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# DEVELOPING COUNTRIES PARTICIPATION IN THE WTO DISPUTE SETTLEMENT SYSTEM

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**Abstract:** *In the Preamble of the WTO defined that there is a need to make sure that developing countries especially the LDC ones, share growth in international trade proportionate with the needs of their economic development. This paper begins with the historical background of the developing countries participation in both GATT and the WTO. There is a broad discussion about the developing countries and the WTO dispute settlement system. Significant appraisals of the present and possible benefits from developing country engagement in the WTO focus mainly on the recent development. This paper examines a different feature of developing country participation in the WTO dispute settlement system. The WTO dispute system is providing the developing countries with some special benefits and developing countries are also trying to increase their status, that's the main reason for the participation in the WTO dispute system. This paper is also trying to find the obstacles that are creating a problem for developing countries to participate in the WTO dispute settlement system. The WTO dispute settlement system is working actively for developing countries, but the GATT system was also tried to develop the status of the developing countries. The comparison between the GATT system and the WTO dispute system developed country and developing country is also referred in this paper.*

**Keywords:** Developing Countries, WTO (World Trade Organization), Dispute Settlement System, GATT (General Agreement on Tariffs and Trade), Member State.
**Research Area:** Law
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## 1. INTRODUCTION

As the developing countries have grown-up in terms of membership numbers, their role has also changed. In the early years of GATT developing countries took on fewer obligations than did the industrialised world and respectively played a less dynamic role but as a part of the Uruguay Round, developing countries made extensive commitments in a number of areas including binding more tariffs and signing on to new agreements in intellectual property and services.[1] Developing countries are given a chance to confront the trade process of economically strong States that normally control international negotiations and multilateral decision-making.[2] Trade between nations is increasingly being conducted under the WTO dispute settlement system, particularly for LDCs who face a highly unequal position in trade disputes with larger and more powerful nations.[3]

Article IV of the GATS and Article XXXVII of GATT 1994 used the same words. It provides that:

‘the increasing participation of developing country Members in world trade shall be facilitated through negotiated specific commitments ....... relating to ...... the strengthening of their domestic services capacity and its efficiency and competitiveness, *inter alia,* through access to technology on a commercial basis; ..... the improvement of their access to distribution channels and information networks; and ..... the liberalization of market access in sectors and modes of supply of export interest to them.’[4]

## 2. DEVELOPING COUNTRIES AND WORLD TRADE ORGANISATION

### *2.1 Developing Countries as a Participant*

Although the GATT’s early status as a ‘rich man’s club, by 1986 the majority of the members were poor countries, including many newly independent African nations. Still more poor nations joined the GATT during the protracted negotiations that produced the WTO.[5] The WTO’s around 150 members are developing countries that are about two thirds of the members. They play gradually more important and active role in the WTO because of their numbers, as they are becoming more essential in the global economy, and they increasingly look to trade as a vital tool in their development efforts. Developing countries are an extremely diverse group often with very different views and concerns.[6] Countries such as Egypt, Thailand, India and Brazil are very active but many LDC are not represented in Geneva at all and a large number of African members do not participate in the WTO.[7] Most developing countries cases were initiated by a limited number of developing countries, like India, Brazil, Argentina, Chile, Mexico and Korea. As the WTO’s foundation document, the Marrakesh Agreement provides ‘there is a need for positive efforts designed to ensure that developing countries and especially the least developed among them, secure a share in the growth in international trade commensurate with the needs of their economic development’.[8] DSU provisions on the implementation of commonly applied principles in cases concerning developing countries are intended to ensure equal treatment of developed and developing countries.[9]

The consequence of the WTO dispute settlement system for developing countries, in particular, is basically three-fold. First, it is a guarantor of rights. Second, it is a check against economic hegemony and finally, it is a method to ensure that systemic changes brought about through the WTO jurisprudence do not weaken developing country interests and concerns.[10] Involvement on the part of the developing members as complainants has been restrained mainly to some active players, particularly the larger trading developing members remarkably, Brazil, India, Korea, Mexico, and Thailand.[11] The developing countries’ top priorities were textile trade, agriculture and dispute settlement procedures.[12]

### *2.2 Developing Countries Involvements*

The principal objectives of the DSU were to create a fairer system, in which every member could bring forward a complaint, have it fully investigated, obtain a ruling on the compatibility of the assess or practice with WTO rules, and – more commonly – ‘to have its day in court’.[13] The DSU has a number of provisions on differential treatment of developing countries in dispute settlement. Some of these are operative obligations and some other are phrased as ‘best endeavours’. A first obligation in the DSU is Article 3.12 which grants the

right to developing countries to invoke the provisions of the so-called 'Decision of 1966' if a complaint is brought against it.[14] Basically, if a developing country Member brings a complaint against a developed country Member, the complaining party has the discretionary right to invoke, as an alternative to the provisions in Articles 4, 5, 6 and the 12, the accelerated procedures of the Decision of 5 April 1966.[15] If the consultation between the developing country Member and other Member is not satisfactory, the developing country may refer the matter to the Director-General, which may then use his good offices. A second specific operative obligation in DSU is Article 8.10 that is the Panel shall include at least one member from developing country when a dispute is in question in which a developing country involved and the third one is Article 12.10 that is the Panel must when examining a complaint against developing country accord enough time to this country to get ready and present its argumentation.[16] If, at the end of the consultation period, the parties cannot agree that the consultations have finished, the DSB chairperson can make longer the time-period for consultations.[17] The last one is Article 27.2 obliges the WTO Secretary to assist developing countries when they are involved in dispute settlement. So the developing member participation is their attendance in WTO panels, for the 96 panels that had been finished at the end of 2005; developing members have been active in 68 such cases. In these disputes, they initiated 40 cases or 42 % of all cases and defended another 28.[18]

Among the DSU's more outstanding reforms are stricter timelines for proceedings, the right to panel, automatic adoption of reports except by negative consensus, review by the standing Appellate Body. For developing country complainants this means a more well-timed trial, free from threat that a defendant could block or considerably delay a case from being heard.[19] The option of appellate review promises more consistent across rulings, resulting in a better-informed body of case law in which to think through the merits of a case *ex ante* this reform encourage developing countries to bring more case to the WTO.[20]Developing countries have not been able to obtain fully the benefits of the dispute settlement procedures of the WTO.

The WTO deals with the special needs of the developing countries in three ways[21]:

1. The WTO Agreement contains special provisions for developing countries
2. The Committee on Trade and Development is the main body focusing on work in this area in the WTO, with some others dealing with specific topics such as trade and debt, and technology transfer
3. The WTO Secretariat provides technical assistance for developing countries.

The Advisory Centre on WTO Law (ACWL) is encouraged by the perceived effects of lack of legal capacity on behalf of developing countries[22] so ACWL is the main legal assistance centre for developing countries in the WTO system. It operates as a law firm representing developing countries government at low-priced rates and also helps to settle the costs of hiring private lawyers where it cannot advise directly.[23] ACWL is especially focused on LDCs; in effect it did assist Bangladesh to make a complaint against India because these countries got relatively few privileges from the WTO dispute system.[24] As a result, it is sometimes the case that a developing country may end up being represented by an ACWL attorney who is one of the top lawyers in the field, whereas a developed country may only have a mid-level

government staff attorney working on the case.[25] Developing country members are granted additional time for consultation and to answer a complaint.[26] Special procedures apply to LDC members must exercise 'due restraint' in raising disputes and asking for compensation according to article 24 of DSU.[27] ACWL contribution in WTO dispute-settlement cases from its establishment in 2001 through 2008, roughly seven years. Over this period, WTO members initiated 144 formal disputes against other members and the ACWL assisted developing countries in 23 of the 144 disputes initiated during this period, or over 16% of all disputes.[28] It has provided over 200 legal opinions each year in response to requests from its developing country Members and the LDCs. In 2014, the ACWL provided 204 legal opinions, compared to 215 in 2013 but the ACWL cannot foresee demand for its legal opinions, it is expected that it will continue at least at the level of 200 legal opinions per year.[29]

At the stage of implementation, the DSU mandates that particular attention be paid to matters affecting the interests of developing country Members refers in Article 21.2 of DSU.

### *2.3 The Role of Dispute Settlement within the Countries*

Developing countries playing important role in the WTO dispute settlement system. Developing countries are active users of the system, accounting for a little less than a third of compliments and increasingly using WTO procedures against each other.[30] International relations have become increasingly dominated by economic factors, the WTO system has moved away from its former, more power-oriented diplomatic approach to trade relations, and embraced rule-oriented approaches and impartial dispute settlement.[31] The more democratic a state is, the *more* it will commence disputes, controlling for the trading countries' relative size, and for one country's dependence on trade with the other, there is also a strong tendency for democracies to be targeted more often.[32]

The first 'best endeavour' provision of DSU with related to developing countries and dispute settlement is Article 4.10, this provision refers WTO Members to use their best accomplishments to give special attention to the problems and interests of developing countries during consultations. [33] Second, Article 21.2 requires the WTO Members to pay attention to matters disturbing developing countries in surveillance of the implementation of DSB recommendations and the third one is the DSB needs to consider additional action suitable in the situation when it considers the implementation of ruling in a case which is brought by a developing country Member according to Articles 21.7, 8.[34] The final one is, the circumstances must be taken into account when a dispute involves an LDC.[35]

The WTO dispute settlement system plays a vital role in the relationship between the two countries. Regarding, the discussion of this topic relationship between two neighbouring countries would be better. Normally, a country not willing to participate in a trade dispute with a country with which they have a good share of exports and imports relationship. [36]

However, Roessler questions the perception of negotiating procedural privileges for developing countries that in GATT and the WTO dispute settlement practice have consequently not been invoked and could detract from the legitimacy of dispute settlement proceedings.[37] The collective trading stakes of a Member country are also a useful sign of the extent to which

developing country uses the dispute settlement system. If the stakes are high, the Member is more likely to assemble the necessary resources to defend its rights through WTO litigation.[38]

## 3. BARRIERS FACED BY DEVELOPING COUNTRIES

Developing countries face composite and interconnected challenges with regard to their participation in the WTO dispute settlement system and these challenges consist of a wide set of deficiencies that developing countries will need to address with a holistic approach.[39] Although the legalization of the dispute settlement system is often thought to be a benefit to developing countries, the reality is not so simple. The dispute settlement system formed under the DSU but it is not a meaningful source of power for developing countries, to the opposite the system may disproportionately favour the developed countries. [40] The rule-based dispute settlement system of the WTO promised to be better than the GATT dispute settlement system. However, some experiential studies of its action suggest that the developing countries face also difficulties in asserting their rights under the new system too.[41] So, it has been argued that the dispute settlement system of the WTO does not deliver to the developing countries what had been promised, as a substitute of creating a system that would allow dispute settlement based on the rule of law, rather than based on economic power, the system would be costlier, more composite and more mechanical.[42] The underdevelopment is the root of the all problem of the developing countries low participation, problems like legal capacity, trade structure, power considerations etc.[43]

### *3.1 The Countries who are unable to Participate*

Hunter Nottage points out, five developing countries account for 60% of developing country complaints, and thirteen developing countries account for 90% of them. In total, 95 of the WTO's 120 non-OECD members had never filed a complaint before the WTO, and 62 had not even participated as a third party as regards countries from Africa and the Middle East, none has ever been a complainant before the WTO. No country in the region has been a respondent either, besides Egypt (four times) and South Africa (three times).[44]

There are no sub-Saharan countries that appear in the list of dispute settlement cases, the problem extends beyond not having a representative office in Geneva.[45] LDCs can hardly expect to obtain a fair deal when challenging trade-related disputes in bilateral negotiations with more powerful countries, even without any open threat or arm-twisting, the negotiations are likely to move toward the desired outcome of the more powerful nation because of its greater economic and political leverage.[46] However, in the case of a dispute, the only decision open to the dispute settlement board might be recommending the adjustment of the measure in such a way that its promote development.[47]

### *3.2 The Barriers from the WTO System*

Several new phases of legal activity per dispute have been imposed such as appeals, compliance reviews and compensation arbitration; by judicial proceedings and thus putting a premium on sophisticated legal argumentation as contrasting to informal negotiation, and by

adding potential of two years to the defendants' legally permitted delays in fulfilling with adverse rulings, so the reforms have elevated the hurdles facing contemplating litigation for developing countries.[48]

They usually face three primary challenges if they are to take part effectively in the WTO dispute settlement system. These challenges are:

(i) a comparative lack of legal knowledge in WTO law and the ability to organize information in relation to trade barriers and opportunities to challenge them;

(ii) constrained financial resources, including for the hiring of outside legal counsel to effectively use the WTO legal system, which has become progressively more costly; and

(iii) fear of political and financial pressure from members exercising market power, and in particular the United States and EC, undermining their ability to bring WTO claims.[49]

The new WTO dispute system has also raised the transaction costs of settling disputes, this is an unfortunate side effect of the much-vaunted move forward a more rule-oriented system.[50] Jan Bohanes and Gerhard Erasmus commented that the high financial costs of using the DSU put its uprightness and purpose in hazard by handicapping poor countries and preventing them from being financially able to bring or argue cases.[51] The developing country concerns focus on those elements in the DSU that are sensitive to, and are informed by, the 'power ratio' between members; that impose inequitable burdens in the dispute settlement process; that inhibit internationally predictable rights of access to judicial process, and that create economic distortions and inefficiencies.[52]

The new premium on legal capacity under the DSU is likely less burden-some for most of the advanced industrial states because for them the move from a power-oriented to a more rule-oriented system contains a little extra haziness, but for developing countries such a move simply replacement.[53] It may also be hard for developing country Member to tolerate the economic harm arising from another Member's trade barrier for the entire period of the dispute settlement proceedings, if such a trade barrier undermines the export opportunities of the developing country and is found to be conflicting with the WTO, its extraction may not occur until two or three years after the filing of a WTO dispute settlement complaint.[54]

Marc Busch and Eric Reinhardt declare for retaliation actions that the inadequate credibility of developing countries' retaliatory threats impairs their chances for securing policy changes for the respondents[55]; they found that it may be better and less burdensome for a developing country complainant not to pursue a dispute to its final stage.[56] In reality, retaliation has proven to be the least ideal solution for most developing countries. Also, Chad P. Bown and Hoekman find that developing countries reluctance to invoke the DSU is in part due to their vulnerability to extra-retaliation.[57]

Bagwell and Staiger (2014) argue that Special and Differential Treatment (SDT) provisions for developing countries not only hold back their trade liberalization prospects but are also uncooperative in expanding their exports: even if developing countries are allowed to 'free

ride' on the mutual liberalization exports of others unless they reduce their own tariffs, terms of trade changes may leave their export volumes unchanged.[58]

### 3.3 The Barriers from the Developing Country Itself

Developing countries would be short of the practical capability to participate in dispute settlement because they would have the inadequate legal expertise and human resources available to access whether a claim could be brought and to pursue the claim successfully until the end.[59] Some countries unable to participate in the dispute settlement even if countries have an allocation at the WTO, the deliberations, consultations and negotiations that are held under its auspices often do not attract much attention in capitals.[60] Because of the lack of support from home, Geneva-based representatives may become disheartened, reducing their incentive to participate in the dispute settlement system. If a major trade dispute subsequently arises in which the country is on the defensive, the mission may be completely lacking in dispute settlement understanding.[61] Representatives are left to work without instructions and are not included in the domestic policy formation process. So the result may be a contradiction between the positions taken by delegations in the WTO and the policies that are actually being pursued by a government towards trade and investment.[62]

Small countries often require the incentive to seek redress. The level of a country's development still heavily influences the settlement of disputes before litigation and enforcement of obligations depends on designing retaliation that imposes realistic costs on a non-complying country.[63] In the WTO context, a member's participation in the system will be, in part, a function of its ability to process knowledge of trade injuries, their causes, and their relation to WTO rights.[64] LDCs remain underprivileged in the WTO dispute settlement system because being deficient in of legal and financial resources, the absence of specific legal rights such as under the Generalized System of Preferences (GSP) and of effective 'sanctioning potential'.[65] Political pressure from developed countries also acts as a deterrent towards developing countries deciding whether or not to bring the case. For example, developed countries made threats to withdraw preferential tariff benefits or foreign aid, if a developing country attempted to challenge a trade measure.[66] The likelihood of retaliation through reduction is preferential access under the GSP or another preferential trade agreement is an added cause of fear for developing countries.[67]

Legal capacity is the ability of a country to assemble legal and human resources to participate in the dispute settlement system. According to Busch, Reinhardt, and Shaffer, legal capacity is the main constraint limiting access to dispute settlement that sufficient legal capacity allows Members more *maneuvering space* since the change of the consultation to a full dispute settlement is not seen as an outcome that should be avoided.[68] The inadequate legal capacity of developing countries may prevent these countries from detecting illegalities, while their lack of "power" may make the enforcement of rulings to their favour difficult. It may also potentially result in retaliatory actions such as loss of special treatment status in trade (or more onerous rules of origin), or compact foreign aid.[69] Institutional weakness is also a great problem for the developing countries themselves. Institutional weaknesses of developing countries have received formal recognition in the Uruguay Round agreements which contain a provision for

SDT. In general, Guzman and Simmons (2005) see their results as supporting the primacy of the legal capacity rather than power as a justification of the choice of respondents. Because of legal resource constraints, developing countries are more selective as to which cases they challenge before the WTO.[70]

In large part of the facts that developing countries, both in the public and private sectors tend to lack the domestic expertise to find out the WTO inconsistent disputes[71] but the developed countries are not like them. Larger developing countries have improved their participation as third parties significantly in recent years, by December 31, 2007, thirteen developing countries had participated as a third party more than ten times, led by China (61), India (50), and Brazil (49). Overall, however, most developing country members have never participated as either a party or third party in a WTO case.[72]

Moreover, one constant criticism of the DSU is that it does not work well for developing countries; there are two aspects of this criticism. First, some argue that developing countries do not have the human or financial resources to participate effectively in dispute settlement.[73] Secondly, some think that the dispute settlement rules are skewed against developing countries because the impact of any retaliation they undertake pursuant to DSU is limited.[74] Moreover, some other reasons for comparatively less frequent by developing countries to GATT and WTO dispute settlement proceedings included their smaller share in world trade; the perishable nature of many exports from developing countries; their dependence on the GSP and on other special systems; the exceptional role of the Textiles Surveillance Body (TSB) in settling disputes relating to textiles exports from developing countries; the numerous GATT exceptions qualifying import restrictions by developing countries; bad past experiences with recourse to the accelerated panel procedures for developing countries provided for in the 1966 GATT Decision; the lack of internal legislation and of inter-agency coordination promoting 'public-private partnerships' between exporters and trade ministers in developing countries and more active participation of developing countries in WTO dispute settlement proceedings; the one-sided focus on trade remedies in WTO law and lack of 'retaliatory power' of many developing countries.[75] However, it may be true that developing countries' retaliatory actions are not as forceful and persuasive. Members need to respect the system, which they have negotiated in good faith.[76] Petros Mavroidis referred that the DSU is about compliance with obligations, not retaliation.[77]

There is hardly any provision for compensating developing countries for substantial export losses incurred during the dispute settlement period when the measure in question is found to be in infringement of the WTO rules.[78] This circumstance can be specifically damaging for smaller developing countries, which are highly dependent on a limited number of exports products and markets.[79]

## 4. CONCLUSION

The developing countries understanding and participation in the dispute settlement system can make an imperative contribution to their overall ability to benefit from their rights and obligations under the WTO agreements.[80] In barely 20 years of its survival, the WTO has managed an inspiring 400 case mark, half of which have been settled under the WTO's

mandatory consultation provisions, without litigation. Contrary to wide view, developing countries have made efficient use of the organisation's widespread dispute settlement provisions initiating complaints in more than 45 per cent of the cases, and participating as respondents in over 42 per cent of the disputes so far.[81]

The limited participation of developing countries in particular LDCs, would according to this view reflect their smaller trade flows that low participation by developing countries reflects their limited legal and administrative capacity to identify illegalities, and to pursue complaints, and/or their inability to purchase such services from e.g. law firms and another problem is that developing countries refrain from launching complaints either from a fear that they will face retaliation by richer adversaries or from a belief that they will not be able to enforce rulings by WTO courts in their favour.[82] Buch and Reinhardt conclude from a statistical analysis of the operation of the DSU during the first five years that developing countries encountered even greater difficulties in bringing compliments under the WTO.[83] For a WTO member to use the WTO system effectively, it must develop cost-effective mechanisms to observe injuries to its trading prospects, identify who is responsible, and mobilize resources to bring a legal claim or negotiate a favourable settlement.[84] The WTO dispute settlement system should obtain its strength from the real desire of Members, big or small, to implement its rulings and commit them to enforce its recommendations.[85]

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