

Using Dispute Settlement Partnerships for Capacity-Building: Bangladesh's Triumphant Experience at WTO DSU

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ABSTRACT

World Trade Organisation grants rights to its Members, and WTO Dispute Settlement Understanding provides a rule-oriented consultative and judicial mechanism to protect these rights in cases of WTO-incompatible trade infringements. However, the DSU participation benefits come at a cost. These costs are acutely formidable for least developing countries which have small market size and trading stakes. No LDC has ever filed a WTO complaint, with the only exception of India-Battery dispute filed by Bangladesh against India. This article looks at the experience of how Bangladesh –so far the only LDC member that has filed a formal WTO complaint – persuaded India to withdraw anti-dumping duties India had imposed on the import of acid battery from Bangladesh. The discussion provides a sound indication of the participation impediments that LDCs can face at WTO DSU, and the ways in which such challenges can be overcome with the help of resources available at the domestic level. It also exemplifies how domestic laws and practices can respond to international legal instruments and impact the performance of a LDC at an international adjudicatory forum. The investigation is grounded on practically-informed findings gathered through authors' work experience and several semi-structured interviews and discussions which the authors have conducted with government representatives from Bangladesh, government and industry representatives from other developing countries, trade lawyers and officials based in Geneva and Brussels, and civil society organisations.

Keywords: World Trade Organisation, Dispute Settlement, Capacity Building, Bangladesh

INTRODUCTION

The World Trade Organisation Dispute Settlement Understanding (WTO DSU) is seen as the central pillar of the multilateral trading system. Trade disputes are filed by member governments if they have reasons to believe that another member government is violating a WTO agreement or a commitment it has undertaken as part of the WTO. Since 1995, WTO Members have filed over 500 complaints with the cause of actions arising from several WTO Agreements. Dispute Settlement Body (DSB) has issued rulings in over 350 of these complaints whilst most of the others were resolved bilaterally between the complainant(s) and respondent(s).¹ The average time taken by the Panels to issue reports has centered around fourteen months. From January 1995 to January 2018, Appellate Body has issued 144 Reports within an average time-span of three months, which together with Panel Reports have contributed to the significant development of jurisprudence, clarification of issues and interpretation of laws. This makes the WTO dispute settlement system (DSS) the most active and the fastest international adjudicatory authority with an appellate jurisdiction in the world. However, resolving trade disputes through the DSU provisions have significant cost repercussions, and these costs may not be equally affordable by all WTO members.

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

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¹ WTO Dispute Settlement: Statistics, at <https://www.wto.org/english/tratop_e/dispu_e/stats_e.htm> accessed 12 September 2017.

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compliance and threaten retaliation in cases of non-compliance.² This demand for greater resources has impeded developing countries' access to WTO DSM.

In the words of Shaffer, the impediments that developing countries face at WTO DSU can broadly be categorised as "...constraints of legal knowledge, financial endowment, and political power, or, more simply, of law, money, and politics."³ These impediments become acutely formidable for least developing countries (LDC) which have small market size and absolute trading stakes.⁴ This is because they generally face a significant cost of mobilising resources for strengthening their DSU participation.⁵ Their low volumes of trade and low profit margins may not justify the non-economic (i.e., litigation) costs they are required to incur for 'maintaining or enforcing market access rights', mainly because the WTO litigation cost is insensitive to the economic stakes involved in a dispute.⁶ The high cost of WTO litigation can significantly reduce the anticipated economic benefits which an industry can receive from the removal of a trade barrier. Moreover, low retaliation capacity and negotiating clout can further dilute the benefits an affected industry based in LDCs can attain from WTO litigation.⁷

With low level of development, small market size, low aggregate trading stakes and poor institutional capacity to litigate and defend trade interests at WTO, LDCs are less likely to file complaints at WTO against trade infringements. Due to low DSU participation rate and high cost

² Marc Busch and Eric Reinhardt, 'The WTO Dispute Settlement Mechanism and Developing Countries' (April 2004) Trade Brief, Swedish International Development and Cooperation Agency, 3-4 <<http://www9.georgetown.edu/faculty/mlb66/SIDA.pdf>> accessed 15 November 2016.

³ Gregory C Shaffer, Marc Busch & Eric Reinhardt, 'Does Legal Capacity Matter? A Survey of WTO Members' (2009) 8 World Trade Review 559, 572.

⁴ Absolute trading stakes are the aggregate of a country's overall exports and imports (including the value, volume and variety of exports and imports).

⁵ Peter Van Den Bossche and James Gathii, *Use of the WTO Dispute Settlement System by LDCs and LICs* (TRAPCA, 2013) 21; Gregory Shaffer, 'Developing Countries Use of the WTO Dispute Settlement System: Why it Matters, the Barriers Posed', in James Hartigan (ed.), *Trade Disputes and the Dispute Settlement Understanding of the WTO: An Interdisciplinary Assessment* Vol 6 (Emerald Group Publishing 2009), 172.

⁶ Gregory C Shaffer, 'The Challenges of WTO Law: Strategies for Developing Country Adaptation' (2006) 5(2) World Trade Review 177, 185.

⁷ Bossche and Gathii, (n 5) 26. ['Since LDCs and LICs have a very small share of global trade, their ability to threaten retaliation against larger trading partners who violate their rights is very limited. Moreover, retaliation is likely to 'hurt' the economic interests of the complaining LDCs and LICs (by depriving themselves of cheaper importers) more than it 'encourages' the offending larger economies to comply.']

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of DSU participation (which may be even higher for LDCs due to poor economies of scale), these countries generally have little future incentive to develop their dispute settlement capacity or resort to DSU provisions for resolving their trade problems.

No LDC has ever filed a WTO compliant, with the only exception of *India-Battery* dispute filed by Bangladesh against India.⁸ This article looks at the experience of how Bangladesh – the first and so far the only LDC member that has filed a formal WTO complaint – persuaded India to withdraw the anti-dumping duties India had imposed on the import of all lead acid battery from Bangladesh. A close look at Bangladesh’s unique experiment of resolving a trade dispute with India is important for several reasons. As LDC with small volume of exports and imports in absolute terms, it has experienced high rates of economic growth and social transformations over the past few decades. It has gone through rapid integration into the global economy, with trade liberalisation, removal or reduction of trade barriers and its increasing focus on export-oriented growth strategy. This testifies its noticeable interest and commitment towards openness and liberalisation of trade.

Bangladesh’s experiment in *Battery* dispute also becomes relevant because the government in this case encouraged the affected exporting company to participate actively in and finance the conduct of dispute settlement proceedings “like never before”⁹. The partnership arrangement formed in this case between public officials and a private company presents a practically-informed example to other developing and least developed countries on how their governments can possibly harness private resources for strengthening their participation at such inter-governmental adjudicatory forums. It also demonstrates how international law can interact with and shape the laws, procedures and practices at the domestic level. In other words, it exemplifies how domestic laws and practices can respond to international legal instruments and impact the performance of a LDC at an international adjudicatory forum.

⁸ This holds true until the date of writing this article (i.e. June 2018). Antigua is the closest example as it has not only filed but also litigated a case at WTO against the US, but it is listed as a small island developing country and not as LDC in the UN list.

⁹ Findings obtained through observation of co-author Dr. Toufiq Ali during his assignment as the Ambassador at WTO Mission of Bangladesh.

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The engagement of affected industries during the management of trade disputes is an enabling element for any government action that is undertaken to safeguard or expand business interests. This argument is based on the hypothesis that an effective partnership arrangement between government and industry can cost-effectively enhance the dispute settlement capacity of developing countries. To examine and establish this hypothesis, the article focuses on Bangladesh's dispute settlement partnership experience as it seeks to examine three specific issues: *first*, how can dispute settlement partnerships play a capacity-enhancing role in least developed countries; *second*, how can a government coordinate with an affected industry for the settlement of trade disputes; *third*, what problems, if any, can a government face in doing the same.

The article, in the following section, provides a brief description of the institutions and procedures that are used in Bangladesh to manage foreign trade affairs, and in particular, foreign trade disputes. Section II analyses the manner in which the first and the only WTO dispute launched by Bangladesh was successfully resolved in its favour and the role that the affected private company played in achieving the same. In Section III, the article examines certain limitations that may impede Bangladesh to resolve trade disputes with the help of partnership arrangements in the future.

This piece is built on empirical research and available literature review. The authors have conducted semi-structured interviews and discussions with the help of selectively designed and individuated sets of questions. The interviewees were identified through purposive snowball sampling approach as it enabled the authors to make an 'initial contact with a small group of people' that were related to the area under investigation and then utilise these to establish further related contacts.¹⁰ With this approach, it became possible to identify those officials who, in various capacities, have been engaged in the process of WTO dispute settlement, and could therefore share their first-hand experiences and provide practical insights into this work. Different perspectives from government officials, private sector representatives, trade lawyers, academics and diplomatic officials were taken into account. The claims made by government officials were verified and cross-checked against the observations provided by private trade lawyers and ACWL officials. Their claims and perceptions were further corroborated, endorsed or refuted in the statements received from trade law academics and officials from international

¹⁰ [Alan Bryman, *Social Research Methods* \(Oxford University Press 2012\) 202.](#)

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and inter-governmental organisations. With such empirical investigation, it builds upon and complements existing literature on Bangladesh's participation at the WTO DSM.¹¹

I. MANAGEMENT OF FOREIGN TRADE DISPUTES: INSTITUTIONAL & PROCEDURAL FRAMEWORKS

Classified by the United Nations as a least developed country, Bangladesh is a parliamentary representative democratic republic with multiparty system. It emerged as an independent nation in the year 1971 as a hugely populous country with lives drenched in poor health and financial standards. Amidst formidable barriers such as lack of economic resources, natural disasters, widespread corruption and poor governance situation, Bangladesh has achieved significant transformations during the past few decades. This transformation process was specially triggered in the 1990s when the economic reforms widely coincided with the political and social transformations the nation was going through.

The 1980s and 1990s have seen a policy shift from a predominantly state-controlled and extensively socialist economy to a privatised and liberalised one. It has employed a market-oriented development strategy supported by a number of liberalizing policy reforms that were undertaken along the guidelines of the World Bank and the IMF.¹² Openness in trade has had a positive effect on the economic growth, exports, imports, FDI and remittance of the country.¹³ In particular, major developments in terms of international trade include relaxation and withdrawal of import quota restrictions and significant reduction in import tariffs.¹⁴ Greater trade openness has led to greater exports and imports in Bangladesh as it got more and more

¹¹ M A Taslim, 'How the DSU worked for Bangladesh: the first least developed country to bring a WTO claim', in G. Shaffer and R. Melendez-Ortiz, *Dispute Settlement at the WTO: The Developing Country Experience* (Cambridge University Press 2010) 230

¹² The phases of trade liberalization discussed in Umme Humayara Manni , Munshi Naser Ibne Afzal, 'Effect of Trade Liberalization on Economic Growth of Developing Countries: A Case of Bangladesh Economy', *Journal of Business, Economics & Finance* 1(2) (2012) 37, at 39.

¹³ Umme Humayara Manni , Munshi Naser Ibne Afzal, 'Effect of Trade Liberalization on Economic Growth of Developing Countries: A Case of Bangladesh Economy', *Journal of Business, Economics & Finance* 1(2) (2012) 37

¹⁴ For more information on its foreign trade policy and economic growth, see Muhammad Aslam Chaudhary, Nasim Shah Shirazi and Munir A. S. Choudhary, 'Trade Policy and Economic Growth in Bangladesh: A Revisit' *Pakistan Economic and Social Review* 45(1) (2007) 1.

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integrated in the world market.¹⁵ This has eventually led to higher economic growth after 1990s in Bangladesh.

There has been a steady increase in the exports, imports and foreign direct investment in Bangladesh, which together have resulted in nearly three hundred percent increase in GDP from 2001 to 2015. With sustained growth in export earnings, the share of exports to GDP has increased from almost eleven percent in 2003 to more than nineteen percent in 2015. With the accompanying increase in imports, the trade intensity (the combined ratio of exports and imports to GDP) has increased from around thirty-one percent in 2001 to nearly forty-eight percent in 2015. Moreover, the overall extent of globalisation in Bangladesh (which also takes into account the aggregate share of investment to GDP in addition to that of exports and imports) has closely followed the trend.¹⁶

Since 2009, Bangladesh has established itself as the world's second largest garment exporting country, after China.¹⁷ The export base of the economy is concentrated around the manufacturing and export of readymade garments (RMG) which is a dominant industry in Bangladesh.¹⁸ The economic sectors in the country are mostly fragmented, with a large number of small, medium and informal businesses, and a small fraction of organised industries such as the industry of ready-made garments. Agriculture and small-scale processing and manufacturing industries still occupy a large share of the country's overall GDP.

From a political perspective, the country has undergone a radical change from being a semi-autocratic to a parliamentary democracy. However, its democratic practices are often disrupted by the residual of some authoritarian elements that are occasionally influenced by special economic interests of influential industries.¹⁹ It is important to note that, over the last decade, businesses have gained considerable influence over politics. This can be seen in the increasing

¹⁵ Ibid, 41-42.

¹⁶ World Bank Database 2016

¹⁷ World Bank Report, 'United International and Regional Trade is Key to Faster Growth for Bangladesh' <<http://www.worldbank.org/en/news/press-release/2015/10/21/international-regional-trade-is-key-to-faster-growth-for-bangladesh-says-new-world-bank-report>> accessed 28 March 2018

¹⁸ Ibid.

¹⁹ Wahiduddin Mahmud, Sadiq Ahmed, Sandeep Mahajan, 'Economic Reforms, Growth, and Governance: The Political Economy Aspects of Bangladesh's Development Surprise', Working Paper No. 22, Commission on Growth and Development (2008) <<http://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.547.2711&rep=rep1&type=pdf>> accessed 3 October 2017.

presence of businessmen and businesswomen as the members of parliament (MP) in the ninth and tenth parliaments in Bangladesh. The figure below provides a clear example of professional affiliations of the current MPs in Bangladesh.

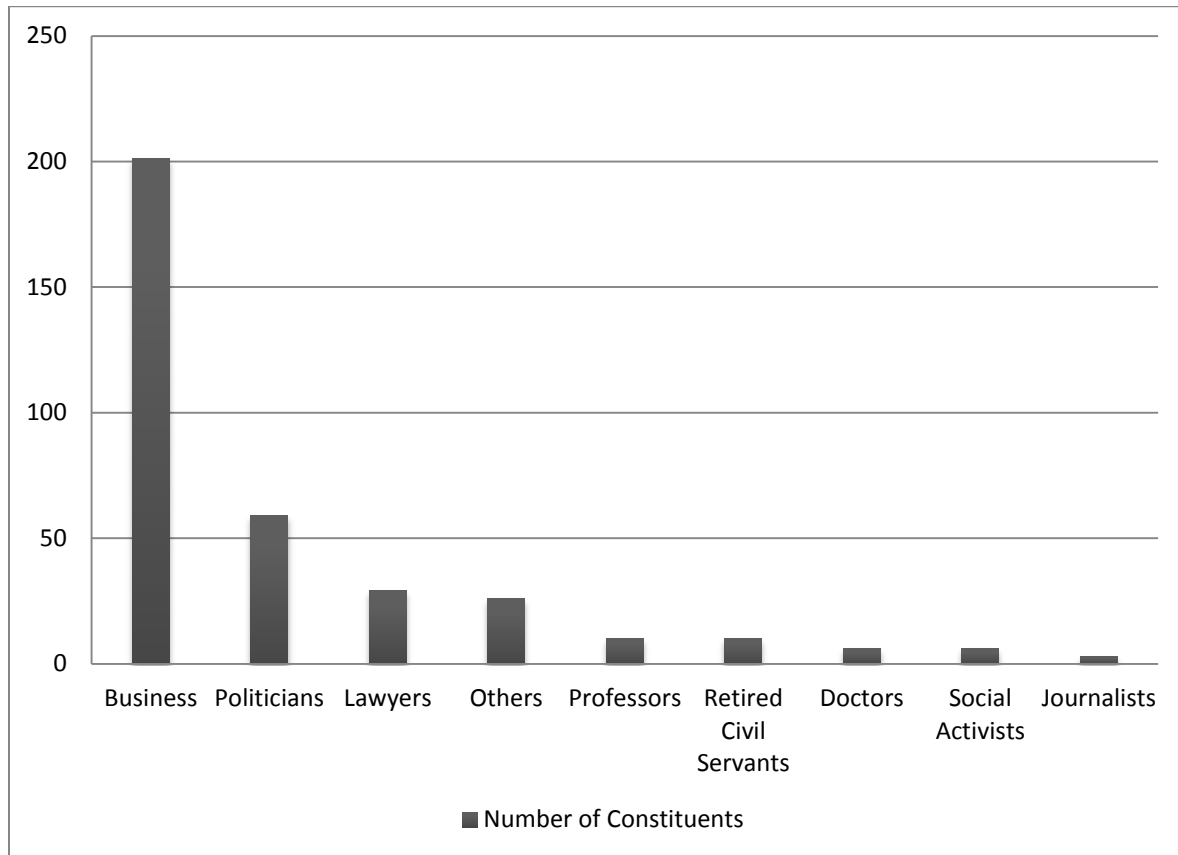


Figure 1: Members of 10th Parliament: Professional Affiliations

*Sources provided in the footnote.²⁰

The figure outlines the professions that dominate the tenth parliament in Bangladesh. We can see that the current parliament has multiple representatives having affiliations with medicine, politics, business, law, media and social activism. However, with nearly 200 MPs from the business world, business emerges as the most dominant profession amongst others. This

²⁰ Bangladesh Parliament website, List of 10th Parliament Members <<http://www.parliament.gov.bd/index.php/en/mps/members-of-parliament/current-mp-s/list-of-10th-parliament-members-english>> accessed 24 October 2017.

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intertwining of business and parliamentary politics at the national level has impacted policy-making in many disciplines including health, infrastructure development and trade.²¹ This, in turn, has had both positive and negative spilling in Bangladesh. On one hand, excessive interaction of politicians with business groups has increased the possibility of rent-seeking activities that can take place in the form of lobbying and corruption.²² On the other hand, the nation's market-oriented development strategy which has led to the increase in trade earnings and overall GDP can possibly be attributed to this close link between businesses and lawmakers in Bangladesh.

Bangladesh's increasing orientation towards business, and more specifically, international trade, can be evidenced with its enthusiastic participation in multilateral trade negotiations. A member of GATT since 1972, a member of WTO since its very inception in 1995, and a noticeable intervener in WTO Ministerial meetings, it is the twelfth LDC member of WTO to ratify the recently negotiated Trade Facilitation Agreement. As an LDC, it has enjoyed preferential market access under the special and differential treatment provisions and generalised system of preferences (GSP) scheme provided in WTO agreements as well as in many bilateral trade agreements.

WTO's GSP schemes have enabled Bangladesh to enjoy preferential market access in the European Union (EU), Canada, Japan and the US.²³ Regional trade agreements have further expanded its preferential access to the significant markets of Australia, China and the Republic of Korea.²⁴ These schemes, which are essentially non-reciprocal in nature, have boosted its

²¹ Mahmud et al (n 19), 17.

²² Gene Grossman & Elhanan Helpman, 'Protection for Sale' (1994) 84(4) *The American Economic Review* 833 [Regulatory capture is defined in this work as an interplay between special interest groups and government organisations that can influence and shape a nation's foreign trade policy to the detriment of other wider economic and social concerns.]

²³ For details on preferential market access that Bangladesh enjoys in Australia, Canada, the EU, Japan, New Zealand, Norway, China and some other countries, see World Trade Organization, Preferential Trade Agreements: Bangladesh <<http://ptadb.wto.org/Country.aspx?code=050>> accessed 11 October 2017.

²⁴ For details and full text access, see World Trade Organization, Regional Trade Agreements (RTA Database): Bangladesh <<http://rtais.wto.org/UI/PublicSearchByMemberResult.aspx?lang=1&membercode=050&redirect=1>> accessed 11 October 2017.

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export market by giving Bangladesh's exports a competitive edge over other like products from competing markets. Its dependence on such non-reciprocal benefits shows that its future performance in international trade and its potential to enforce its foreign trade rights (in case of any trade infringements) under various multilateral and bilateral trade agreements are fundamental to its future economic growth.

Being the only LDC member of WTO with the experience of acting as a complainant at WTO DSU along with the demonstrated willingness to use the multilateral trading system, Bangladesh has established an impressive institutional framework to manage its foreign trade concerns. Its Ministry of Commerce is responsible for the overall management of the country's international trade; this includes the settlement of WTO disputes. Given the complexity and specificity of WTO-related matters, a special cell has been created in the Ministry of Commerce, named the WTO Cell.²⁵ The WTO Cell is expected to advise the Ministry and implement its decisions pertaining to WTO matters. It is also responsible for maintaining coordination with Geneva Mission and for the dissemination of international trade related information among private stakeholders. In addition, there are seven working groups that investigate various WTO matters and provide inputs and advice to the Ministry.

The apex body to consider WTO-related matters is the High Level Committee and it is headed by the Commerce Minister. Invitations to participate in the Committee meetings are extended by the Ministry of Commerce to the representatives of key business chambers, think tanks, relevant ministries and government departments.²⁶ These meetings enable the government to gauge the interest of the private sector on trade issues under consideration, and to inform the participating stakeholders about the current state of foreign trade affairs.²⁷ The frequency of these meetings is uncertain. A meeting is invariably held prior to a WTO Ministerial Conference or when an important issue comes up before the WTO. While this structure enhances coordination between

²⁵ For details, see Ministry of Commerce <<http://www.mincom.gov.bd/about.php>> accessed 14 December 2017.

²⁶ A typical list of invitees would include representatives from the Federation of Bangladesh Chambers of Commerce & Industry, the Metropolitan Chamber of Commerce & Industry, Dhaka Chamber of Commerce & Industry, International Chamber of Commerce, Ministry of Foreign Affairs, Ministry of Agriculture, Ministry of Finance, National Board of Revenue, think tanks, and other Ministries or bodies depending on the subject matter.

²⁷ Interview with Government Official, Ministry of Commerce, Bangladesh (Video Conferencing, 24 January 2014).

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public and private stakeholders, it is uncertain as to what extent it is a policy-formulating or decision-making organ of the government.

The Bangladesh Tariff Commission (BTC) is an important advisory wing of the Ministry of Commerce and its main purpose is to protect the interests of the private sector against unfair foreign practices.²⁸ It serves to enhance coordination and exchange between the government and industries. The Commission can extend advisory functions to the public and private sector entities in the country, though it is legally obliged to provide advice on the matters referred to it by the government bodies only.²⁹ It carries out investigations with the help of inputs provided by the private sector, mainly through private stakeholders' consultations, joint symposia and public hearings. It appears to be an institution established for the implementation of WTO obligations the country has undertaken under the Anti-Dumping Agreement.³⁰ However, it remains unclear whether BTC is also mandated to receive petitions from the private sector on concerns other than dumping practices. So far, BTC has not issued or published any data on whether it has conducted an anti-dumping investigation followed by a complaint from a domestic entrepreneur.

The BTC's functions relating to international cooperation are merely advisory, and the Ministry is not obliged to follow its advice. Moreover, its functions are mostly inward-looking as they are designed to assist the local industry facing unfair trade practices within Bangladesh and abroad.³¹ The creation of BTC as a public-private interface along with other institutional developments reinforces the idea that multilateral trade requires close coordination between private and public sector entities. At the same time, it is important to note that the extent to which BTC is "effective"³² in discharging its functions depends almost wholly on the person in charge of its chairpersonship and that person's personal equation with the Commerce Minister

²⁸ Established by way of Bangladesh Tariff Commission Act 1992, it is a statutory public institution constituted under the administrative wing of the Ministry of Commerce. For details, see Bangladesh Tariff Commission <http://www.bdtariffcom.org/index.php?option=com_content&view=article&id=43&Itemid=76> accessed 5 December 2017.

²⁹ List of functions provided at Bangladesh Tariff Commission <http://www.bdtariffcom.org/index.php?option=com_content&view=article&id=43&Itemid=76> accessed 5 December 2017.

³⁰ Studies can be undertaken on its own motion, or by receiving a referral from the government or a private sector entity. For more information, see Bangladesh Tariff Commission, Structure and Functions: Trade Policy Division <http://www.bdtariffcom.org/index.php?option=com_content&view=article&id=28&Itemid=70> accessed 5 December 2017.

³¹ Ibid.

³² The term 'effective' refers to the institutions ability to achieve its objectives and smoothly perform its functions.

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as well as the Commerce Secretary.³³ This depicts an informal and an ad-hoc nature of the institutional framework within which different public stakeholders operate in Bangladesh. This can commonly be observed in many developing countries and LDCs, where public sector officials operate under poor observation of rule of law and heavy red tape at bureaucratic level.³⁴ These conditions allow informal interactions and political influence to precede over well-established procedures.

Alongside, think tanks and academic institutions have emerged to enhance the country's understanding and expertise on laws and regulations governing trade. The Bangladesh Foreign Trade Institute (BFTI), for example, is a leading academic institute specialised in international trade law. Established jointly by the Ministry of Commerce and industry representatives, it provides policy support and advice to the government and private sector associations on trade-related matters. It also serves as a regular consultative forum between the industry officials and the government policy makers.³⁵ On the academic front, the WTO cell since 2017 has delivered training on anti-dumping matters to the academic faculty of public and private universities and trade lawyers in Bangladesh.³⁶ These training courses are mainly delivered by officials from the Commerce Secretariat, BTC, WTO Cell and the Department of Finance. This academic initiative is worthy of an applaud, however it remains to be seen as to whether and to what extent this training programme can enhance the academic awareness and enthusiasm on trade defence matters in the country.

Along with the institutional developments taking place at the government and academic levels, Bangladesh is also witnessing a gradual emergence of an organised business community.³⁷

³³ Interview with Government Official, Ministry of Commerce, Bangladesh (Video Conferencing, 24 January 2014).

³⁴ Indra de Soysa and Johannes Jütting, 'Informal Institutions and Development: Think Local, Act Global?', (Informal Institutions and Development: What do We Know and What Can We Do?), <<http://www.oecd.org/dac/governance-development/37790393.pdf>> accessed 20 September 2018.

³⁵ Information obtained from UNCTAD, Virtual Institute, Bangladesh Foreign Trade Institute 13TH VI Think Tank <<http://vi.unctad.org/news-mainmenu-2/591-bfti0413>> accessed 5 December 2017. Other leading think tanks based in Bangladesh are: Centre for Policy Dialogue <<http://www.cpd.org.bd>>; Bangladesh Institute of International and Strategic Studies <<http://biiss.org>>; Bangladesh Institute of Law and International Affairs <<http://www.biliabd.org>> accessed 5 December 2017.

³⁶ Details regarding this program and its delivery are on file with the authors.

³⁷ The term 'organised private sector' or 'organised industry' in this article refers to an industry that has the following characteristics: (i) industries that are strongly represented by trade associations, confederations, export promotion councils or chambers of commerce; (ii) industries with established channels of communication and

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Industries in Bangladesh are gradually trying to organize themselves to advance their interests. For example, the ready-made garment (RMG) manufacturing and exporting industry has coordinated its activities and represented its interests to the government through Bangladesh Garment Manufacturers and Exporters Association.³⁸ Moreover, chambers and confederations have played a role in this integration process as well. For example, the Metropolitan Chamber of Commerce and Industry (MCCI) undertakes occasional research and interacts with the government on frequent basis to protect business interests. However, as chambers, confederations and federations operate in the nature of umbrella organizations, they diffuse their resources and engagement among diverse industries and sectors in the country, and hence, their ability to advance specific trade interests is often limited.³⁹

These developments clearly evidence that Bangladesh has taken considerable steps to transform its domestic institutions and procedures for responding proactively to the demands of the WTO legal system. These steps are taken to enhance its institutional capacity to better utilise the multilateral trading system. The government and the private sector have developed channels of coordination and information exchange in respect of WTO matters including trade disputes. However, little information is available about the emergence of domestic law firms and consultancies offering services relating to WTO and dispute settlement in Bangladesh. It also remains unclear if there is a legal provision mandating the BTC to examine petitions from the private sector except for those relating to bilateral antidumping issues. It is also unclear if the private sector has a legal right or a specified procedure to petition or approach the government

exchange between producers, manufacturers, exporters, importers and their representative organisations; (iii) industries in which the exporters, importers and their representatives are aware of international trade developments, foreign and national trade policies affecting their business interests and the possibility of approaching their governments to address trade grievances; (iv) industries that have the capacity and know-how to gather information and other required resources that may be required for presenting trade grievances in a well-substantiated and investigated manner to their governments.

³⁸ For details, see Bangladesh Garment manufacturers and Exporters Association, About us <<http://www.bgmea.com.bd/#ad-image-4>> accessed 5 December 2017.

³⁹ The list and details of all leading chambers of commerce in Bangladesh can be accessed at National Web Portal of Bangladesh: Trade Bodies of Bangladesh <http://www.bangladesh.gov.bd/index.php?Itemid=157&id=83&option=com_content&task=view> accessed 5 December 2017. The list and details of trade associations in Bangladesh can be accessed at the National Web Portal of Bangladesh: Trade Bodies of Bangladesh <http://www.bangladesh.gov.bd/index.php?Itemid=157&id=83&option=com_content&task=view> accessed 5 December 2017.

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for the initiation of a multilateral action. Nevertheless, the developments show that the government and private sector have acknowledged the benefits of WTO participation, and have therefore taken steps and devised strategies to develop their international trade and adjudication related capacities.

Owing to the minimal participation of Bangladesh at WTO DSM, it may not be substantively possible to comment on the effectiveness of the above mentioned institutional and procedural developments. Nevertheless, these developments can preliminarily be examined by considering a WTO dispute launched by Bangladesh against India. This leads the discussion forward, as the following section will explore the manner in which the only trade dispute launched by Bangladesh at WTO DSM was jointly handled by the government and the affected industry. More importantly, the section explores the nature of interaction that took place between the government and a private company in Bangladesh during the settlement of this particular dispute. It exemplifies how international law can lead to the formation and functioning of public private networks at a domestic level.

II. INDIA - BATTERIES FROM BANGLADESH

So far, the only WTO dispute launched by Bangladesh is *India – Anti-Dumping Measure on Batteries from Bangladesh*.⁴⁰ The initial disagreement between India and Bangladesh was sparked by the petitions filed at the Directorate General of Anti-Dumping, India (DGAD) by the two leading battery manufacturers in India (Exide Industries Ltd. and Amara Raja Batteries Ltd). They alleged in their petitions that the imported batteries from Bangladesh (and China, Korea, Japan) were being dumped in Indian markets and were therefore infringing their profit margins.⁴¹

After receiving the petitions in January 2001, DGAD initiated an investigation against Bangladeshi firms that were exporting batteries to India. The investigation mainly affected the exporting interests of Rahimafrooz as it was the key exporter of batteries from Bangladesh to

⁴⁰ *India-Anti Dumping Measure on Batteries from Bangladesh* (WT/DS306, 28 January 2004).

⁴¹ Ranabir Ray Choudhury, 'Row over battery imports' *The Hindu: Business Line* (16 February 2004) <<http://www.thehindubusinessline.in/2004/02/16/stories/2004021600080800.htm>> accessed 14 August 2016.

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India.⁴² By March 2001, the DGAD had made a preliminary finding.⁴³ At that stage, the affected company (Rahimafrooz) had almost no experience of engaging in anti-dumping investigations. More so, there was no legal or economic expertise on anti-dumping matters available in the country at that time which could have been consulted by the affected company.⁴⁴ DGAD required extensive information from the respondents, but Rahimafrooz was hesitant in supplying some parts of the required information which it considered business sensitive as it feared that its competitors in India could have access to such data.⁴⁵ Hence, although it supplied some of the required data, it did not satisfy all the evidential requirements solicited by DGAD.⁴⁶

The DGAD also wanted to undertake on-site investigation by sending its officials to Rahimafrooz's factory and its head office in Bangladesh; Rahimafrooz however denied this access request as it was reluctant to provide such access without understanding what the implications of such verification visits might be. In December 2001, DGAD issued its final determination imposing anti-dumping duties on lead acid battery imports from Bangladesh.⁴⁷

After unsuccessful attempts at seeking Indian judiciary's intervention, Rahimafrooz turned to its government. It is unclear at which stage Rahimafrooz sought the intervention of the Government of Bangladesh. Not knowing which organization or authority to approach, it took up the matter directly with the Commerce Ministry, both at the bureaucratic as well as the political levels.⁴⁸ Rahimafrooz's lobbying at the political and bureaucratic levels, coupled with media coverage, created considerable pressure on the Bangladesh's government to pursue this matter further. Two successive Commerce Ministers in Bangladesh raised this matter with their Indian counterparts

⁴² Finding obtained through observation of co-author Dr. Toufiq Ali during his assignment as the Ambassador at WTO Mission of Bangladesh; Taslim (n 7) 230, at 237.

⁴³ The details of the findings are not reproduced here.

⁴⁴ Taslim (n 7) 230, at 237.

⁴⁵ Interview with Government Official, Ministry of Commerce, Bangladesh (Video Conferencing, 21 January 2014).

⁴⁶ Ibid.

⁴⁷ Final Findings, *Anti-dumping investigation concerning import of Lead Acid Batteries originating in or exported from Japan, Korea, China and Bangladesh*, Case No: No. 67/1/2000-DGAD, paras 50-51, details at Directorate General of Anti-Dumping and Allied Duties < http://www.dgtr.gov.in/sites/default/files/Final-Finding_13.pdf> accessed 26 March 2018.

⁴⁸ Finding obtained through observation of co-author Dr. Toufiq Ali during his assignment as the Ambassador at WTO Mission of Bangladesh

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as attempts to resolve this at the bilateral level were made. None of these interventions yielded any positive result for Rahimafrooz.⁴⁹

The Ministry of Commerce was initially reluctant to launch a WTO dispute against India due to fears of potentially unfavourable political and trade ramifications the challenge might cause.⁵⁰ However, the combined efforts of BTC, the WTO Mission and the affected industry were instrumental in convincing the Ministry to initiate the challenge. The Mission's key challenge here was to convince its government back home that the filing of a formal WTO case would not have any deteriorating impact on the bilateral relations between the two countries. To make this point, examples of "small" countries filing cases against much "larger" countries at WTO DSU were put forward as illustrations.⁵¹

After examining the factual evidence, ACWL advised Bangladesh that it had a very strong and winning case at hand.⁵² Lack of previous DSU experience and possible infringement of its relations with its neighbor played a major role in delaying the launch of this dispute; nevertheless, the favorable analysis provided by ACWL and its subsidized fee structure encouraged the country to go forward and take India head-on in this matter.⁵³

In January 2004, Bangladesh requested formal consultations with India, and it therefore became the first LDC, and so far the only LDC, to formally initiate a WTO dispute. Bangladesh contended that the antidumping measures imposed by India were violating the provisions of GATT 1994 and the Anti-Dumping Agreement.⁵⁴ During the first round of discussions, India assured Bangladesh that it would remove the duties on the import of batteries. But the duties, for

⁴⁹ Bangladesh Tariff Commission, 'Brief for the Chairman', internal memo (Dhaka 2002) [presently taken from M.A. Taslim, 'Dispute Settlement in the WTO and the Least Developed Countries: the Case of India's Anti-Dumping Duties on Lead Acid Battery Import from Bangladesh', *The WTO dispute settlement system and developing countries: ICTSD* (Jakarta, Indonesia, 25-26 January 2006), at 11-16, <http://ictsd.org/downloads/2008/06/ma_taslim.pdf> accessed 18 July 2017]

⁵⁰ Bossche and Gathii (n 5) 26 ['They fear that bringing trade cases against developed countries that can retaliate outside the WTO system would be costly to them.']

⁵¹ Findings obtained through observation of co-author Dr. Toufiq Ali during his assignment as the Ambassador at WTO Mission of Bangladesh.

⁵² Interview with an official representative, Advisory Centre on WTO Law (Geneva, Switzerland, 11 April 2013)

⁵³ Interview with Government Official, Ministry of Commerce, Bangladesh (Video Conferencing, 24 January 2014).

⁵⁴ The details can be found at the WTO website: Dispute Settlement: Dispute DS306 <http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds306_e.htm> accessed 23rd March 2018.

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some time, were not withdrawn. In order to convince India to comply with its assurance, the then Ambassador to Bangladesh's WTO Mission approached the Commerce Secretary and the Commerce Minister of India during their Geneva visit. During these informal discussions, the then Ambassador received a reassurance from India's Minister that "he [would] take up the matter when he [returns] to India".⁵⁵ Shortly after these discussions, the duties were withdrawn by India.⁵⁶ Thus, the settlement procedures of this dispute were influenced by personal initiatives and informal ways of interaction. On 20 February 2006, the parties informed the DSB that they have arrived at a mutually satisfactory solution to the matter.⁵⁷ With this, the first instance of Bangladesh's participation at WTO DSM was settled in its favour.

Multiple factors were seen as the key reasons that motivated Bangladesh to challenge India in the present dispute.

- (i) A look at the examples of developing countries which were able to successfully challenge much larger developing as well as developed countries at WTO DSU without adversely affecting their diplomatic and trade relations.
- (ii) Advice from ACWL that outlined the flaws in DGAD's anti-dumping procedures and its analysis on the high prospects of winning the case against India.
- (iii) Availability of competent lawyers from ACWL, and their willingness to undertake the case at minimal cost.
- (iv) The continual lobbying by battery exporters (Rahimafrooz, along with Bangladesh Accumulator & Battery Manufacturers Association), and Rahimafrooz's undertaking to finance the dispute.
- (v) The emerging political will of the government to be a participant in multilateral trading system gave further motivation to launch this dispute.

⁵⁵ Findings obtained through observation of co-author Dr. Toufiq Ali during his assignment as the Ambassador at WTO Mission of Bangladesh.

⁵⁶ The measure was terminated by India's Customs Notification No. 01/2005 dated 4 January 2005.

⁵⁷ World Trade Organisation: Dispute Settlement DS306, at <https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds306_e.htm> accessed 22 April 2018.

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- (vi) Relevant knowledge acquired by the government from the previous handling of anti-dumping issues⁵⁸ nurtured the confidence that the present case could be taken up.

Several of these reasons were further confirmed by government officials from India who were involved in the investigation and consultation proceedings. They reaffirmed that the key reasons that led to the initiation of *Battery* dispute were the “constant support from the concerned exporters”, a “strong and motivated industry”, and “very strong connections the industry had with its government”.⁵⁹

Active participation of private stakeholders in this dispute was seen as one of the main reasons behind its invocation and successful conclusion. This is evident from one of the arguments advanced by BTC in its recommendation to the government. BTC argued that the government would not suffer any additional cost in conducting the dispute as the entire cost was being met by the industry. In the worst case scenario (of receiving an unfavourable ruling), the nation will maintain its “*status quo*” trade wise, but will benefit from enhanced WTO knowledge and experience gained during the handling of this dispute.⁶⁰ It can therefore be argued that the exporting firm was trying to regain its lost market access in India, and on the other hand, the government seemingly was aiming for enhanced WTO knowledge and experience. At the same time, the government was concerned about protecting a “strategic economic interest”⁶¹ and initiating its first ever action at WTO DSM in the “strongest possible manner”⁶². Launch of this dispute may also be seen as a symbolically-motivated initiative by the government to demonstrate to its neighbouring trade partners its willingness and capacity to invoke DSU provisions (if required) in cases of future infringements of its market access interests.

The government relied heavily on the support provided by the affected industry in conducting the investigations. Rahimafrooz in this case gave an undertaking to the government that it would

⁵⁸ See notes 77 and 79.

⁵⁹ Interview with a government official from the Ministry of Commerce, Government of India (Telephonic conversation, 3 May 2013); Interview with an official representative, Ministry of Commerce, Government of India (Delhi, India, 12 June 2013).

⁶⁰ Interview with Government Official, Ministry of Commerce, Bangladesh (Video Conferencing, 21 January 2014).

⁶¹ Taslim (n 7) 230, at 235 (noting that the battery exports were strategic as they were important for ‘gaining a foothold in the Indian market’).

⁶² Interview with Government Official, Ministry of Commerce, Bangladesh (Video Conferencing, 24 January 2014).

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bear all costs required for investigating and litigating the dispute.⁶³ The legal fee of ACWL was also paid by Rahimafrooz.⁶⁴ The interaction between the government and the business entity in this case was an “informal” and “extremely unusual” affair.⁶⁵ In the words of a government official from Bangladesh’s WTO Mission, “Rahimafrooz was treated differently for the reasons that its representative was a well-educated and knowledgeable person, the company had a good reputation in the country, and it enjoyed close contacts with the concerned government officials.”⁶⁶ These factors helped the company in convincing the government to act against India so it could regain its lost market access. However, in the absence of clearly established procedures for seeking government support, it is clear that each case will be different. The fact that Rahimafrooz was able to successfully lobby for government support does not necessarily confirm that a different company facing trade barriers in the future would also succeed in the same manner in Bangladesh.

There were no signs of participation from think tanks in this dispute. Apart from the law officers at the Mission, there were no WTO-trained lawyers from Bangladesh working with ACWL on the matter. The only participating entities in the dispute from Bangladesh were the decision makers at the Ministry of Commerce, BTC, WTO Mission and Rahimafrooz.⁶⁷ The role played by the WTO Cell, the High Powered Committee and the seven working groups established under the Ministry of Commerce remains unclear, either for reasons of insufficient available information or because they may not have been involved in the dispute. BTC played an important role in investigating the matter, convincing the government, coordinating with the private sector, and preparing the case with the help of ACWL. The WTO Mission also played an important role as it was coordinating the tasks between Ministry of Commerce, BTC, ACWL, and their counterpart officials from India. A combination of informal interactions between Bangladesh’s Mission and India’s Commerce Ministry, strong institutional support from BTC and the Mission, Rahimafrooz’s political influence, its close relations with relevant government

⁶³ Ibid.

⁶⁴ Ibid. Attempts were made to cross-check the same from an ACWL official, who chose to make no comments on the given situation.

⁶⁵ Interview with a government official from Bangladesh (Video conferencing, 21 January 2014).

⁶⁶ Ibid.

⁶⁷ Findings obtained through observation of co-author Dr. Toufiq Ali during his assignment as the Ambassador at WTO Mission of Bangladesh.

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officials at Commerce Ministry, and the strong financial support provided by Rahimfroz - together resulted in the desired settlement of the dispute.

Only a symbolic role was played by the concerned associations and chambers of commerce as the entire procedure was financed mainly by Rahimfroz. The instance therefore suggests that an affected exporter with financial and political influence can potentially circumvent the need to have an organised and integrated representation of its interests to the government. This approach might have its own advantages and disadvantages.

An advantage could be that the approach would require the most affected company or companies in the concerned sector to pay for the protection of its profit margins. The cost therefore would not be imposed on all the companies in the concerned economic sector by way of enhanced taxes or a participation fee collected by trade associations for the purposes of dispute settlement.⁶⁸ A disadvantage might be that the approach will potentially lack a representative element, and might as a result create a further divide between the interests of “haves” and “have not’s”.⁶⁹ The former might be protected at the cost of the latter in a discriminatory manner. This is because the companies with scarce financial resources and political influence may not be able to approach and/or convince the government to initiate a bilateral or multilateral action. Moreover, some business entities might “free-ride” by enjoying the trade benefits generated from the investment of resources by other companies without contributing themselves to the process of dispute settlement. Hence, the approach might further the temptation to “free-ride”.⁷⁰ It may not be a winning approach in the long run, because an organised and combined effort by affected exporters with overlapping interests can lead to relatively more equitable protection of trade interests through strengthened dispute settlement capacity of the country.⁷¹

⁶⁸ Amrita Bahri, *Public Private Partnership for WTO Dispute Settlement: Enabling Developing Countries* (Edward Elgar 2018), 203.

⁶⁹ *Ibid*, 51.

⁷⁰ Gene M Grossman and Elhanan Helpman, *Special Interest Politics* (The MIT Press 2001) 103 [‘On one hand, individuals who have similar policy preferences have much to gain from pooling their resources to pursue common political aims. On the other hand, there is always the temptation to “free-ride”. This is so because those who share a group’s objectives can benefit from its political efforts even if they refuse to help pay the bills.’]

⁷¹ Amrita Bahri, ‘Handling WTO Disputes with Private Sector: The Triumphant Brazilian Experience’, Vol. 50 (4) (August 2016) *Journal of World Trade* 641, at 663.

III. PARTICIPATION IMPEDIMENTS: A CRITICAL LOOK

The *Battery* dispute demonstrates that the public and private entities in Bangladesh can coordinate and exchange resources if a trade barrier is impacting an industry that has the resources and motivation to invest in the removal of that barrier. Such interaction may not be possible if a barrier is infringing the interests of an informal or a small scale industry such as the ones dealing in jute and footwear. Such industries have in fact faced instances of trade infringements in the past; however, they have chosen to endure them or not go on the offensive side. This is either because they have not had the required resources or contacts with government officials, or due to a fear of unfavourable trade ramifications from their trade partners based in the culprit countries.⁷²

A recent example demonstrates this point. Following a complaint by Indian jute millers, DGAD has imposed definitive anti-dumping duties on the jute products imported from Bangladesh in October 2016.⁷³ These duties are having a damaging impact on the financial interests of the jute industry in Bangladesh, as it exports a significant portion of its jute products to India. Moreover, Bangladesh's export of fishing nets (in 2018)⁷⁴ and hydrogen peroxide (in 2017)⁷⁵ have also recently been hit by the imposition of anti-dumping duties in India. No visible efforts have been made by Bangladesh to oppose these duties at the multilateral level.⁷⁶ The print media has not taken up these issues, except for occasional references; clearly, the pressure on the government

⁷² Interview with a trade lawyer based in Bangladesh (Telephonic conversation, 13 March 2015).

⁷³ Final Findings, *Jute Product Originating in or Exported from Bangladesh and Nepal*, Case No: 14/19/2015-DGAD, (para 131) details at Directorate General of Anti-Dumping and Allied Duties, <<http://www.dgtr.gov.in/anti-dumping-cases/jute-product-originating-or-exported-bangladesh-and-nepal>> accessed 12 March 2018.

⁷⁴ Final Findings, *Anti-Dumping Duty investigation concerning imports of "Fishing Net" originating in or exported from Bangladesh and China PR.*, Case No: 14/44/2016-DGAD, OI 23/2017 (para 98) details at Directorate General of Anti-Dumping and Allied Duties, <<http://www.dgtr.gov.in/anti-dumping-cases/anti-dumping-duty-investigation-concerning-imports-%E2%80%9Cfishing-net%E2%80%9D-originating-or>> accessed 12 March 2018.

⁷⁵ Final Findings, *Hydrogen Peroxide originating in or exported from Bangladesh, Taiwan, Korea, Indonesia, Pakistan and Thailand*, Case No: 14/3/2015-DGAD, (para 123) details at Directorate General of Anti-Dumping and Allied Duties, <<http://www.dgtr.gov.in/anti-dumping-cases/hydrogen-peroxide-originating-or-exported-bangladesh-taiwan-korea-indonesia>> accessed 12 March 2018.

⁷⁶ This holds true, with the only exception of a recent threat of filing a WTO case that Bangladesh has expressed in media against the duties imposed on jute products. [Rezaul Karim, 'BD to take up issue with WTO as bilateral efforts prove futile' *The Financial Express* <<http://today.thefinancialexpress.com.bd/first-page/bd-to-take-up-issue-with-wto-as-bilateral-efforts-prove-futile-1520440976>> accessed 12 March 2018].

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to act is missing. These recent developments indicate that *Battery* dispute was a “one-off” dispute and Bangladesh on other occasions has stayed away from invoking DSU procedures.

Several examples demonstrate this point. In early 1990s for example, Bangladesh endured the US antidumping measures on shop towels after losing the investigations conducted by the US antidumping authorities.⁷⁷ Bangladesh incurred substantial expenses on gathering information and hiring a US based trade lawyer to participate in the US anti-dumping investigation procedures, but it could neither avoid the imposition of duties nor challenge them at WTO DSM.⁷⁸

Following the *Battery* dispute in 2004, Brazil imposed anti-dumping duties on Bangladesh’s jute products.⁷⁹ This followed an anti-dumping review conducted by Brazil on the import of such products from Bangladesh.⁸⁰ The affected exporter in this case was a government-owned corporation in Bangladesh. After achieving success in the *Battery* dispute, Bangladesh’s WTO Mission was of the opinion that the government could be interested in challenging these duties. Nevertheless, the matter was not followed up as the affected government corporation, in the meantime, had located different markets for its future trade; it was no longer interested in regaining its lost market access in Brazil.⁸¹ The instance indicates that in certain instances of trade infringements, an affected private sector can change the nature of its exporting products or divert its products to newly identified markets. An industry may prefer these paths and avoid the option of defending its market access interests for various reasons including lack of dispute settlement experience and inability to support the government with the resources required for

⁷⁷ The duty was revoked in February 2005. For details, see Revocation of Antidumping Duty Orders on Shop Towels, Federal Register, vol. 70 (11 April 2005), at 18, 362.

⁷⁸ Interview with a government official from Bangladesh (Video conferencing, 21 January 2014).

⁷⁹ Imposed in 1992, the Brazilian Antidumping measures survived the Sunset Reviews of 1998 and 2004 and continued. The measures were again extended in September 2010 Review. [International Jute Study Group, World Jute Profile – Brazil <http://www.jute.org/wjp/cp_brazil.htm> accessed 11 July 2017]. Bangladesh was unable to defend its trade rights all these years. On the other hand, the Indian government was successful in removing the Brazilian antidumping duties on imports of jute bags which were mainly affecting the exporting interests of five Indian companies – Birla, Cheviot, Howrah, Ganges and Gloster. [The World Trade Review, ‘Anti-Dumping Safeguards: Brazil lifts dumping duty on Indian jute bags’ (1-15 February 2005) <<http://www.worldtradereview.com/news.asp?pType=N&iType=A&iID=100&siD=1&nID=19430>> accessed 11 July 2017].

⁸⁰ See Brazilian CAMEX Resolution 24 (9 September 2004).

⁸¹ Interview with a government official from Bangladesh (Video conferencing, 24 January 2014).

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investigation of barriers or the launch of a formal dispute settlement proceeding. These alternative options may also be preferred in cases where it is difficult to approach the government, or where the expected cost of litigation is higher than the expected benefits, or if the nature of a dispute is non-litigious.⁸² Moreover, there are a number of other challenges which may be responsible for impeding Bangladesh's access to WTO DSM.

General lack of awareness about the opportunities offered by the WTO could be an impediment to Bangladesh's WTO participation. The business communities, civil society organizations, academics and national media in Bangladesh consider WTO matters as purely inter-governmental. They often fail to understand that the chief function of WTO DSM is to protect the economic interests of business communities operating in the Member States.⁸³ The formation of a public-private alliance for the management of disputes may also be hindered in the absence of an informed private sector. It is therefore important for the private sector to understand the purpose of international trade law and the benefits it can derive from the WTO provisions. National media, academia and civil society organizations can play an instrumental role in changing the private sector's outlook towards WTO laws.⁸⁴ They can do so by publishing, researching and analyzing developments in the field of international trade and the WTO legal system. Regular newsletters, newspaper reports and reporting of WTO cases can help the private sector understand the implications of various international trade developments and the ways in which the WTO provisions can protect their business interests.

Cost is another major impediment.⁸⁵ The cost of WTO litigation has substantially increased with the passage of time, and it has therefore made it increasingly difficult for financially constrained, least developed countries to invoke DSU provisions. A government official puts this problem in the following words: "There is an impression that WTO litigation can be very expensive. Therefore, the very thought of litigating or defending an action at the WTO is financially daunting."⁸⁶ The hiring of professionals, collecting information, monitoring foreign practices,

⁸² Bahri (see n 68), 216.

⁸³ Interview with a trade lawyer based in Bangladesh (Telephonic conversation, 13 March 2015).

⁸⁴ The same can be seen in the Brazil where media, academics and NGOs have played an important role in changing the countries' perspective towards WTO. See, for example, Bahri (n 71), at 653-55.

⁸⁵ Taslim (n 7) 230, at 241.

⁸⁶ Interview with a government official from Bangladesh (Video conferencing, 21 January 2014).

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research and investigation - all require substantial resources. It may not be economically, politically and socially viable for a resource constrained developing country to divert its scarce resources away from the development of basic necessities such as food, shelter, water and sanitation. Therefore, small share of world trade, low levels of development and more pressing developmental needs exacerbate the problem of cost constraints for countries like Bangladesh. In addition, poor economies of scale may also be an exacerbating factor due to minimal participation in WTO DSM. This can be contrasted to the experience of those developing countries which have enhanced their participation capacities and have overcome the problems of economies of scale through their frequent participation as complainants, respondents and third parties at the DSU.⁸⁷

The fear of defeat is a major dissuading factor. A government official states that the “fears of the past always hang over us” and the past here refers to the defeat Bangladesh faced in the US anti-dumping investigation that took place in 1992.⁸⁸ What makes the defeat even more discouraging is the high cost incurred during this investigation.⁸⁹ In addition, the *fears of unfavorable political and economic ramifications* have further discouraged the government and private sector from challenging the practices of developed and developing countries.⁹⁰ Claims are made that the fears have, to some extent, been overcome after the success achieved in the *Battery* dispute.⁹¹ However, following the *Battery* dispute, the unwillingness of Bangladesh to contest several ongoing anti-dumping measures indicates that these fears have not been fully dispelled and that they are largely intact.

These fears can only be overcome by confronting them, i.e., by participating at the WTO in different capacities. Filing a complaint or defending litigation may not be the only ways to strengthen the participation experience. Bangladesh can also possibly consider the strategy of third party participation which can further expand its WTO understanding and experience in a cost-effective manner.⁹² Bangladesh has joined WTO litigation as a third party participant on a

⁸⁷ See, for example, Bahri (n 68) 101, 122 and 147.

⁸⁸ Interview with a government official from Bangladesh (Video conferencing, 21 January 2014).

⁸⁹ Taslim (n 7) 230, at 231, 240.

⁹⁰ Ibid 230, at 241.

⁹¹ Interview with a trade lawyer based in Bangladesh (Telephonic conversation, 13 March 2015).

⁹² China, for example, has addressed this problem by participating in numerous WTO litigations as a third party. With third party participation, China has developed its understanding and built its experience of WTO DSM in a cost effective manner. For more details, see Bahri (n 68), at 101.

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single occasion, and it has stayed away from a number of textile and apparel litigations which had the potential of affecting its market access interests.⁹³ Bangladesh chose to join its first WTO dispute as a third party at the time when it was pondering upon the possibility of launching the *Battery* dispute against India. It launched the formal DSU proceedings against India right after gaining some experience through observation as a third party in *US-Textiles Rules of Origin*. This testifies that the experience of observing the conduct of dispute settlement proceedings as a third party participant can potentially enable a country to overcome its litigation related fears.

Countries with substantial interests in a matter can participate as a third party in the consultation and litigation of that dispute without having to pay the litigation costs. Mere observation of dispute settlement proceedings can help them to understand how the overall dispute settlement process works, how documents are drafted and substantiated with evidence, and how arguments and counterarguments are made and presented during the hearings. Third party participation can also enhance a WTO Member's opportunity to influence outcomes in areas in which it has systemic interests. Frequent third party participation could also be used as a sustainable and cost-effective tool to attract young legal professionals and law students in the field of international trade law. This can be done by inviting law students and fresh graduates to join the team that observes and intervenes as third party at Geneva. The prospect of observing multilateral proceedings at one of the most renowned international organizations set in an exciting location can kindle their interest and enthusiasm in this field of practice. This experience of observing dispute settlement proceedings can subsequently strengthen the know-how and understanding of the process at law firms, government offices or trade entities which these students and graduates may eventually join. Many developing countries, such as China, India, Brazil, Argentina, and even LDCs such as Madagascar, Malawi, Senegal and Zambia have realized these benefits of third party participation.⁹⁴

In Bangladesh, there does not seem to be any difference in the policies of the major political parties towards foreign trade and WTO participation. In the recent years, changes in government regimes have not impeded the country's participation in WTO affairs, nor has there been any shift in government policy towards foreign trade. However, the influence of major industry associations on the formation of government policies that affect their business interests is very strong. For instance, the readymade garment industry association (BGMEA) is well represented at the Bangladesh's Parliament with several MPs and Ministers having garments business or other affiliation with garments industry; hence they have no difficulty in persuading the

⁹³ *United States – Rules of Origin for Textiles and Apparel Products* (WT/DS243, 11 January 2002). This is the only instance where Bangladesh has acted as a third party.

⁹⁴ Brazil has participated as third party in 77 cases, China in 102 cases, India in 91 cases, and Argentina in 47 cases. Amongst LDCs, Madagascar has participated in 4 cases, Malawi as well as Zambia in 6 and Senegal in 2 cases. For details, see World Trade Organisation, *Understanding the WTO: The Organization, Members and Observers* <http://www.wto.org/english/thewto_e/whatis_e/tif_e/org6_e.htm> accessed 3 December 2017.

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government to adopt policies that are favourable to their business interests. It is the smaller and less influential firms that are unable to influence policies in a similar manner. Effective institutional and procedural forums for government-industry coordination, beyond that which currently exists, need to be deployed for those firms that are neither represented by strong industry representatives nor have the required financial and political influence. Perhaps it can consider the 'three pillar' institutional model that Brazil has established to manage foreign trade disputes with the help of private stakeholders.⁹⁵ The Brazilian 'three pillar' dispute settlement mechanism 'consists of a specialized WTO dispute settlement division located in the capital, Brasilia (the "first pillar"), coordination between this unit and Brazil's WTO mission in Geneva (the "second pillar"), and coordination between both of these entities and Brazil's private sector, as well as law firms and economic consultants funded by the private sector (the "third pillar")'.⁹⁶ Strong institutional coordination between these three pillars has better enabled the government to manage trade disputes with the help of public private coordination. It is not possible to generalise the effectiveness (or ineffectiveness) of this model as it may not produce similar results in LDCs, especially because of the starkly different economic and political conditions of Brazil and Bangladesh. However, future scholarship can analyse and assess the viability of this mechanism for LDCs or in particular for Bangladesh.

CONCLUDING REMARKS

Several LDCs and developing countries are facing protectionist measures imposed by their larger trading partners. Bangladesh's experience can provide insights to policymakers and business entities in those LDCs which may, with some hesitation, ponder upon the possibility of enforcing their infringed trade interests through DSU provisions. The findings will help such countries reassess the course of actions they have undertaken so far to deal with trade conflicts, and to explore various capacity building options to prepare themselves for a future trade disagreement they may want to pursue multilaterally. In other words, the discussion provides a sound indication of the nature of participation impediments that LDCs may face at the WTO DSM, and the ways in which such challenges can be overcome with the help of resources already available at the domestic level.

⁹⁵ Gregory C Shaffer, Michelle Raton Sanchez Badin & Barbara Rosenberg, *Winning at the WTO: The Development of a Trade Policy Community Within Brazil in , Dispute Settlement at the WTO: The Developing Countries Experience*, 27 (Gregory C Shaffer & Ricardo Melendez-Ortiz eds., Cambridge University Press 2010).

⁹⁶ Gregory C Shaffer, Michelle Raton Sanchez Badin and Barbara Rosenberg, 'The Trials of Winning at the WTO: What Lies Behind Brazil's Success' (2008) 41(2) *Cornell International Law Journal* 383, 423.

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In Bangladesh, there are elaborate structures for dealing with WTO-related issues. Within the Ministry of Commerce, there is a High Level Committee headed by the Commerce Minister, the WTO Cell, and seven Working Groups. In addition, there is the statutory body – BTC - which can also play an important role in these matters. Except for the BTC and the Permanent Mission at WTO, government institutions have not played an apparent role either in *Battery* dispute or in other trade remedy investigations. This demonstrates that the institutions that are established to handle WTO dispute settlement processes must not only be developed, but they must also be deployed and permitted to play their assigned roles when the need arises. Simultaneously, the private sector institutions such as trade associations and industry confederations must also develop their capacity to support the affected enterprises. In the absence of effective corresponding structures at the government and private sector levels, the outcome can be reduced to one-off dispute settlement events that may not even provide sufficient encouragement for future DSU participation.

The discussions show how international law has shaped domestic laws and practices, and more importantly, the formation of public-private networks in Bangladesh. They also exemplify how developments and changes in domestic policies and approach have affected the performance and participation of Bangladesh at international institutions such as the WTO. The Article affirms that the private stakeholders are indispensable contributors for any governmental action that seeks to protect or expand private business interests. As the real “victims” and “beneficiaries” of the dispute settlement proceedings, private sector entities should be regarded as the “backbone” of this process.⁹⁷ Every trade disagreement which grows into a formal legal action at WTO DSU (if not resolved or diffused by way of negotiations or consultations) generally emanates from cross-border commercial relationships between exporters and importers or business entities and public-sector authorities. Moreover, exporters and importers are most suitably placed to gather information and evidence concerning foreign trade measures and their impact during the course of conducting their everyday business activities. Hence, some form of coordination between government and industry is embedded in the very nature of WTO dispute settlement proceedings

⁹⁷ The argument is based on the academic sentiment expressed in Alberto Alemanno, ‘Private parties and WTO Dispute Settlement System’ (2004) Cornell Law School Inter-University Graduate Student Conference Papers, Paper 1 <http://scholarship.law.cornell.edu/lps_clacp/1> accessed 2 October 2016.

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as the violation of WTO rules directly affects business interests of exporters, importers, manufacturers and producers, which in most cases are private companies. It is therefore important to create an environment at the domestic level that encourages dispute settlement partnerships to flourish, and that will in turn, strengthen the capacity of developing and least developing countries to self-enforce their international trade rights. This close look at Bangladesh's dispute settlement journey, however limited, prepares for other LDC's an indicative roadmap on how to create such conditions that can help governments to collaborate with private stakeholders in matters related to international trade.