome than it could achieve in bilateral negotiations. Two general hypotheses emerge that could be tested on a broader range of cases: developing countries that are members of the WTO will gain better negotiation outcomes than non-members, and developing countries that file a complaint with the support of interested developed country members will gain better outcomes than those that act alone. The broader implication of the study is that the institutional context of a negotiation can reduce the effect of asymmetric power relations. This opens up space for small countries to negotiate for concessions from their most powerful trade partners.

The WTO adds to the tactical toolkit available to a developing country. When facing discrimination against their exports, WTO members can respond with a distributive strategy supported by the rules of the WTO dispute settlement process. Filing a complaint forces the other side to listen to this demand for a unilateral policy change, establishes a neutral standard to settle the dispute, and increases the opportunity to find allies. The institutional context shapes bargaining incentives for both sides so that even a weak country can use a strong legal case to push forward with its distributive strategy while a strong country may offer concessions to avoid a negative precedent or damage to the rules system. Although the legal resources required for adjudication are an obstacle for using legal tactics, the alternative of a bilateral negotiation leaves developing countries in a situation with a far worse outlook for ending the discrimination against their goods by a developed country. With more progress in the area of legal assistance for developing countries, the WTO rules for dispute settlement can help to establish a level playing field.

For issues that are outside of existing WTO commitments, however, the legal framing tactic will not be relevant. New trade issues can only be negotiated through bilateral agreements or in trade rounds to expand on existing rules. In addition, cases with questionable legal interpretation will be more difficult. Developing countries lack the legal capacity to manage the more complicated legal cases and are less likely to find allies to support their case when their interpretation involves stretching existing legal commitments. Disputed

as initiators, third parties, or even as defendants were more likely to initiate complaints in the WTO DSU. Davis 2005.

rulings that raise legal controversy among members are less likely to exert the compliance pull from international legitimacy that accompanies most rulings. While unable to solve all trade problems, legal framing offers developing countries an effective tactic against trade barriers that represent a clear violation of existing commitments.

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