

INTERNATIONAL TRADE DISPUTES: ¿DOES COLOMBIA NEEDS A LITTLE BIT MORE OF LAW?

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ABSTRACT

While Colombia had demonstrated that possesses good capabilities handling international trade disputes, the attitude towards the matter has been one of prudence, a matter that raises concerns owing into account that in the near future it will be signed two more RTAs in addition to the one agreed by the Andean Community with MERCOSUR. This article raises some suggestions towards a change of direction introducing some legalistic elements to our actual framework in the matter.

Subjects: International Trade, Disputes, Developing Countries

I. INTRODUCTION

Once I came back to Colombia and reopened my law office, one of the first possible clients I attended was a dairy factory who intended exporting ultra-pasteurised milk to a given important Latin American country, but faced problems within its Secretariat of Agriculture because of the presence of the foot and mouth decease in Colombia, a matter which seems to me as a flawed sanitary excuse. As long as I suggested the path of the WTO dispute settlement mechanism, and explained how to have resource to it, the enterprise decided to change its plans and look for other less complicated markets.

Despite the lost client, what concerned me more was the fact that while preparing the legal opinion, I read that the government plan regarding milk production was raising exports four times, from

25,000 to 100,000 ton in four years¹, a task that seems to me quite difficult, if access to external markets was as difficult as it was to that factory.

As a developing country with reduced aggregate domestic demand², Colombia has been trying for ages to buttress its economic growth into external markets, an undertaking that calls for a sort of commercial, diplomatic and legal efforts.

Colombia's trade policy not only depends upon a single feature, like successful negotiations of trade agreements, education and knowledge, popular promotional campaigns, government support enacting domestic measures facilitating production or clever lawyers winning cases. The conjunction of all of them is the clue to success.

Nevertheless, international trade disputes (ITD) are quite important, in view of the fact that unlawful protectionism rests exclusively in the breach of the embodied commitments of International Trade Law, a situation that necessarily demands solution through the available dispute settlement mechanisms.

No matter how successful was, for instance, any given international negotiation or how proper was any government measure, if concerned countries does not honour its obligations and therefore practices unjustifiable protectionism, which impedes our exports to reach the golden mine we are looking for.

This article is about Colombia's ITD. It consists in a general overview of our country's performance in the matter, and also the suggestion of the establishment of a legal framework to legalise the *de facto* public-private partnership, which already exists, in order to clarify and facilitate the enhancement of our country's capabilities handling ITD.

The paper is organised into five sections. The first one comprises a necessary background about ITDs complexities, the existing differences between developed and developing countries and the

1 <http://www.minagricultura.gov.co>

2 <http://www.banrepublica.gov.co>

contextual situation of Colombia in order to understand properly the underlying reasons of many situations that will be subject to analysis. Section two comprises an overview of Colombia's participation in ITD in relation to our main trade agreements, the World Trade Organisation (WTO) and the Andean Community (AC). I will not examine other treaties, like the Group of Three (G-3) or the Latin American Integration Association (LAIA) mainly because the objective of this paper is the establishment of general tendencies, an aim that perfectly could be reached through the study of the mentioned two main treaties. In addition to this, the LAIA treaty has only one dispute reported with Chile³, which mainly follows the same patterns of the disputes I will examine, and, on the other hand, there are not disputes related to the G-3 treaty. Section three comprises an analysis of the section two overview findings, in which I will dig up the main patterns towards the matter. In section four I will suggest the introduction of legalistic components I think must be enacted in order to improve our capabilities in ITD as a country. Finally, in section five I will conclude.

II. THE NECESSARY BACKGROUND

Unlike domestic commercial disputes, which mainly embrace legal procedures, ITD are more complex. They usually comprise politic, diplomatic, economic, social, and —since 1995— legalistic issues as well, which are not easy to balance in an adequate manner.

Despite the countries, or the matter involved in any given ITD, the mentioned elements tend to be present in every situation of this kind. Cases like the *European Communities - Regime for the importation, sale and distribution of bananas*⁴ easily gives an idea

3 Interview of April 4th 2004 with Mr. GABRIEL IBARRA, a well known practitioner in International Trade Law.

4 WT/DS27/R

of how complex an ITD could be. In that case, the situation of the ACP and Latin American countries raised thorny political, social and economic difficulties. On the other hand, the involvement of the U.S. in the dispute, a country that does not cultivate bananas, also raised hurdles in the legal arena⁵.

Such level of intricacy tends to establish differences of consideration, since industrialised countries are more capable to handle ITD than developing ones. Knowledge, financial support, political weight, diplomatic skills and an array of additional positive factors give the former more opportunities to handle ITD⁶.

Member's participation statistics in the WTO Dispute Settlement System, for instance, clearly indicates that the bulk part corresponds to developed nations⁷. The U.S. and the European Union, for instance, has been participating, as a part or third party, in all the decisions taken by panels and the Appellate Body⁸. Hence Industrialised countries are more skilful in ITD than developing ones, and Colombia's situation does not escape of such fate.

In regard of its international trade interests, Colombia's position is not exactly the strongest one, both within the Andean Community and the WTO.

Colombia's natural exports markets are the neighbourhood countries, mainly Venezuela and Ecuador⁹, which are covered by the Andean Community, a regional trade agreement (RTA) embracing purposes of thorough integration¹⁰, but within weakness

5 BHALA RAJ, 2001, *International Trade Law: Theory and Practice*, 2nd ed., Lexis Publishing, New York, pp. 1483-1484.

6 HOEKMAN BERNARD and PETROS MAVROIDIS, 1999, *Enforcement Multilateral Commitments: Dispute Settlement and Developing Countries in a Milenium Road*, in <http://www.worldbank.org>, visited on March 7th, 2004.

7 <http://www.wto.org>, visited on March 7th 2004.

8 SHAFFER GREGORY, 2003, *Defending Interests - Public Private Partnerships in WTO Litigation*, Bookings Institution Press, Washington, p. 6.

9 <http://www.dane.gov.co>

10 KINOSHITA FERNANDO, 2000, *Anotaciones sobre la comunidad Andina: De 1969 hasta 1999*, in <http://www.ambitojuridico.com.br/aj/di0001c.html>, visited on March 7th 2004.

that impedes its truthful operation. Since the AC is a treaty of only five members in which two of them —Ecuador and Bolivia— receive special and differential treatment, some conflicting situations could introduce overwhelming stresses that could lead the treaty to slowing down, as it has been happening in some occasions, like the 80's crisis¹¹, a situation that nobody really wants. Despite its failures, at the end the AC has had quite positive effects in regional trade¹².

The AC was formed following the European model¹³, but omitting some of the elements that gave the EU the necessary teeth to assure real levels of integration despite Member States' own interests. According to article 228 of the Treaty of Amsterdam, the European Court of Justice has the power to impose fines over MS that breaches its treaties' obligations¹⁴, a tool that the Court of Justice of the Andean Community (CJAC) does not have. Instead, she has the power to authorize the withdrawal of concessions, a remedy largely criticized because it lacks effectiveness and welfare consequences¹⁵.

Besides our natural neighbourhood's markets, our main exports destinations are the US and the EU, markets where the entrance of many products depends upon Generalised Systems of Preferences (GSP), which are unilateral concessions. Such a scheme demands considerable diplomatic efforts and, naturally, an additional underlying tendency towards the avoidance of conflicts.

11 Ibidem.

12 ALEGRETT SEBASTIAN, 2000, "La realidad de la Comunidad Andina", *El Espectador*, October 25th 2000 in <http://www.comunidadandina.org>, visited on March 7th 2004.

13 KINOSHITA, *op. cit.*

14 STEINER JOSEPHINE and LORNA WOODS, 2000, *Textbook on EC Law*, 7th Ed, Blackstone Press Limited, London, pp. 500-501.

15 HORN HERRIK and PETROS MAVROIDIS, 1999, *Remedies in the WTO Dispute Settlement System and Developing Country Interest*, in <http://www.worldbank.org>, visited on April 26th 2001, p. 19.

To sum up, the context of Colombia's position towards ITDs seems to be not exactly a strong one, a situation that not only corresponds to our country, but a developing one¹⁶. Colombia situation is not quite different of other developing countries that, regarding of its international trade interests, also lean over RTAs of not significant weight, and GSPs.

III. AN OVERVIEW OF COLOMBIA'S INTERNATIONAL TRADE DISPUTES

A. THE ANDEAN COMMUNITY

Colombia's main activity towards ITD rests within the framework of the AC, where private parties have rights of standing¹⁷. A snapshot of the judicial proceedings before the Court of Justice of the Andean Community (CJAC) as of September 2002, the last one posted in the Internet web site of the CJAC gives some quantitative data¹⁸.

Discharging the cases about pre-judicial interpretations, a matter not directly related to ITD as far as it corresponds to domestic uniformity of the application of Community's legal order, there were 35 active cases related to matters of ITD —annulment of Community's norms and actions for the breaching of MS obligations—. Of the 35, cases Colombia was directly involved in 13.

The cases predominantly comprise the breaching of Community's obligations. Colombia was involved in ten, out of the twenty five of them, as respondent, affected country or plaintiff.

16 HOEKMAN and MAVROIDIS, *op. cit.*

17 Articles 19, 25 and 31 of the Treaty Establishing the Court of Justice of the Andean Community.

18 http://www.tribunalandino.org.ec/estado_casos.htm, visited on 08/04/2004

In its condition of respondent, Colombia was involved in eight, mainly prompted by the Court itself, which initiated five¹⁹. Of the remaining three, one was initiated by the General Secretariat²⁰ and two by private parties²¹.

In its condition of affected country, the Court prompted the case 72-AI-00, related to import applications of fresh eggs into Venezuela²².

As a plaintiff, Colombian Sugar Mills prompted the case 73-AI-00 against Venezuela because the breach of various commitments embodied in the Community legal order²³.

The remaining three cases of Colombia were about annulment of Community's norms, and were set off mainly by the government itself, who initiated two²⁴. The last one was of private concern²⁵.

The snapshot described above gives a picture, in quantitative terms, about Colombia's ITD participation into the AC. However, regarding qualitative terms, Colombia's role offers more interest. Of the nine cases of paramount importance reported by MARÍA ALEJANDRA RODRÍGUEZ, six are related to Colombia²⁶.

In the case of *Colombia v. Resolution 237 of the Board of the Cartagena Agreement*²⁷, about special treatment of Bolivian and Ecuadorian exports to MS, the CJAC established a sort of parameters the Board has to accomplish in order to confer the exceptions Bolivia and Ecuador have in its condition of countries with S&D treatment.

19 Cases 1-AI-97; 16-AI-97; 53-AI-00; 26-AO-01 and 32-AI-01.

20 Case 25-AI-01.

21 Cases 75-AI-01 and 22-AI-02.

22 Case 72-AI-00.

23 Case 73-AI-00.

24 Cases 35-AN-01 and 71-AN-01.

25 Case 14-AN-00.

26 RODRÍGUEZ MARÍA, 2002, *Study of selected international dispute resolution regimes, with an analysis of the decisions of the Court of Justice of the Andean Community*, 19 *Ariz J of Int'l & Comp Law*, 863.

27 Case 1-AN-85.

In the case of *Colombia v. Resolution 252 of the Board of the Cartagena Agreement*²⁸, the CJAC determined that safeguard measures in cases of currency devaluation does not requires any given term of duration established by the Board, while the only power it has in such cases is limited to verify the injury caused by the devaluation and to issue recommendations.

In the case of *César Moyano Bonilla v. Articles 1, 2, and 279 of Decision 486*²⁹, regarding the application of the most favoured nation (MFN) and national treatment (NT) principles, the Court declared article 1 partially null and article 2 totally null while the Commission did not have the power to modify what was agreed in the Treaty of Cartagena. The mentioned articles broadened the scope of the MFN and NT principles, establishing the possibility to grant such status in Intellectual Property matters beyond the boundaries of the Treaty.

In the case of *Colombia v. Resolution 311 of the General Secretariat*³⁰, it was held that the levying of the implicit VAT to imports from MS was not a contribution while better internal treatment to imports does not breach the NT principle agreed under the Treaty of Cartagena. For the Court, the purpose of granting better treatment to imports obeys the aim to bring such products commercial equivalence in relation to the national ones.

While the case of *Bopp del Ecuador & Cia Ltda v. Resolution 410 of the General Secretariat*³¹ about rules of origin, did not involved Colombia directly, Colombia's presence needs to be highlighted because there were Colombian interests involved in the matter³².

28 Case 1-AN-86.

29 Case 14-AN-2001.

30 Case 79-AN-2000.

31 Case 65-AN-2000).

32 Cortázar Urdaneta & Cía – Gazette n° 3 in <http://www.cortur.com/gazette>. Html, visited on April 12th, 2004.

Finally, in the case of *Colombia v. Resolutions 19 and 47 of the General Secretariat*³³, the Court held that excessive regulations are barriers to trade, which undermines international trade between MS and therefore uphold General Secretariat's findings about the barriers to trade imposed by Colombia against the importation of textiles from Venezuela.

B. THE WTO

Following WTO's organisation of the statistic information³⁴, Colombia's participation can be reported as follows:

In the case of *Venezuela-Import Licensing Measures on Certain Agricultural Products*³⁵, a complaint by the US, Colombia requested participation into the consultations but was not accepted by Venezuela. Pursuant article 4:11 of the Dispute Settlement Understanding (DSU) in such situation the country rejected can ask for consultations independently. To date, Colombia did not requested consultations.

In the case of *European Communities-Generalized System of Preferences*³⁶, a complaint by Thailand, Colombia requested participation as third party but was rejected. Thailand's rationale was that these were consultations under article XXIII of the GATT agreement (nullification or impairment). In January 2002 Colombia raised the matter before the Dispute Settlement Body (DSB) stating that although she was not entitled to participate as third party, she acted as co-defendant of the EU.

In the case of *Chile – Safeguard Measures and Modification of Schedules regarding Sugar*³⁷, Colombia is acting as complainant.

33 Case 72-AN-98.

34 see <http://www.wto.org/disputes>

35 Case WT/DS275.

36 Case WT/DS242.

37 Case WT/DS230.

In the case of *United States – Safeguard Measure Against Imports of Broom Corn Brooms*³⁸, Colombia is acting as complainant. The case was raised in 1997.

In the case of *European Communities – Regime for the Importation, Sale and Distribution of Bananas*³⁹, a complaint by Guatemala, Honduras, Mexico and the United States, Colombia requested participation into the consultations.

In the case of *European Communities – Protection of Trademarks and Geographical Indications for Agricultural Products and Foodstuffs*⁴⁰, a complaint by Australia and the US, Colombia requested participation into the consultations and in the Panel proceedings reserved rights as third party.

In the case of *Nicaragua – Measures Affecting Imports from Honduras and Colombia (I)*⁴¹, Colombia is the complainant. The Panel proceedings were established in May 2000. To date it has never been conformed.

In the case of *European Communities – Export Subsidies on Sugar*⁴², a complaint by Thailand, Australia and Brazil, Colombia requested participation in the consultations and also reserved third party rights into the panel proceedings.

In the case of *Measures Affecting the Approval and Marketing of Biotech Products*⁴³, a complaint raised by the US, Canada and Argentina against the EU, Colombia requested participation into the consultations and also reserved third party rights within the panel proceedings.

In the case of *European Communities – Conditions for the Granting of Tariff Preferences to Developing Countries*⁴⁴, a

38 Case WT/DS78.

39 Case WT/DS 16.

40 Cases WT/DS174 and WT/DS/190.

41 Case WT/DS188.

42 Cases WT/DS 265, WT/DS/266 and WT/DS/283.

43 Cases WT/DS291, WT/DS/292 and WT/DS293.

44 Case WT/DS246.

complaint by India, Colombia reserved third party rights over the panel proceedings.

In the case of *United States – Import Prohibition of Certain Shrimp and Shrimp Products*⁴⁵, a complaint by India, Malaysia, Pakistan and Thailand, Colombia reserved its third party rights into the panel proceedings.

In the case of *Canada – Patent Protection of Pharmaceutical Products*⁴⁶, a complaint by the European Union, Colombia reserved third party rights in the panel proceedings.

In the case of *United States – Sections 301-310 of the Trade Act of 1974*⁴⁷, a complaint by the European Union, Colombia reserved third party rights into the panel proceedings.

In the case of *Chile – Price Band System and Safeguard Measures relating to Certain Agricultural Products*⁴⁸, a complaint by Argentina, Colombia reserved third party rights.

In the case of *European Communities – Trade Description of Sardines*⁴⁹, a complaint by Peru, Colombia reserved third party rights into the panel proceedings.

In the panel compliance report of the case of *European Communities – Regime for the Importation, Sale and Distribution of Bananas*⁵⁰, requested by the EU, Colombia requested joining consultations as a third party.

In the case of *Turkey – Certain Import Procedures for Fresh Fruit*⁵¹, a complaint raised by Ecuador, Colombia reserved third party rights.

45 Case WT/DS/58.

46 Case WT/DS/114.

47 Case WT/DS/152.

48 Case WT/DS/207.

49 Case WT/DS/231.

50 Case WT/DS/27/RW.

51 Case WT/DS/237.

In the case of *Colombia – Safeguard Measure on Imports of Plain Polyester Filaments from Thailand*⁵², Colombia levied the safeguard measure attacked, and therefore Thailand requested the termination of the proceedings in October 1999.

In the GATT era, Colombia participated in the cases of *Bananas I*⁵³ and *Bananas II*⁵⁴, procedures prompted jointly with Nicaragua, Costa Rica, Guatemala and Venezuela against discriminations in the European market of bananas. As professor BHALA stated, since the GATT contracting parties never adopted both panel reports, which backed the complainant's position, they finally negotiated the Banana Framework Agreement (BFA), in which obtained a sort of privileges to enter the European market in lieu of not taking resource before to the WTO until 2002⁵⁵.

IV. THE CHALLENGING COLOMBIAN BEHAVIOUR

Albeit its developing country context, one can arguably talk about preciseness and accuracy. However, one can also talk about prudence.

A. ACCURACY

Colombia's accuracy in ITD can be seen through the outcomes within the AC, the GATT and the WTO as well.

Being present in seven of the nine paramount cases of the CJAC indicates that Colombia's participation into the system has been quite important to flesh the bones of the Community legal texts, a task that mainly can be done through jurisprudence.

52 Case WT/DS/181.

53 BHALA, *op. cit.*, p. 1463.

54 *Ibidem*.

55 *Ibidem*, pp. 1464 and 1469.

Although the GATT cases of *Bananas I* and *Bananas II* were not adopted, they paved the way to the BFA, an agreement that allowed Colombia's bananas to enter the European Market as third country bananas in a 'whooping' percentage, as Professor BHALA relates⁵⁶.

Regarding the WTO, Colombia's participation as third party in various cases of importance indicates that our country has had been constantly warned about the matters that could represent some interest regarding the country's international trade.

The recent participation in the case of *European Communities – Conditions for the Granting of Tariff Preferences to Developing Countries*, decided the 7th of April 2004⁵⁷ by the Appellate Body, is a good indication of the noticed watchfulness. This was a quite important case regarding Colombia's interests in the European market. Having the Appellate Body declared the European GSP incompatible within the WTO commitments, a substantial damage to our exports ought arise, especially to flowers, a hardship situation of deep economic and also social consequences. Another case that could be of assistance to illustrate the matter is the one of *Turkey – Certain Import Procedures for Fresh Fruit*, a case of not special significance within the whole global commerce, but with the possibility of jeopardise market access conditions for bananas, one of our valuable exports. Not only economic or political 'important' cases are on the watch of our international trade officials, but the ones of just commercial interests.

The main reason I think produced the mentioned outcome rests in the public-private sector relationship which *de facto* is present handling ITD, specially regarding foreign trade barriers. As I could establish in a survey made to prepare this article, which included a series of interviews with officials of the Ministry of Industry, Trade and Tourism⁵⁸, Colombia's main body regarding international trade,

56 *Ibidem*.

57 WT/DS/246/AB/R.

58 Interview with Mrs MARÍA CLARA GUTIÉRREZ on March 31st 2004.

and some private practitioners in International Trade Law, Mrs MARÍA CLARA LOZANO⁵⁹ and Mr GABRIEL IBARRA⁶⁰, I observed that despite the lack of regulations establishing rules, what usually occurs in any given situation involving ITD is a sort of *ad hoc* partnership between the concerned sector or industry and government's officials, in which information flows, interchanges of opinions arise and also strategies are built.

In the mentioned case of the *European Communities – Conditions for the Granting of Tariff Preferences to Developing Countries*, since the request of consultations arose, Colombian officials began to follow closely the matter in conjunction with the Colombian Flower Grower's Association (ASOCOLFLORES), a task that included a series of meetings, legal consultations and also the drafting of legal opinions, all bolstering the EU perspective, which was the one we were interested to maintain⁶¹.

As the mentioned case, there are many other examples. Mr. IBARRA, for instance, related many experiences of that type, especially regarding the sugar industry, both within the framework of the AC and the LAIA. Mrs LOZANO also has had many situations in which she has been working together with the government, especially in cases pertaining antidumping custom duties.

B. PRUDENCE

As it was mentioned above, accuracy takes place at the same time with prudence, an adjective that also must be used to describe Colombia's attitude towards ITD.

Such prudence can be observed in the scarce number of actions raised directly by the government, both within the AC and, mostly, the WTO.

59 Telephonic interview held on April 6th 2004.

60 Interview held on April 3rd 2004.

61 Interview with Mrs GUTIÉRREZ.

Of the 25 cases about the breaching of the AC legal order, Colombia's government did not provoked any. The two raised by Colombia corresponds to private parties; one against Colombia itself and other against Venezuela. In regards of annulment actions—a matter that concerns only to AC administrative institutions and therefore has no direct relation with foreign governments—Colombia raised two of the mentioned three.

Within the WTO the situation is also more evident. Since 1995, Colombia had prompted only three, a small number, of which only one is active, the case of *Chile – Safeguard Measures and Modification of Schedules regarding Sugar*. The remaining two cases are inactive. The one of *United States - Safeguard Measure Against Imports of Broom Corn Brooms* was raised in 1997 and there is not accurate information about the matter. The case of *Nicaragua – Measures Affecting Imports from Honduras and Colombia (I)*, indirectly related to the existing dispute before the International Court of Justice (ICJ)⁶², remains inactive due to political and diplomatic strategic reasons.

Other equally developing countries tend to use more often WTO dispute settlement proceedings. Leaving behind the cases of Brazil and India, which largely are the leaders of the so-called Third World, countries like Chile, Guatemala, Honduras, Mexico, Thailand and Argentina, surpasses Colombia in WTO dispute settlement terms⁶³. Among them, the Central America countries case is of interest. Countries like Guatemala or Honduras, which export values are quite smaller than the Colombian ones⁶⁴, uses to have resource before the WTO more often than Colombia. In the context of South America, Chile, which economy is also smaller than the Colombian one, has raised seven cases, much of them against other developing countries.

62 Differend Territorial et maritime (Nicaragua c. Colombie), Requête de la République du Nicaragua, 6 décembre 2001, in <http://www.icj-cij.org>

63 <http://www.wto.org> visited on March 7th 2004.

64 <http://www.oas.org> visited on March 7th 2004.

C. ¿WHY SUCH PRUDENCE?

Owing into account Colombia's accuracy towards ITD, it is important to ask about the reasons of such prudence. A number of reasons explain the matter.

Firstly, the diplomatic approach towards ITD is a factor of consideration. Because the supreme direction of the international relations rest over the President⁶⁵, Colombia's involvement in any ITD is a matter of the highest level of decision⁶⁶. In such stance, political considerations tend to have excessive weight, particularly in a country like Colombia, where a bundle of highly difficult situations exist. The above-mentioned context of Colombia as not a particularly strong country, leads to matters related to external aid, military assistance, unilateral concessions (GSPs) and so on, factors which are of heavy weight. Such scheme arguably indicates that at the end, the interests of business depend upon external factors, which could be out of they reach.

Secondly, Colombia's attitude towards legalistic issues pertaining ITD tends to be one of scepticism, both within the government and private sector scopes. Although in the interview with the government officials the matter was not mentioned, and also there is not relevant literature about it, to my opinion the experience in the cases of *Bananas I* and *Bananas II* rationally indicates that the legal defeat caused by the lack of adoption of the panel reports has had consequences into government's mind regarding legal issues in ITD. Notwithstanding panel reports paved the way to the BFA, what remained was that the objective pursued through legalistic means finally was reached through diplomacy. Then, the side effect of the employed strategy was a sort of distrust in legal means pertaining ITD.

Regarding the AC, the situation is even more wretched, specially related to actions pertaining the breach of AC's legal order. The

65 Article 189(2) Colombian Political Constitution.

66 Interview with Mrs GUTIÉRREZ.

presence of 25 proceedings of this kind among a total of 35 related to ITD in a single snapshot, demonstrates that breaching the law is usual within the Community. Mingling this tendency with the lack of teeth of CJAC powers, necessarily leads distrust. Notwithstanding that private parties has rights of standing, the affluence of actions prompted by them is scarce. Mr IBARRA, for instance, who was the plaintiff in the above-mentioned case of the Colombia's Sugar Mills against Venezuela, expressed his scepticism regarding the enforceability of the Community legal order and hence it worthless character in order to settle situations of confrontation.

Thirdly, the generalised remoteness and lack of understanding of international trade by much of the entrepreneurs, but not of the government, is a factor of consideration, a point of view shared both by Mrs LOZANO and Mr IBARRA.

While within the Ministry officials tend to be quite familiar with International Trade Law, private sector tendency is different. Although there are some exceptions, like the one of the fireworks factory and its exporting nuisances to Peru —related by Mrs GUTIÉRREZ— only big companies or major trade associations, like, for instance, the Colombian Association of Sugar Mills (ASOCAÑA) or ASOCOLFLORES, use to approach and work with the government. Notwithstanding that this tendency is common in the international trade arena⁶⁷, the problem is that Colombia's production and employment rests principally in small and medium size enterprises but not big companies⁶⁸. In the interviews with Mr IBARRA and Mrs LOZANO, it was stated that medium size and small business, and also minor trade associations usually are far apart of international trade and even more from the WTO, an organisation that seems to them something of the government resort, in which civil society does not play any special role.

As my own experience indicates, that approach is real. Much of the times I had to attend cases of trade barriers, small or medium

67 SHAFFER, *op. cit.*, pp. 32-34

68 Acopi web site.

size entrepreneurs usually does not believe that WTO law or even AC Law can help them to solve its problems. The mere mention to have resource to some of the above-mentioned regimes engenders suspicion. Generally speaking, International Trade Law is associated to the fear of incommensurable and useless expenses they cannot afford.

Fourthly, is the lack of resources. Notwithstanding that much of the time private sector had declared its readiness to afford the expenses of the legal proceedings, especially before the WTO, like legal advice, administrative costs and so on, the government face problems related to budgetary regulations, which tend to hinder such possibility. On the other hand, budgetary and staff constraints within the ministry, tends to impede the involvement into ITD⁶⁹.

To sum up, Colombia's position towards ITD is quite particular. Colombia is good handling international disputes but does not tend to get involved in them.

V. THE ENHANCEMENT OF OUR CAPABILITIES

Far from pretending a change of attitude with no reason, the problem I see is that while the WTO introduced down-stream legalistic issues to ITD to facilitate and also strengthen international trade⁷⁰, Colombia is not following that path, a situation that arises concerns.

In the near future, Colombia will sign two additional RTAs in addition to the one recently signed by the AC COUNTRIES with MERCOSUR; the FTA with the U.S. and the Free Trade Agreement of The Americas (FTAA). Within such scheme, the lack of attitude defending our exports interests could have huge costs.

Dispute settlement proceedings in international trade are necessary to gain external markets while unlawful protectionism is one of the major barriers to market access.

69 Interview with Mrs GUTIÉRREZ.

70 HOEKMAN and MAVROIDIS, *op. cit.*

The comparison between GATT and WTO procedures proves largely that the relative absence of ITD within the framework of the later obeyed to the lack of the quasi-judicial elements the former already has, and the result is an astonishing one. In only nine years of existence, the WTO has had more cases than the whole GATT era, which lasted 48 years⁷¹.

Moreover, despite the fact that the major players of the WTO already are the major players in ITD, especially the U.S. and the EU⁷², it is also possible to observe that developing countries also had begun to use the dispute settlement mechanisms with enthusiasm and also success, not only against unlawful protectionism from industrialised countries, but against developing ones too⁷³. Cases like the one of Argentina versus Chile regarding the price brand system or indeed the one of Thailand against Colombia itself, in which Colombia levied the safeguard measure avoiding the proceedings, clearly demonstrates that in some occasions, it is worth having resource to ITD.

The future challenges our IT interests will face merits that the benefits accrued because of the accuracy of our ITD capabilities must be enhanced, by introducing some legalistic issues, which will allow our society being less prudent but more forceful overthrowing trade barriers.

The improvement of our ITD apparatus, therefore, is quite necessary.

A. THE NECESSITY OF RULES

Although foreign trade is closely related to international relations, which merits diplomacy, it is also important to note that Public International Law differs from International Trade Law. While the

71 HOEKMAN and MAVROIDIS, *op. cit.*

72 *Ibidem.*

73 *Ibidem.*

former is based upon the concept of sovereignty, and consequently independence, the later is based upon the Richardian principle of nations' competitive advantages, which means interdependence⁷⁴. Moreover, in a globalised world of market-oriented economies, business—but not just governments—are the real concerned parties in international trade, and to operate properly business needs the certainty and predictability that only law can bring.

Therefore, much of the times ITD must be semi-detached from purely diplomatic relations, a phenomenon that can be widely observed within the WTO. Despite, for instance, the numerous trade disputes between the U.S. and the EU, both countries maintain quite well diplomatic relations as a whole, a fact that can bear me out by observing, for instance, defence or economic cooperation issues. As Douglas Rosenthal stated, one of the main WTO benefits rests in the legal disciplines brought to the down-stream side of ITD in order to avoid confrontation in other areas or even war.

At developing countries stage, it is also possible to observe that the various trade disputes between them do not necessarily tend to lead exposition of diplomatic relations. The case of Chile, for instance, is of importance. While that country has been involved in cases against Colombia, Peru and Argentina, it did not generated diplomatic annoys.

Without rejecting diplomacy, a matter that cannot be left behind, legalisation about ITD is also a topic that neither can be left apart; is a necessary and useful tool, as it will be explained.

Experience had demonstrated that the enhancement of Countries' ITD dynamism always begun through the establishment of legal structures regulating public-private relationship at the up-stream side of ITD.

In the U.S., for instance, while during much of the time that country did not depended from international trade, since the 70's

74 MC RAE DONALD, 2000, *The WTO in International Law: ¿Tradition Continued or New Frontier?*, 1 *Journal of International Economic Law* 27- 41, pp. 27-30.

the economic situation changed significantly, a fact that led to the enacting of Section 301 of the Trade Act of 1974, in which a procedure was introduced to organise public and private sector interaction⁷⁵.

According to Section 301, the United States Trade Representative (USTR) is enabled to conduct investigations regarding trade barriers to U.S. exports. Such investigations can be requested by private business or ‘self-initiated’ by the USTR itself. Such investigations can lead the U.S. to initiate dispute settlement proceedings and also impose trade sanctions, a matter that falls beyond the boundaries of this article.

In the same vein, the EU experience since the creation of the WTO followed a similar path. A brief summary of the EU evolution towards the matter can illustrate how a country can change the tendency from prudence to initiative, with rewards of consideration.

As Shafer relates⁷⁶, once the WTO was signed, the EU attitude towards ITD was ‘prudent, inward-looking [and] reactive’, especially against the actions raised by the U.S. regarding market access in key sectors, like the agricultural one (bananas, beef). However, at the beginning of 1996 the situation began to change through the strategy designed by the Trade Directorate General of the Commission, which for the most part consisted in the strengthening of the public-private sector relationship.

Firstly, the establishment of the Market Access Unit facilitated the interaction between private sector and the Commission. The creation of a database about foreign trade barriers, which gathers information from various sources —directly from business and indirectly through embassies or foreign missions of the EU— has had the effect to identify lots of situations where unlawful protectionism exist. Since in 1996 the list consisted in 350 identified barriers, in 1998 it rose up to 1,200, now depurated to 850. The ninety per cent of the trade barriers identified has been reported by

75 SHAFER, *op. cit.* pp. 28 – 31.

76 *Ibidem*, p. 68.

the private sector⁷⁷. The Internet web site of such database was another initiative of interest. While in early 1996 received 30,000 daily contacts, in 1998 it received an astounding 150,000⁷⁸.

Secondly, the establishment of the Market Access Action Group was a useful tool to organise properly Commission's work with the objective to defend international trade interests. The group is an inter-agency committee with the mission to assign responsibilities for (a) investigations, in which the Commission determines whether a trade barrier exists, whether it constitutes a breach of the WTO or other agreement and the economic impact of them, (b) prioritisation of cases⁷⁹.

Thirdly, the enactment of the Trade Barriers Regulation (TBR)⁸⁰, gave to business an alternative track to approach more directly and technically the Commission than Article 133 procedures. Although article 133 procedures are still more frequently used, the use of TBR proceedings is increasing steadily. Such Regulation relaxed the conditions of the New Commercial Policy Instrument (NCPI)⁸¹, which was not used because the difficulties related to rights of standing and injury determination⁸². Unlike the NCPI, which assigned rights of standing only to the whole industry affected, under the TBR individual enterprises are able to initiate cases before the Commission. Additionally, the proof of injury can be focused within a particular activity or region, instead NCPI's requirement of injury over the whole community industry.

77 *Ibidem*, p. 69.

78 *Ibidem*.

79 *Ibidem*, p. 71.

80 Council Regulation 3286/94 'Community Procedures in the field of the Common Commercial Policy in order to ensure the exercise of the Community's rights under international trade rules, in particular those established under the auspices of the World Trade Organisation'.

81 Council Regulation 2461/84, 'On the strengthening of the Common Commercial Policy with regard in particular to protection against illicit commercial practices'

82 SHAFER, *op. cit.*, p. 85.

The end result is that between 1997 and 2003 the EU has been requesting more consultations than any other WTO member, the U.S. included. Between 1997 and 1999, there were 37 complaints raised by the EU while the U.S. raised 35, and since 1999 to date, the EU has the domain in terms of use of WTO's DSU proceedings, mainly against the U.S. Moreover, while during 1995 and 1999 the U.S. was involved in fourteen Panel or Appellate Body decisions as complainant and in five as defendant, and the EU only in four as complainant and in five as defendant, during January 2000 to January 2003, the tide changed dramatically. The U.S. was involved only in five as complainant and in twenty-one as defendant and the EU was in nineteen as complainant and in three as respondent⁸³.

Not only in quantitative terms but in qualitative ones the change was of importance. Cases like the one of the tax regime for overseas sales corporations⁸⁴, which established the record of a yearly US\$4 billion allowed withdrawn of concessions, the greatest in WTO's history, clearly indicates that the EU strategy worked properly.

While the mentioned mechanisms are present only in industrialised countries, a question that arises is whether they are possible in developing ones.

According to HOEKMAN and MAVROIDIS, for instance, while the WTO dispute settlement mechanisms improved the down-stream input to ITD, the up-stream dimension continues largely unattended, especially in the developing world. Amongst the reflections made by the author in his paper about the enforcement of multilateral commitments and developing countries, the one about private sector participation calls the attention. The author states:

'The private sector must play a much greater role in enforcement. In part this can be achieved by designing domestic legal mechanisms that increase the incentive for them to collect, compile and transmit information on the measures that are being applied by governments, both their own and foreign [...] greater private sector participation is also vital in order to ensure that

83 *Ibidem*, p. 73.

84 Case WT/DS/108 *United States – Tax Treatment for Foreign Sales Corporations*.

developing countries can defend their rights through DSP at the WTO level. This “upstream” dimension of DSP at the WTO is as important as the efficacy of the “downstream” panel and Appellate Body process⁸⁵.

In the same vein, VALENTINA DIELICH is of the opinion that not only big business but small and medium ones and also consumers merit participate into the WTO process, having into account that some of the most important cases raised by Latin American countries before the WTO had been largely supported by the enterprises affected, as was the case of the Venezuelan reformulated gasoline exports to the U.S.⁸⁶, where PETROVEN and its filial CITGO were behind the scene, or the one of the Canadian subsidies to aircraft industry raised by Brazil⁸⁷, within the involvement of EMBRAER. The author states the following:

‘si consideramos que estas grandes empresas son actores reales aunque no formales en el sistema de solución de diferencias, se debería pensar en articular a nivel nacional un foro o centro consultivo que incluya a los especialistas del Estado y a estas grandes empresas. Obviamente este tipo de apreciaciones abre las puertas al reclamo legítimo de muchos otros actores “reales”, por ejemplo consumidores, que tampoco tienen legitimación para actuar por sí —sin el sponsorship del Estado— en el sistema internacional de comercio pero son directamente afectados en sus intereses por la regulación del mismo según las reglas de la OMC. O, cubriría también el reclamo de participación de las organizaciones no gubernamentales (ONG) y sindicatos [...] considerando el involucramiento directo de algunas grandes empresas en el proceso de solución de diferencias de la OMC, y sin necesidad de reconocerles legitimación para actuar por sí mismos ante la OMC, debe debatirse la necesidad o no de su inclusión en el proceso de edificación de los argumentos del Estado de una manera mas transparente en los casos que el Estado lleva en la OMC y los involucra directamente’⁸⁸.

85 HOEKMAN and MAVROIDIS, *op. cit.*, p. 19.

86 Case WT/DS/2 *United States – Standards for Reformulated and conventional Gasoline*.

87 Case WT/DS/70 *Canada – Measures Affecting the Export of civilian Aircraft*.

88 DIELICH VALENTINA, *Latinoamerica y el sistema de solución de diferencias de la Organización Mundial del Comercio*, in <http://www.worldbank.org>, visited on March 7th 2004.

It seems thus, that legal mechanisms to allow private sector a sort of formal participation within the WTO framework are not exclusively of the industrialised world. Moreover, while developing countries need to enhance participation into the system, such an aim is difficult to obtain without the legalisation of business participation.

Regarding the case of Colombia, the absence of any legal mechanism to approach and work with the government in matters differing imposition of antidumping duties and countervailing measures⁸⁹, creates uncertainty and unpredictability. Therefore, by and large, it made the process more difficult. As Mrs LOZANO and Mr IBARRA commented, while generally speaking the officials of the Ministry tends to openness and reasonableness, this may be the biggest obstacle to initiate a case because at the end decisions depends upon subjective considerations. According to their views, a mechanism of this kind will spark the activity in the discipline of ITD.

Moreover, in the interview with government's officials, when I ask them about the possibility to establish a sort of database like the one existing within the EU, their opinion was a favourable one. Indeed, one of them commented about the possibility to consult the webmaster of the Ministry web page to examine the possibility to open a space where business can contact them pertaining trade barriers.

It was also stated that bearing in mind dispute settlement mechanisms within international trade agreements Colombia is actually negotiating, one of the Ministry's activity is the analysis of the possibility to establish a framework to handle the subject rationally, an initiative that only merits consideration and best wishes.

89 Decrees 269/95; 809/94; 2657/94; 2038/96; 2259/96; 152/98; 1407/99 and 2793/00.

B. THE MODEL THAT FITS BETTER

The mechanisms developed within the EU are of a more public tendency than the one of the U.S. While in the U.S., for instance, lobbying is quite common, and officials are more permeable to it, within the EU the situation is different. According to SHAFFER, this situation obeys to existing different economic and administrative circumstances between the two. Amongst them, business size and the mentioned permeability to lobbying are of importance.

Regarding business size, in Europe external trade depends more of small and medium business than in the U.S. As Commissioner ERKII LIIKANEN stated:

‘we must remember that more than 95% of enterprises are SMEs. Over 90% of European enterprises are micro enterprises with fewer than 10 employees. SMEs employ 66% of the workforce in the private sector’⁹⁰.

Regarding administrative culture, the practice of lobbying into Europe differs largely from the U.S. The later ‘revolving door’ administrative culture⁹¹ facilitates permeability while into the EU, the situation is different as Shaffer states:

‘[...] The Commission is organised largely on a French continental model of *fonctionnaires*, or public servants [...] Commission officials are much more likely to pursue life career as civil servants. This career structure reinforces the Commission’s greater insulation from lobbying pressures. The Commission Legal Service, in particular, tends to work at arm’s length from private lawyers hired by business’⁹².

Comparing the U.S. within the EU organisation, it seems to me that Colombia’s conditions regarding those two issues tend to be more like the European model than the one of the U.S. On the one

90 Shaffer, *op. cit.*, pp. 96-97.

91 *Ibidem*, p. 122.

92 *Ibidem*, p. 125.

hand, Colombia's industry rest mostly in small and medium business⁹³, and on the other hand, despite the differences existing between 'good' and 'bad' lobbying, such concept in Colombia chiefly tends to be associated to dishonesty and bribery.

Hence, while the case of the U.S. is of the utmost importance in regards of the strengthening of countries' ITD forcefulness, the one of the EU is also an interesting one that fits better regarding our own realities. As long as for ages Colombia have been taken from Europe most of its legal system, it could be worth to evaluate closely the possibility to follow the European model, obviously adjusted to our own circumstances.

VI. CONCLUDING REMARKS

The main concluding remark of this article is that Colombia merit and needs the enhancement of its ITD capabilities through the establishment of up-stream legal structures to legalise the existing relationship between the public and private sector regarding ITD.

Such kind of framework already exists in industrialised countries, like the us and the European Union, with astonishing results.

The European experience is quite indicative, since it turned dramatically from one of precaution and defence to one of forcefulness.

Despite that those frameworks actually only exists in industrialised countries, there is no reason of not to think about them into developing countries. Indeed, well known scholars are of the opinion that developing countries need more participation from the private sector within the up-stream face of the WTO process.

An European-based model seems to fit more properly to Colombia's administrative culture and economic reality.

93 Acopi web page.